New Labour Government - what's on the workplace reform agenda?

At last week's general election, the Labour Party won a majority of Parliament's seats and is likely to govern alone. Some of the workplace policies Labour campaigned on included:

- Increasing minimum sick leave entitlement to 10 days per year. Labour will seek to increase this entitlement within the first 100 days of the new Government;
- Reforming the Holidays Act 2003 to simplify leave calculations and allow annual and sick leave to accrue over time (rather than leave entitlements arising in blocks);
- Increasing the minimum wage to $20 per hour in 2021. Labour has promised to take a 'balanced approach' to increases beyond 2021.

New contractor protections

It is also likely that new protections for contractors will be introduced. We expect that Labour will effectively make 'dependent contractors' (contractors who work under the control of one 'employer/principal') a third category of workers by providing them additional entitlements and protections compared to truly independent contractors. Labour has promised it will allow contractors to bargain collectively, require written contracts for contractors and introduce a duty of good faith for contracting parties. In November 2019, MBIE released a discussion paper with a number of 'options for change' for contractors. The options included changing the legal definition of 'employee' and making it easier for workers to have their employment status determined. While this paper did not receive much attention in 2020, some of the suggestions have already been adopted by Labour (e.g. the right to bargain collectively) and we expect more will be included in any package of reforms.

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Quick Reference

Unclear wage subsidy rules lead to Court action

Two ERA determinations have found employers acted unlawfully when reducing their employees' pay during the COVID-19 Level 4 lockdown. Both determinations have been appealed to Employment Court.

Gate Gourmet

Gate Gourmet New Zealand Limited (**Gate**) provides inflight catering services to passenger aircraft.[1] On 27 March 2020 Gate told its employees that as a result of COVID-19 and the lockdown it was closing part of its business.

Gate presented a number of options to its employees in terms of how they would be paid during this period. Its employees agreed that, subject to Gate complying with all applicable legislation, Gate would pay each employee at least 80% of their normal pay. A group of Gate's employees were paid at the minimum wage. On 1 April 2020, the statutory minimum wage increased to $18.90 per hour ($756 per week for a 40 hour week).

On 1 April Gate told its employees that only employees who actually performed work would be paid at the new minimum wage rate. Employees who did not work would continue to be paid at the agreed rate of 80% of normal pay but based on the old minimum wage rate. The employees objected to this on the basis that Gate could not reduce an employee's pay below the current minimum wage rate, i.e. below $756 per week. Gate agreed to apply the new minimum wage rate to all employees but maintained that employees who did not perform work would receive only 80% of normal pay. As a result, the employees were paid $604.80 per week (80% of $756).

The employees who were paid at the minimum wage (**Employees**) asked the Employment Relations Authority (the Authority) for a determination that Gate acted unlawfully in paying the Employees below the minimum wage rate.

Gate argued it had complied with the Minimum Wage Act (**MW Act**) by increasing the wage rate payable to employees that performed work. This ensured no employee was paid less than the minimum wage for the hours they worked. Gate believed it did not need to increase the wage rate of employees who did not work. Gate argued an employee could not be paid below the minimum wage if they didn't do any work.

The Employees argued the only reason they were not performing work was that Gate unilaterally imposed a partial closedown of its business and failed to provide them work, despite being an essential service which remained open during the lockdown. The Employees said they were entitled to their normal wages and that there can be no contracting out of the MW Act, i.e. Gate could not pay them less than the minimum wage regardless of their agreement to receive 80% of their normal wages. The applicants said that the 'no work, no pay' principle relied on by Gate, could not apply in this case as it only applies when an employee fails or refuses to perform work.

The Authority held that the sums paid to the Employees were wages; the sums were not gratuitous and were paid on the basis of the Employees' employment agreements with Gate. Because the sums were 'wages' the Authority said that the MW Act "is in play". The Authority held that it followed *"that if the applicants were ready, willing and able to carry out their function in an essential industry, Gate was required to pay them at least the minimum wage, notwithstanding any agreement it may have to the contrary."*

The Authority determined that Gate had breached the MW Act and ordered Gate to pay the employees any shortfall in their wages.

Dove Hospice

On 23 March the Eastern Bays Hospice Trust (trading as **Dove Hospice**) applied for the COVID-19 wage subsidy. The next day it closed its retail stores due to the lockdown. Dove Hospice sent a memorandum to staff advising that staff would be paid 80% of their normal wages until 22 April. Four employees were then dismissed on the grounds of redundancy. Dove Hospice gave the employees eight weeks' notice of termination of employment; the first four weeks to be paid at 80%, and the second four weeks to be paid at just the wage subsidy rate.

The dismissed employees sought a determination from the Authority that the Dove Hospice had made unlawful deductions from their pay in breach of the Wages Protection Act 1983 (**WP Act**) as they had not agreed to be paid less than their normal pay.

The WP Act defines 'wages' as *"salary or wages…to be paid to a worker for the performance of services or work."* The Dove Hospice said that because the employees had not performed services or work during the lockdown it was not obliged by the WP Act to pay the employees their normal pay. The Authority rejected this argument and said Dove Hospice had stretched the language of the WP Act too far. The WP Act and the definition of 'wages' must be considered within the context of the relevant employment agreement. The employees' employment agreements did not permit the Dove Hospice to suspend payment of

[1] Quigg Partners has previously acted for Gate Gourmet Limited but is not involved in these proceedings.

normal wages in lockdown circumstances. The employees were ready and willing to work and would have worked but for the lockdown.

The Authority held that the Dove Hospice had breached its obligations to the workers under the WP Act and their employment agreements because it had not sought or received the employees' consent to reduce their wages. The Dove Hospice was required to pay the shortfall.

Determinations challenged

Both of these decisions have been challenged in the Employment Court.

A full Court of the Employment Court heard Gate's challenge on 13 October 2020. Business New Zealand and the Council of Trade Unions also appeared to provide submissions, emphasizing the potentially wide-reaching implications of this decision. If every employee who was at home during lockdown was at 'work' and so was required to be paid the minimum wage for their contracted hours, then whole industries (such as hospitality and retail) will be in breach of the MW Act. The distinguishing factor in this case could be that Gate Gourmet was an essential service and its employees could have worked, it just did not have any work for its employees to do.

While the decision in Dove Hospice was relatively unsurprising – it was always generally understood that to reduce employees' salary or wages, written agreement would be required – it might come as a wake-up call for employers who during the uncertainty of the move to 'lockdown' implemented reductions in pay and hours quicker than they might normally have and without clearly documenting employees' agreement.

Lockdown redundancies found to be unjustified

Process defects, predetermination, and lack of justifiability in the decision to make two employees redundant

Solly's Freight (1987) Limited (**SFL**) applied for the wage subsidy on 25 March. SFL was anticipating it would be significantly affected by the lockdown. The managing director had already requested the Christchurch branch manager, Mr Welsh, prepare a list of 7 employees to be dismissed in the event redundancies were necessary. The applicants, Mr de Wys and Mr Jenney, were both named in the list.

On 26 March Mr de Wys received reassurance from Mr Welsh that SFL was *"going to pay everybody for 40 hours…"* That was reinforced on 31 March when SFL sent a letter to all employees which said SFL had applied for the wage subsidy. The letter said that SFL would use its best endeavours to carry on and if the wage subsidy was received *"well and good, if not changes to our operation will become absolutely necessary."* The letter said restructuring *"may become necessary in time"* but did not say it was currently under consideration. On 1 April Mr Jenney received reassurance from Mr Welsh at a toolbox meeting that he did not need to *"worry too much about redundancy".*

On the morning of 2 April Mr Adrian (SFL's systems manager) received a phone call from a Ministry of Social Development (**MSD**) official in relation to the wage subsidy. Mr Adrian told the MSD official that some employees were to be excluded from SFL's wage subsidy application. A list of names, including Mr de Wys and Mr Jenney's, was provided to the MSD official later that day. These names were recorded as *"no longer with the company."* The Authority held that on the morning of 2 April SFL knew, or ought to have realised, that it would soon receive the wage subsidy funds.

However, the same day Mr Adrian told Mr Welsh that SFL was going to send redundancy letters to the 7 employees on the redundancy list. Before the letters were sent, Mr Welsh spoke to Mr de Wys over the phone and to Mr Jenney in person to tell them that they were to be dismissed on the grounds of redundancy. The 2 April letter said that despite SFL's wage subsidy application, SFL had not been successful in contacting MSD *"let alone obtain funding."* The letter said SFL could not *"just go on waiting…We have no work."*

The dismissals

SFL provided no information about why it came to the view it could not *"just go on waiting"* especially given SFL knew when the 2 April letter was sent (or ought to have known) that it would soon be paid the wage subsidy. The statement about not having had contact with MSD was incorrect. The Authority said the statement *"we have no work"* was an 'overstatement' as it knew it was an essential service and could continue to cart essential freight.

The Authority noted that SFL had declared in the Wage Subsidy application that it would use its 'best endeavours' to retain its employees, but instead it excluded Mr de Wys and Mr Jenney from that very application prior to dismissing them. SFL also had obligations to consult with the employees before deciding to dismiss them on the grounds of redundancy and SFL did not fulfil this obligation.

The Authority found that the employees were both unjustifiably dismissed. The process defects were more than minor and resulted in unfair treatment. The Authority said no fair and reasonable employer could have decided on 2 April that the Mr de Wys and Mr Jenney were surplus to SFL's requirements, after reassuring them

on 26 March/1 April and by the 31 March letter about the continuity of their employment if the Wage Subsidy was received.

Both employees received compensation for lost earnings. They also received compensation for humiliation, loss of dignity and injury to their feelings, these awards being $10,000 and $15,000.

Lessons

This case indicates that the Employment Relations Authority will not apply a different standard to dismissals which occurred as a result of COVID-19 or during the lockdown. An employer still needs to follow the 'ABC's' for a redundancy. This means consulting with employees before any decision has been made and providing all of the relevant information so that employees can effectively take part in this consultation process.

Cross border employment: to deduct, or not to deduct?

The IRD has released a draft operational statement clarifying the obligation of non-resident employers to deduct taxes (PAYE, FBT and ESCT)

We have recently had a number of non-resident employer clients querying their obligations to deduct PAYE (income tax) from the wages and salaries of their employees based in New Zealand. In many of these cases, the employees are New Zealand citizens/residents who have returned to New Zealand for the foreseeable future due to the COVID-19 pandemic, but are continuing to provide their services to their overseas employer normally, albeit remotely.

The IRD has released a draft operational statement clarifying the obligations of these employers. In summary, non-resident employers will only have an obligation to withhold PAYE and return FBT and ESCT if they have a *sufficient presence* in New Zealand to be subject to New Zealand tax law, and the employee's *services are attributable* to the employer's presence in New Zealand. No withholding obligations will arise where the employee is a non-resident and the payment is exempt income or where relief is provided by a Double Taxation Agreement.

A non-resident employer may have a sufficient presence if it has a trading presence in New Zealand and a workforce performing services attributable to that trading presence. However, merely having an employee present in New Zealand who is only performing services attributable to the employer's overseas activities will likely not constitute a sufficient presence.

This Operational Statement has not yet been confirmed by the IRD. However, if issued it will provide helpful clarity to overseas employers. Overseas employers will still have to address the employment law and immigration issues potentially arising from having an employee based in New Zealand.

Balance of convenience test dashes interim reinstatement challenge

An employee was not awarded interim reinstatement because the employer did not have confidence in the employee's commitment to health and safety and due to concerns raised by other staff.

Mr Smith was employed as a Site Engineer/Site Supervisor at Fletcher Concrete & Infrastructure Limited's (**Fletcher Concrete**) concrete plant. Mr Smith was dismissed for not following Fletcher Concrete's Isolation Policy after he asked for a distance guard to be opened so that he could undertake a visual inspection of a crusher driver belt. This Isolation Policy was said to be a health and safety 'golden rule'.

Mr Smith accepted that he did not follow the Isolation Policy but said that he didn't consider that it was applicable to the work he was doing. He said that he believed he was following a different procedure which allowed for a visual inspection. Mr Smith made an application for interim reinstatement. The Employment Relations Authority declined Mr Smith's application. Mr Smith challenged that preliminary determination.

The Employment Court applied the well settled interim injunction principles.

Arguable Case

The Employment Court found that Mr Smith had an arguable case that he was unjustifiably dismissed. There were arguably competing policies addressing the work undertaken by Mr Smith and questions as to whether the procedure followed by Fletcher Concrete was adequate. Mr Smith argued that there had been disparity of treatment, as other employees failed to follow the Isolation Policy but he was the only employee dismissed. The Employment Court considered these issues warranted further consideration.

The Employment Court found that Mr Smith also had an arguable case for permanent reinstatement.

Balance of Convenience

The Employment Court found that the balance of convenience did not favour interim reinstatement. While Mr Smith had valid concerns arising from his dismissal, the Employment Court found that they could be rectified in time should he succeed in his substantive claim. Mr Smith had been able to obtain a mortgage holiday and there were no immediate concerns he would lose his home. If Mr Smith succeeded in his substantive claim, any shortfall in income could be rectified. There was also no suggestion that Mr Smith would not be able to return to the work that he had previously undertaken because of the gap in employment. The Employment Court distinguished his situation from other workers where ongoing experience is critical to skills or external certification requirements.

Fletcher Concrete gave evidence that it would not have confidence in Mr Smith's commitment to health and safety and that his reinstatement would send an inappropriate message to other staff. Fletcher Concrete also pointed to concerns from other staff, including statements that they would resign if Mr Smith returned. The Employment Court noted that such statements should be treated with caution but found that these issues pointed away from an order for interim reinstatement.

The Employment Court found that the detriment suffered by Mr Smith by not being reinstated could be substantively rectified if he succeeded; but the concerns of Fletcher Concrete, if it succeeded, might not. As a result, the balance of convenience did not support an order for interim reinstatement.

Overall Justice

While Mr Smith had an arguable case, the Employment Court stated that this was not a situation where it was clear the employer had made material errors.

The Employment Court found that the overall justice of the matter did not displace the balance of convenience issues and interim reinstatement ought not to be ordered.

Comment

The finding that the balance of convenience favoured Fletcher Concrete rather than Mr Smith is interesting and will provide comfort to employers who dismiss employees on the grounds of breaches of health and safety policies. The Employment Court clearly considered that the detriment arising from not ordering interim reinstatement could be rectified and/or would not be a barrier to permanent reinstatement. In contrast, the detriment to Fletcher Concrete, arising from an employee who was alleged to have breached a 'golden rule' of health and safety returning to the workplace, might not be able to be cured.

Motel room death threat in the 'backdrop' of constructive dismissal

The Employment Court has upheld the Authority's finding of constructive dismissal during a period of casual employment which followed a fight between two colleagues allegedly involving a death threat

Background

Mr Armstrong was employed on a casual basis as salesman for a company (**SBL**) selling caravans and camper trailers. He accepted a period of employment lasting from Thursday through to Sunday working at a car show in Hamilton. He later agreed he would also be available to work on the Monday if needed.

On the Saturday, an altercation occurred between Mr Armstrong and another salesman who were sharing a motel room. Mr Armstrong said that the other salesman pushed him into a wall and threatened to kill him. On the Sunday, after telling his manager, Mr Caspersen, what had happened, Mr Armstrong did not feel he could work and decided to return to Auckland. He telephoned Mr Caspersen who told him to leave his work shirts at the Auckland office. Mr Caspersen confirmed this by a text message which also stated, *"I will decide Tomorrow what [I am] going to do from this point."*

On the Monday, Mr Armstrong texted Mr Caspersen to see if he was still needed. Mr Caspersen replied, *"No plan, pick your Car up drop off shirts"*. On the Tuesday, Mr Caspersen sent Mr Armstrong an email that said, *"I will not be continuing our job role offers with you"*. He sent another email that said this was a *"direct result of the problem that occurred"* and that he was not intending to resolve the salesmen's conflict.

The Authority

SBL submitted that the decision to not offer further work was made on the Tuesday, i.e. not within the period of employment and so it was not a dismissal. The Authority disagreed finding that Mr Armstrong's period of employment included the Sunday and Monday because the parties owed each other obligations to offer and carry out work on those days. The directions to return the work shirts on the Sunday and the Monday amounted to a dismissal. The directions were clear statements that Mr Caspersen had decided Mr Armstrong was no longer working for SBL.

The Authority held that the process leading to the dismissal was defective. Mr Caspersen had not investigated Mr Armstrong's concerns and had declined to reach a view on what happened. Mr Armstrong was not given an opportunity to comment on what happened or on the prospect that he was to be dismissed. The defects led to Mr Armstrong being treated unfairly, and as a result, his dismissal was unjustified. Mr Armstrong was awarded $10,000 for compensation for humiliation and injured feelings.

The Employment Court

SBL challenged the Authority's finding and submitted that at the time of the first direction to return the work shirts, Mr Armstrong had already abandoned his employment so could not have been dismissed. The Court rejected that submission as employers should only draw that inference after making enquiries to confirm the employee's intention. SBL had made no such enquiries. Further, Mr Armstrong's text on the Monday confirmed he was still interested in work.

SBL also submitted that Monday did not fall within the period of employment as the offer of work was conditional on SBL needing Mr Armstrong's assistance. The Employment Court confirmed the Authority's finding that Monday did fall within the period of employment, as Mr Armstrong had agreed to be available for SBL that day and so mutual obligations of employment existed between the parties.

The Employment Court reached the same view as the Authority that the dismissal was unjustified for substantially the same reasons, and so dismissed SBL's challenge.

Lessons

All dismissals must be justified and follow a fair process, and this requirement will not be applied in a casual manner to casual employees! Within any period of employment (i.e. a period of work a casual employee has agreed to work), employers should be aware that casual employees still have the right not to be unjustifiably dismissed. When a casual employee is no longer needed or performing poorly, sometimes the best option is to allow the employee to complete their current period of employment and then not offer further work.

Although not an issue in this case, a common casual employment pitfall is offering work consistently to casual employees which may slowly morph the relationship into a permanent part time arrangement.

The Privacy Act 2020 - out with the old and in with the new

The Privacy Act 2020 will come into force on 1 December 2020, repealing and replacing the Privacy Act 1993

The two Privacy Acts are largely similar and agencies that collect, store and use personal information can continue to do so in largely the same way.

From 1 December 2020, agencies must not disclose personal information to a foreign entity unless they believe on reasonable grounds that the foreign entity is:

1. Carrying on business in NZ and is subject to the Privacy Act 2020; or
2. Subject to privacy laws with comparable safeguards; or
3. Is a participant in a specified privacy scheme or is subject to privacy laws of a specified country.

If an agency does not reasonably believe one of the above, the agency must inform the individual that their personal information may not be protected with comparable safeguards overseas and receive the individual's consent to proceed with the disclosure.

The new Privacy Act also creates a notifiable privacy breach regime. A privacy breach occurs when personal information is accessed, disclosed, altered, lost or destructed by accident or without authority. A privacy breach will also occur when an agency is prevented from accessing the personal information it holds. If a privacy breach has caused, or has the potential to cause, serious harm to the affected individual the agency must inform that individual and the Privacy Commissioner as soon as practicable. There are limited exceptions to this requirement.

Many employers store their employees' (and other individuals') personal information on data clouds or servers that are hosted overseas. This will constitute a disclosure of information to a foreign entity and these employers must ensure that, come 1 December 2020, their privacy policy (and what actually happens in practice) is compliant with the new Act.

Returning to work after parental leave - part time or flexible work hours

It's a cliché that being a parent is a full time job, and so there's no question why many employees who have welcomed a new child do not want to return to work full time (or at their old work hours) once their parental leave ends.

The Parental Leave and Employment Leave Protection Act 1987 does not provide these employees any right to return to work on reduced hours, or any special entitlement to negotiate for reduced hours. The Act makes a presumption that employers can keep the employee's position open until the end of the parental leave (there are limited exceptions to this). Reference to the employee's position means the same position and on the same terms and conditions of employment that applied when the employee commenced parental leave. This includes hours and location of work.

All employees have a right under Part 6AA of the Employment Relations Act 2000 to make a request at any time to vary their hours, days or place of work. Such requests must be in writing and state the request is being made under Part 6AA of the Act. It must specify the variation sought (including whether it is a permanent or temporary variation), when the employee wishes the variation to begin (and end if applicable) and any changes the employer will need to make to its arrangements. Employers may only decline such a request on the grounds set out in the Employment Relations Act 2000. However, these grounds are broad and give employers significant leeway to decline requests.

An employee can only challenge an employer's decision in relation to a flexible working request if the employer has not complied with the time period for dealing with the request (1 month). The Employment Relations Authority can impose a penalty not exceeding $2,000 if the employer has not dealt with a request in the required time. However, the Employment Relations Authority can't enquire into whether the grounds on which the employer declined a flexible working request were reasonable or not.

Overseas snippets

Dismissed manager receives AUD$5.2 million in compensation

Mr R was employed as State Manager by TechnologyOne Limited. He was summarily dismissed after he made a series of bullying complaints. The Australian Federal Court found his dismissal was as a result of the complaints, and so in breach of the Fair Work Act 2009 which prohibits taking adverse actions in response to certain workplace rights being exercised. The dismissal aggravated his pre-existing depressive disorder causing him to suffer "a profound mental breakdown". This rendered him unfit to obtain other employment. TechnologyOne Limited had also failed to pay Mr R contractual incentives dating back to 2009

The Federal Court awarded Mr R $750,000 for lost share options, $2.8M compensation for future economic loss, $10,000 compensation for hurt and humiliation, $47,000 in pecuniary penalties for contravention of the Fair Work Act and $1.6M for breaches of Mr R's employment contract.

While the amount of compensation was partly driven by Mr R's high level of remuneration, TechnologyOne Limited could have avoided or reduced liability if it had listened to the HR advice it received to investigate Mr R's complaints before proceeding with termination, considered Mr R's unique individual circumstances and how a dismissal might affect him. Employers taking disciplinary steps against highly remunerated employees should be mindful that these employees have 'more to lose' and so are more motivated to litigate and able to fund it.

Secret recording of meeting valid reason for termination

An Australian sales assistant secretly recorded a disciplinary meeting with her regional manager regarding non-compliance with a policy. The sales assistant was invited to a second meeting to discuss her manager's allegation that the sales assistant had been disrespectful, insubordinate and intimidating during the first meeting. An HR manager objected to the sale assistant's choice of support person and informed the sales assistant that if she did not attend the second meeting she would be suspended without pay. The sales assistant did not attend and was immediately dismissed.

The Fair Work Commission said the process leading to dismissal was "bungled and incompetent" and the HR manager was "incompetent". The reasons relied on to dismiss the employee were not valid. Of note, the secret recording did not substantiate the regional manager's allegations about the sale assistant's conduct in the first meeting. However, the Commission also found that had the two managers known about the secret recording that would have been a valid reason to dismiss. The recording had destroyed the trust and confidence in the employee. For that reason, reinstatement was not appropriate in the circumstances.

Deliberate cougher dismissed

Due to the COVID-19 pandemic, the employees working at an aged care facility in Australia were required to have their temperature taken upon arrival at work. On the first day of temperature testing, an employee coughed into the face of the nurse taking his temperature. He had received training on hygiene protocols earlier that month but did not follow the coughing guidelines, such as coughing into the elbow. He offered an apology to the nurse a few hours later.

The employee was dismissed a week later and subsequently brought a claim for unfair dismissal. He claimed he had coughed involuntarily and had not had time to cover his mouth. However the Fair Work Commissioner found his dismissal was valid. The cough was held to be deliberate and this behaviour was unacceptable in a high-risk environment (an aged care facility).

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