DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update: May 2017

This update covers:

- A reminder about legislative changes to minimum standards which came into force on 1 April 2017;
- A Bill before Parliament which, if enacted, would allow the contracting out of the personal grievance provisions, in certain circumstances;
- A case note relating to breach of a record of settlement;
- A case note relating to discrimination on the basis of union involvement;
- An update on recent trial period cases; and
- A note on the proposed Employment (pay equity and equal pay) Bill.

Minimum Standards Reminder

Our May 2016 update covered changes in the Employment Standards Legislation Bill, which came into force on 1 April 2016 for all new employees employed after that date.

The changes related to availability provisions in employment agreements, shift cancellations, restrictions on secondary employment and a variety of other minimum employment standards.

On 1 April 2017 these standards came into force for staff employed before April 2016 (i.e. they now apply to all employees).

If you haven't yet reviewed and updated your employment agreement template(s) as well as all your existing employees' individual employment agreements to ensure compliance, the time to act is now! If you need assistance with this, please get in touch with us soon.

Contracting out of Personal Grievances

The Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill is currently before Parliament. It would amend the Employment Relations Act to allow employers and employees to contract out of the personal grievance provisions in the Act if the employee's proposed annual gross salary is over $150,000.

The Bill was introduced on 8 December 2016 and had its first reading on 22 March 2017. It has been referred to the Transport and Industrial Relations Select Committee, which is due to report back to Parliament on the Bill by 22 September 2017. Early indications appear to show a level of support from Labour, as well as the Government.

The intention of the Bill, at this stage, is to provide parties the *option* of contracting out. Employees earning more than $150,000 could refuse to agree to a clause contracting out, and have the personal grievance provisions apply.

The explanatory note to the Bill explains focusses on unjustifiable dismissal or disadvantage.

However, the Bill as drafted enables the parties to contract out of Part 9 of the Act. Part 9 of the Act includes not only dismissal and disadvantage personal grievances, but also all the other grounds for a personal grievance, such as discrimination and sexual/racial harassment.

Part 9 also covers matters such as disputes, the obligation to keep and maintain a wages and time record, penalties for breach of an employment agreement or provision of the Act (such as good faith) and compliance/enforcement orders.

It seems unlikely it is Parliament's intention to enable the contracting out of all these provisions, so it will be interesting to see if any subsequent versions of the Bill address this issue.

L6 DIMENSION DATA HOUSE, 99 CUSTOMHOUSE QUAY, PO BOX 25-301, WELLINGTON 6146
T:+64 4 550 4060 E:enquiry@ddelaw.co.nz W:www.ddelaw.co.nz

Concerns have also been raised about the $150,000 threshold, as it would include employees such as IT workers or engineers, who are not necessarily at the executive level and may not have the bargaining power the Bill assumes.

Lumsden v Skycity Management Ltd

Mr Lumsden was employed by Skycity in a hospitality role. Mr Lumsden had raised concerns with Skycity and the parties were scheduled to attend mediation. Prior to mediation a customer and Mr Lumsden had an altercation. Both the customer and Mr Lumsden made complaints. Skycity commenced an investigation into the counter complaints.

The parties attended mediation, where they entered into a record of settlement. It was agreed Mr Lumsden would resign and he was paid a confidential sum. The record of settlement also stated the parties would not disparage each other; Mr Lumsden was welcome to apply for jobs at Skycity; and matters were fully and finally settled. The agreement was signed by a mediator from MBIE and was therefore enforceable under the Employment Relations Act.

After the mediation, Mr Lumsden's former manager at Skcity completed Skycity's HR process for departing employees. In the section marked *'Would you re-employ?'* the manager ticked *'No'*. The manager also included comments stating Mr Lumsden had outstanding performance issues, staff and customer complaints, wasn't a team player, and was difficult to manage as he wouldn't follow directions.

Skycity claimed the note saying not to re-employ and the negative comments about Mr Lumsden were not disparaging because they were factual and/or truthful in nature, and they represented the manager's views. The Court was not persuaded by this argument and stated the comments on the form were '*plainly disparaging'* and Skycity had therefore breached the agreement.

The Court also found Skycity had breached the clause which stated Mr Lumsden was welcome to apply for future employment opportunities. Mr Lumsden had applied for four positions, but was not successful.

The Court stated Skycity should have treated every application fairly and on its merits, keeping in mind it obligations in the settlement agreement (including non-disparagement).

Skycity was ordered to pay $7,500 as penalty for breaching the settlement agreement, 75 per cent of which was paid to Mr Lumsden.

This case serves as an important reminder for organisations to both carefully consider and comply with the terms of any settlement it enters into. A term of settlement should only be agreed to if a party intends to comply with it. Internal comments can also be considered to be disparaging, even if considered true.

Go Bus Transport Limited v Hellyer

When it comes to grounds of discrimination we tend to think about race, nationality, sex, age, religious beliefs, sexual orientation and disability. However, an often-overlooked ground, only relevant in an employment context, is involvement in a union.

This ground of discrimination was recently reviewed by the Chief Judge of the Employment Court in *Go Bus Transport Limited v Hellyer*. Go Bus dismissed Mr Hellyer, a bus driver, for allowing his wife to take a free bus ride when she had forgotten her wallet.

Mr Hellyer was the Dunedin Branch President of the union and involved in collective bargaining. Go Bus claimed Mr Hellyer had a heightened awareness that family members could not travel for free because it came up in bargaining.

The Court found Mr Hellyer had been unlawfully discriminated against and unjustifiably dismissed (for a multitude of reasons). The Court noted that where the grounds for the dismissal are based on unlawful discrimination, an employer will very rarely be able to justify the dismissal.

The definition in the Act of *'involvement in activities of a union'* includes, within 12 months before the action complained of, the employee:

- Being an officer of a union;
- Being an official representative of a union;
- Being a union delegate;
- Having acted as a negotiator or representative of employees in collective bargaining; and
- Having participated in a strike lawfully.

Mr Hellyer fit squarely within this definition, given his representation of employees at collective bargaining.

Under s 119 of the Act, if an employee establishes they have been disadvantaged or dismissed from their employment, and they were involved in the activities of a union under s 107, then it is presumed the employee has been discriminated against, and the employer must prove otherwise.

The Court examined the statutory scheme and the reasons for unlawful discrimination grievances in relation to union activities.

The Chief Judge noted the importance of unions both to employees and employers, including the ability for employers to deal with a single body, rather than individual employees. The Chief Judge stated:

> *The philosophy of the legislation is to attempt to ensure that an employee's present or past union activities are not held against that employee but that he or she is to be dealt with, in relation to events which may bring about grievances, in the same way as would be an employee without those union activity connections.*

The Court found the evidence showed Mr Hellyer had been held to a higher standard than other employees because of his union activities, and therefore he had been unjustifiably discriminated against.

Mr Hellyer's union activities had been a material factor in the decision to dismiss, as Go Bus stated his heightened awareness of the policy against free family rides led to a conclusion Mr Hellyer had attempted to defraud the company.

If you have any unions operating in your organisation, be careful to ensure key decision makers are aware of the law in relation to discriminating against employees involved in union activities. If in doubt, take advice before taking any disciplinary action against an employee involved in union activities.

An update on Trial Periods

The case law on trial period clauses is continually evolving. Both the Authority and the Employment Court continue to interpret these clauses strictly. Recently, an issue has arisen as to whether a trial period clause must include a specific start date.

Section 67A(2)(a) requires a trial provision to start '*at the beginning of the employee's employment*'.

It may seem obvious that a trial period starts on an employee's first day of work, but in a series of four cases against the same employer, *ECE Lighthouse Ltd*, an Authority Member in the Auckland ERA found the trial periods in question did not expressly state the trial period started at the beginning of employment. The ERA found:

> *[The Employer] is precluded from relying on the trial period provision in clause 15 of [the Employee's] employment agreement on the grounds that it does not meet the requirements of s.67A(2)(a) of the Act because it failed to state or contain words "to the effect that" the trial period commenced on the first day [the Employee] started work.*

However, an Authority Member in Christchurch has disagreed with this view in a recent decision:

> *I do not accept, notwithstanding the ECE Lighthouse determinations that a [trial] period provision must specifically state the date on which the [trial] period commences. The effect of s 67A(2) and the well established principles on trial period provision is that trial periods can only start when an employee begins work.*

Recently, the Employment Court has granted an application for an employee to appeal an ERA decision out of time partly on the basis the challenge appears to have merit because the Authority did not consider the lack of a start date specific to the trial period provision when determining it was operative.

We will keep our clients updated as this issue progresses, but in the meantime, we recommend playing it safe and specifying either in the agreement or offer letter that the trial period runs from the employee's first day of work.

Employment (Pay Equity and Equal Pay) Bill

The Government and unions recently announced the settlement of the *Bartlett v Terranova* case. The settlement comprised a substantial pay rise for 55,000 aged care workers.

The Government has now released the Employment (Pay Equity and Equal Pay) Bill ('*the Bill*') for public consultation. The final day for submissions is 11 May 2017. The Bill would repeal and replace the Equal Pay Act 1972 and the Government Service Equal Pay Act 1960.

Pay equity claims are to be raised direct with employers, responded to and bargained for, if necessary with the assistance of mediation, facilitation and determination by the Employment Relations Authority.

If a claim is found to have merit, the parties are expected to bargain in good faith about suitable comparators and the pay rate.

Employers and employees will have the ability to dispute aspects of a claim at different stages. This may result in claims becoming drawn-out and expensive.

Changes to the Bill and its processes are to be expected as it progresses through Parliament.

We will keep a close watch over the progress of the Bill and will provide updates.