

Sweeping changes to NZ employment law on the horizon

Here follows a summary of the 37 proposed changes to employment law announced by John Key and Kate Wilkinson yesterday. All this information is publicly available on various government web sites this morning, but not all in one place. The devil is in the detail though, and much of that detail will be subject to public submission once the draft bill has been referred to the relevant Select Committee.

THE KEY CHANGES

90 day trial period to be extended to all employers regardless of size. This right will still require prior agreement by the parties, and certain criteria being satisfied before employers can dismiss people with impunity within the period.

Requiring employers to provide employees with a signed employment agreement. Where the agreement is not signed, the employer will have to provide an unsigned copy. This proposal is designed to clarify uncertainties caused by case law.

Amending the test of justification in s 103A of the Employment Relations Act 2000. This will require the Employment Relations Authority to look at what a hypothetical fair and reasonable employer *could* have done in all the circumstances at the time the dismissal or action occurred when deciding whether a dismissal or action by an employer was justified (instead of what it *would* have done, as is currently the case). This change will open up for consideration the range of reasonable responses that a fair and reasonable employer could have had to a situation, and emphasises that the Employment Relations Authority must not substitute its judgement with that of the employer.

Changing the Employment Relations Act 2000 to make process less important than overall fairness. A number of changes are proposed, including taking into account an employer's resources, not subjecting a process to pedantic scrutiny, and focussing on the key elements of fairness (proper investigation, communicating with the employee, giving the employee a reasonable opportunity to respond to the employer's concerns, considering the employee's explanation with an open mind, and checking whether the employee has been unjustly treated). These changes will simply incorporate into the Employment Relations Act what the case law requires already.

A Code of Employment Practice relating to disciplinary and dismissal procedures. This will help employers understand the basics better in (hopefully) easily to understand language. This is long overdue.

Making early access to mediation easier. This would theoretically help employers and employees assess their mutual risks at an early stage, avoiding litigation.

Allowing the Employment Relations Authority to give priority to mediated cases. This is designed to make mediation more attractive. More detail is needed to understand exactly how it will work, but sometimes cases just are not suitable for mediation – this change may therefore cause prejudice to parties or force them to undertake a mediation which experienced representatives know will not succeed. However, the next proposed change may solve this.

Allowing the Employment Relations Authority to clarify when mediation is impractical or inappropriate. We need more detail to understand what is proposed here, but if it is an automatic process, it should solve the issue identified in the previous proposed change.

Allowing mediators and Authority members to make recommendations to parties. This will allow a mediator or an Authority member to make a recommendation about how the problem may be solved and for the parties to have 7 days to decide if they agree. If they do, it will become binding. This is an intriguing change, and more detail is needed to assess how effective it may be.

Allowing the Employment Relations Authority to dismiss vexatious or frivolous claims. There will be a right of appeal against such decisions. Even though very few cases are truly vexatious or frivolous, this proposal must be a change for good.

Allowing the Employment Relations Authority to penalise parties who do not attend investigation meetings and who file late claims without good reason. The first change is sensible, but the second proposed change is puzzling – why not just disallow a late claim altogether unless to do so would be manifestly unjust?

Removing reinstatement as a primary remedy. This is sensible as reinstatement is rarely practicable or reasonable. Reinstatement will still be available where appropriate.

Treating personal grievances which are not actively progressed as withdrawn. So long as notice is given by the ERA of an intention to treat a PG as withdrawn, this is wholly sensible and will help clear backlogs of dormant claims.

Developing a code of professional ethics for employment advocates. This will help deal with the few rogue advocates who conduct themselves in an unprofessional way.

Union access to workplaces. Consent by the employer will be required before a union official may visit a workplace, although that consent cannot be unreasonably withheld. In other words, a refusal would have to be for a lawful reason.

Employers may communicate directly with staff during bargaining, including about terms of any settlement offer. This change addresses a reported lack of certainty from employers about what they may say to their employees during collective bargaining. The uncertainty stems from a prohibition in the Employment Relations Act 2000 on employers to bargain about matters relating to terms and conditions of employment with individual members whom the union is acting for. Presumably, individual bargaining will still be prohibited though, as that would undermine the whole bargaining process.

Allowing employees to exchange up to one week's annual holiday for cash. Only employees will be able to request the change and although employers may decline the request without giving a reason, they can't force an employee to accept cash in exchange for annual leave. (If they do, the employee would be able to have his extra week's holiday and keep the pay). Whether this is a sensible change remains to be seen. Many employees benefit greatly from a good break, and employers should perhaps consider whether forcing an employee to take their fourth week as holiday is better for productivity in the long run.

Simplifying the way that pay for sick leave, bereavement leave, public holidays and alternative holidays is calculated for employees whose hours and pay are irregular. The proposal is for the pay rate to be calculated by averaging the gross earnings for the preceding 52 weeks (or lesser period if the employee has not been with the employer for 52 weeks).

Allowing employers and employees to agree to transfer the observance of public holidays to another identified working day. This would enable people of non Christian faiths to take days off to enable them to observe different holy days, for example.

Allowing employers to ask for proof of sickness or injury within 3 consecutive days of an employee taking sick leave, so long as they cover the employee's reasonable costs. The employer would no longer need reasonable grounds to make the request. This may cause practical problems if the employee has recovered within a day or two, and so cannot get a doctor to certify the illness if the employee didn't consult the doctor when he was temporarily ill.

Penalties to be increased. The proposal is to double the maximum penalties to \$10,000 for individuals and \$20,000 for employers who do not comply with the Holidays Act.

THE MORE TECHNICAL STUFF

Making the Employment Relations Authority more accountable and judicial in its conduct and decisions. This can only be a good thing, as it will help iron out inconsistencies between Members' approaches to issues.

Formalising the conduct of Authority investigations. This will help all parties understand how investigations are carried out.

Search and freeze orders to be issued by the Employment Court only. These are potentially draconian, so they should only be issued by the higher Employment Court.

Allowing the Authority to remove matters to the Employment Court of its own motion. At present, they can only do this if a party requests it.

Giving parties a right to cross examine witnesses during Authority investigations. Allowing parties to cross examine witnesses will make the Authority much more like a court, and will inevitably mean that cases take longer and will encourage more legal representation. Effective cross examination is a skill that is much harder than it looks – it's not like on the TV!

Allowing the Authority to consider whether minimum legal entitlements could be bargained away before they refer a matter to mediation. This is billed as a “technical change”. It is connected to the next change.

Preventing minimum entitlements being negotiated away in mediations. Entitlements such as minimum wage or holiday entitlements will still be allowed to be the subject of negotiation but not reduced below the legal minimum.

Allowing a party to withdraw a claim in the Employment Court without affecting the claims of another party in the same proceeding. Another technical change.

Allowing people between 16 and 18 to enter into binding agreements with their employers. Even though you may employ people between these ages, any agreement they enter into must currently be approved by a court. This will change under this proposal, which must be sensible.

Giving legal definition to the role of Labour Inspectors. This proposal is to give Labour Inspectors greater powers to manage complaints and support businesses to achieve compliant practices and system.

Allowing Labour Inspectors to enter into enforceable agreements with employers. This is designed to allow willing employers to avoid legal proceedings.

Allowing Labour Inspectors to issue Improvement Notices. These will be similar to the notices that Health and Safety Inspectors can issue.

Allowing penalties and interest to be awarded when there is long-standing and repeated non compliance with a demand notice. Demand notices require employers to comply with their obligations to pay wages and allowances.

Allowing Labour Inspectors to seek a penalty action from the Authority where the employer has failed to provide a copy of an employment agreement. This gives Labour Inspectors another weapon in their armoury.

Increasing penalties. The proposal is to double the maximum penalties to \$10,000 for individuals and \$20,000 for employers who do not comply with the requirements of the Employment Relations Act.

Allowing the Employment Court to deal with pre-proceeding discovery (the obtaining of information from a party) regardless of whether the matter is or is intended to be brought before Authority or Employment Court. Discovery is the legal term for the process of obtaining information from a party, usually documents. This change would enable parties to assess the strengths of their case more effectively.