

## **Employment Bills released to amend Employment Relations Act and Holidays Act**

On Monday, the Government presented two Bills proposing a number of planned changes to the Employment Relations Act 2000 (ERA) and Holidays Act 2003 announced last month.

Common to both Bills is an intention to provide employers and employees with greater flexibility in their relationship and to give employers increased control over their places of work.

The most notable changes to the ERA of interest to employers relate to union access to workplaces, employers' communications with employees during collective bargaining, adjustments to the personal grievance system, and the way in which the employment institutions (particularly the Authority) resolve employment relationship problems.

The Holidays Amendment Bill introduces the possible cashing up of the fourth week of annual leave, and transfer by agreement of public holidays. The draft legislation allows employers to require proof of sickness or injury from day one of absence (at their expense) and to direct when an alternative holiday should be taken where agreement with the employee cannot be reached.

### **Union access**

The Employment Relations Amendment Bill (No 2) makes union access to workplaces conditional upon the employer's consent. Consent may not be unreasonably withheld. Currently, unions can enter a workplace without even notifying the employer, subject to a requirement of reasonableness regarding timing and method of entry, and an obligation to comply with reasonable safety and security procedures applicable in the workplace. The intent behind these new restrictions is to afford employers more control over who is present on their site and when.

Within two working days of a decision to refuse consent to union access, an employer must provide written reasons for the refusal. An employer who fails to provide written reasons in breach of the legislation or who unreasonably withholds its consent to access could be the subject of a penalty.

### **Communications during collective bargaining**

The Bill clarifies that an employer may communicate directly with employees during bargaining for a collective agreement. Specifically, an employer can inform employees of its proposals for a collective agreement. However, all such communications must be consistent with the overriding duty of good faith.

### **Personal grievances**

Proposed changes to the personal grievance regime are aimed at reducing compliance costs, improving resolution processes, and reducing delays. The likely effect of these changes will be that the balance is adjusted towards employers, giving employers more control and confidence when making decisions about employment relationships.

The changes include:

- Extending the 90 day statutory trial period to all employers. At present, trial periods are available only to employers with less than 20 employees. Trial periods are by agreement in writing and only at the commencement of the employment relationship. Employees subject to a trial period who are dismissed or given notice during the trial cannot raise a personal grievance in relation to the dismissal. However, they can complain in relation to any issues of discrimination, sexual or racial harassment or unjustified disadvantage.
- Amending the test for justification for an employer's actions, including dismissal, to "whether the employer's actions and how it acted were what a fair and reasonable employer could (rather than

would) have done in all the circumstances at the time". The revised test recognises that there is a range of possible fair and reasonable actions that an employer can take in any situation.

- Introducing statutory minimum requirements for a fair and reasonable process to reduce the importance of procedure in dismissal and disciplinary situations. The Bill would insert these requirements with the proviso that an employer's processes should not be subject to pedantic scrutiny so that an otherwise justifiable action is considered unjust. Interestingly, the Bill specifies that an employer's resources to deal with personal grievances will be considered when determining whether a fair process has been followed.
- Removing reinstatement as the "primary remedy" for unjustified dismissal under the ERA, but retaining it as a possible remedy where practicable and reasonable.
- Increasing penalties to a maximum of \$10,000 against individuals and \$20,000 against employers and unions.
- Introducing a new mechanism for mediators or the Employment Relations Authority to make recommendations to resolve an employment relationship problem, which only become binding if accepted by the parties involved.

## **New Employment Relations Authority procedures**

The Bill requires the Authority to act in a more formal and consistent manner, without undermining the investigative nature of its inquiries. Advocates will enjoy a statutory right to cross-examine witnesses, and the Authority will be empowered to dismiss frivolous or vexatious claims or defences.

## **Holidays**

Holidays Amendment Bill provisions aimed at increasing choice for employers and employees include:

- Payment out of up to one week of minimum annual holiday entitlement by agreement following an employee's request. Employers cannot be pressured into accepting such requests and can in fact adopt a policy preventing payout of annual holidays.
- Transfer by agreement of one or more public holidays to other working days. The Bill sets out a number of criteria that employers and employees must meet, and again employers can adopt a policy preventing such transfer of public holidays.

Employers are to enjoy greater control in being permitted to direct when an alternative holiday must be taken where the parties cannot agree, and to require proof of sickness or injury at any time including during the first three days of absence. The Bill removes the requirement for an employer to have reasonable grounds to suspect that sick leave is not genuine before it can request proof within the first three days.

For simplification, the Bill introduces a new calculation for "average daily pay" as an alternative to relevant daily pay for public holidays, alternative holidays, sick leave and bereavement leave. Average daily pay is based on an averaging formula over 52 weeks, as opposed to a hypothetical assessment of what an employee would have been paid on the day in question. The new pay rate may be used when it is not possible or practicable to determine what the employee would have earned or where an employee's daily pay varies throughout the pay period in which the leave falls.

The Bills will receive a first reading before referral to a Parliamentary select committee. Enactment is expected later this year.