DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update: April 2019

This update covers:

- Employment Relations Amendment Act 2018
- Domestic Violence – Victims' Protection Act 2018
- The Employment Relations (Triangular Employment) Amendment Bill
- Fair Pay Agreements Working Group Report
- Employment Court orders collective agreement to be draw up for a reluctant employer

Employment Relations Amendment Act 2018

The Employment Relations Amendment Act 2018 received royal assent on 11 December 2018, introducing a number of changes aiming to improve fairness in the workplace including through work conditions, union access, and limitations to the 90-day trial period. Refer to our February 2018 update for more detail on the key changes.

The changes brought about by the Amendment Act have been implemented in stages. The following list sets out the key changes coming into force at each stage:

12 December 2018

— Union access to workplaces without employer consent

— Eliminating the ability for employers to make pay deductions for partial strikes (for example, when employees turn up to work but refuse to perform certain tasks)

— Compulsory MECA bargaining

— Reinstatement is once again the primary remedy considered by the Employment Relations Authority

6 May 2019

— Minimum rest and meal breaks

— 90-day trial periods being limited to employers with fewer than 20 employees

— The 30-day rule is being restored, meaning new employees must be employed on terms and conditions consistent with, or more favourable than, applicable collective agreements.

11 June 2019

— Union membership status included as a form of employment related discrimination

Domestic Violence – Victims' Protection Act 2018

The Domestic Violence – Victims' Protection Act received royal assent on 30 June 2018, confirming changes to employees' rights and entitlements relating to flexible working arrangements, a new type of leave for victims of domestic violence, and adding a new category of unlawful discrimination. These changes come into force on 1 April 2019. Please refer to our August 2018 update for more detail on these changes. The changes have now been passed into law, as written in our previous update, without amendment.

Employment Relations (Triangular Employment) Amendment Bill

The Employment Relations (Triangular Employment) Amendment Bill (the **Bill**) was first introduced by the previous Labour Government, before progress was halted by Labour's loss in the 2008 election. The Bill then lay dormant before resurfacing in February 2018.

The Bill's purpose is to increase the rights and protections available to employees working under the control of a business other than their employer. This is an increasingly common scenario for employees in New Zealand, with the use of labour hire companies becoming more

common as a means for companies to efficiently manage their workforce.

The Bill is now at its second reading, after going through fairly significant changes at the Select Committee stage. When originally drafted, the Bill sought to provide employees engaged through labour hire companies the ability to sign onto the terms of applicable collective employment agreements with each controlling third party they worked for. This has been removed from the latest version of the Bill, effectively limiting its changes to an ability to join the controlling third party to personal grievance proceedings.

The Bill proposes to modify the Employment Relations Act 2000 to allow employees and/or employers (i.e. labour hire companies) to join a controlling third party to a personal grievance proceeding before the Employment Relations Authority or Employment Court. If the notification requirements are met by the employee and/or employer, the Authority (or Court) will be required to join the controlling third party to the proceedings.

Employees must notify the controlling third party of the personal grievance within 90 days of the alleged actions giving rise to the personal grievance (or within 90 days of when it came to the notice of the employee).

Employers must notify the controlling third party of the personal grievance within 90 days of the personal grievance being raised with them.

The Bill proposes that the possible remedies against controlling third parties be limited to those currently available under section 123(1)(b) and (c) of the Employment Relations Act 2000. Those being reimbursement of lost wages and compensation for humiliation, loss of dignity, and injury to feelings. Reinstatement will not be an option given the employees will never have been employed by the controlling third party.

Fair Pay Agreements Working Group Report

Background

In December 2018 the Fair Pay Agreements Working Group (**the Working Group**), made up of industry leaders and experts released its report into Fair Pay Agreements (**FPAs**).

The Working Group was formed to make recommendations on a system of FPAs for sector/occupation wide collective bargaining to agree on minimum terms and conditions of employment (including wages).

The intent of FPAs is to address the *'race to the bottom'* of employers undercutting competitors by decreasing wages. FPA's are intended to result in employers paying fair wages and to endeavour to ensure good employers are not disadvantaged by paying reasonable industry standard wages.

The Working Group's mandate was to consider how FPAs could be utilised to address the following issues:

- New Zealanders work long hours with low productivity (as compared to most OECD countries);
- New Zealand's productivity growth has been poor, with economic growth driven by higher participation rates, as opposed to productivity increases;
- Wages for lower income employees have risen more slowly than those on higher incomes; and
- Income inequality is increasing.

The Working Group noted many European countries use FPAs (or similar systems) as part of their employment relations framework. The Working Group noted OECD recommendations for *'centralised'* bargaining, which is associated with reduced wage inequality, better integration of vulnerable groups, reduced unemployment and the potential for increased skills and training pathways.

Industries where competition is driven by reducing labour costs (i.e. lowering wages), rather than increasing productivity or quality are the focus of FPA's.

Working Group Conclusions

The Working Group concluded that:

- Any FPA system should complement the current employment relations and standards system;
- A stronger worker/employee dialogue is required;
- FPAs won't be a useful tool in all industries/ occupations; and
- Provisions providing for training and skills development for workers should be a key feature of FPAs.

The Working Group was unable to agree on whether the system should be compulsory.

Design of an FPA System

A summary of the Working Group's recommendations is set out below under the key features of the FPA collective bargaining system (as identified by the Working Group).

Initiation

— Bargaining for an FPA should only be initiated by workers and their union representatives.

— Bargaining for an FPA should be able to be initiated in two circumstances:

  — *'Representativeness trigger'*: in any industry or occupation, workers should be able to initiate an FPA process if a minimum threshold of 1000 or ten per cent of workers is met (whichever is lower).

  — *'Public interest trigger'*: if the representativeness trigger is not met bargaining for an FPA may still be initiated if there are *'harmful labour market conditions'* in the industry or occupation.

— The representativeness trigger should cover union and non-union workers.

— The public interest trigger would be defined by legislation.

— An independent body would be required to determine if the triggers had been met.

Coverage

— The occupation, sector or industry covered by an FPA should be negotiated and defined by the parties.

— All workers (i.e. not just employees) should be covered by an FPA.

— All employers within the defined sector should be covered by the FPA.

— The Working Group recognised the potential need for limited flexibility (set by legislation and time limited) for some employers to be exempt from FPAs.

Scope

— Required minimum content of an FPA should be set in legislation.

— Additional terms would be the subject of bargaining between the parties.

Bargaining parties

— A representative organisation should be nominated by parties to bargain on their behalf.

— Coordination between parties should be encouraged.

— Non-union members should be represented in good faith by representatives.

— Workers should be able to attend paid meetings to instruct and elect representatives.

— Costs should be distributed proportionately across the groups involved in bargaining.

Bargaining process rules

— Clear timelines will be required to prevent lengthy process and excessive cost.

— Facilitation should be used to support bargaining.

Dispute resolution during bargaining

- The Government has mandated no industrial action during bargaining for an FPA.
- After initiation, disputes over coverage should be referred to the Employment Relations Authority.
- Mediation should be the primary dispute resolution process for issues during bargaining.
- If mediation is unsuccessful then the matter should be referred to the Employment Relations Authority, with limited recourse for challenge (i.e. on procedural grounds only).
- Standard dispute resolution procedures would be used once an FPA is in force.

Conclusion, variation and renewal

- Once agreement has been reached, an FPA should require ratification from a majority of employers and workers.
- The procedure for ratification should be set in law.
- FPAs should be registered and publicly available.
- Before expiry of an existing FPA either party should be able to initiate a renewal of the agreement or negotiate variation of some (or all) of the terms.

Enforcement

- FPAs should be enforced through the Employment Relations Act 2000.

Support to make the bargaining process work well

- Support and resourcing to build capability of the parties and to facilitate the FPA process is required.

Next Steps

The Government will now consider the recommendations of the Working Group. This will involve detailed policy consideration. No timeframes for this have been indicated.

Employment Relations Authority to determine the provisions of a collective agreement

A landmark Employment Court decision will see the Employment Relations Authority (the **Authority**) determine the provisions of a collective employment agreement for an employer and union who were unable to agree on the provisions themselves.

In *Jacks Hardware and Timber Ltd v First Union Inc*,[1] the union and employer (trading as Mitre 10 in Dunedin and Mosgiel) had been negotiating a collective employment agreement since 2013.

By 2018 the parties had reached agreement on most of the clauses, however, whether employee pay rates were to be included in the collective employment agreement had proved to be a major sticking point. The union applied to the Authority under section 50 of the Employment Relations Act (the **Act**) for the provisions relating to wages be fixed by the Authority. Under section 50, the union had to prove:

- There had been a breach of the duty of good faith in relation to the bargaining; and
- The breach was sufficiently serious and sustained as to significantly undermine the bargaining; and
- All other reasonable alternatives for reaching agreement had been exhausted meaning fixing the provisions was the only effective remedy for the parties.

The Authority accepted the union's application on the basis the employer had breached the duty of good faith when they unlawfully concluded bargaining in 2015. The Authority also said in

[1] *Jacks Hardware and Timber Limited v First Union Incorporated* [2019] NZEmpC 20.

reaching its determination, the parties had unsuccessfully used direct bargaining, mediation, facilitation and litigation to try and reach an agreement so all reasonable alternatives had been exhausted.

The employer challenged the Authority's determination pleading the breach of good faith in 2015 was not sufficient to undermine the bargaining and there were other reasonable alternatives for reaching an agreement. The Court rejected the employer's argument and upheld the Authority's determination, noting the employer had been surface bargaining (going through the motions of bargaining) throughout the negotiations which had seriously undermined the bargaining process.

The Employment Court said its decision to break the impasse, was '*one of the rare sort'*, in that normally parties to collective bargaining were able to resolve such issues themselves with the assistance of the mechanisms provided for under the Act. For this reason, we don't imagine this case will open the floodgates for more fixing applications to the Authority. However, it will put more pressure on employers to negotiate in line with the good faith provisions provided for under the Act.