BUDDLE FINDLAY

Legal update on employment - June 2014

Peter Chemis, Hamish Kynaston, Sherridan Cook, Alastair Sherriff, Susan Rowe

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Pre-employment checks – surprise…!

Whether you see recruitment as an art or a science - or both - obtaining accurate and timely information about job applicants is key. Most employers undertake reference checks, and many require official confirmation of things such as qualifications, licenses and the right to work in New Zealand. It is increasingly common now to go further and undertake background checks into criminal offending and, in safety sensitive areas or for relevant roles, to require pre-employment drug tests.

These processes can take time, and people often start work before the results are in. What does an employer do when the results aren't as expected?

Case study - Richardson V Fonterra Cooperative Group Limited

Mr Richardson applied for employment as a tanker driver. He advised Fonterra that he had no previous convictions because he mistakenly thought the 'Clean Slate Act' applied.

Mr Richardson was offered and accepted employment, and gave Fonterra written permission to access his criminal record. Fonterra received this a month after he'd started, and it showed that he'd had several convictions, including for driving with excess blood alcohol, driving while disqualified and theft as a servant. The application form had included a warning that he could be dismissed without notice for providing misleading information about his convictions, and Fonterra dismissed him accordingly following a disciplinary process.

Mr Richardson successfully challenged his dismissal and was awarded three months' lost wages and $5,250 compensation for hurt and humiliation.

This was because the offer was unconditional and the collective agreement included a 'complete agreement clause' that provided (as many agreements do) that it superseded all previous representations and agreements. Fonterra therefore could not cancel the agreement under the Contractual Remedies Act. Further, Fonterra did not put it to Mr Richardson that he had **deliberately** misrepresented the situation, though it believed this. The summary dismissal was also in breach of contractual notice requirements.

The Authority did not reinstate Mr Richardson, noting that Fonterra had a zero-tolerance approach to convictions, and that Mr Richardson's failure to give full information was significant, despite his misunderstanding of the Clean Slate Act.

Our advice

While not always possible, it is best practice not to employ an applicant until the results of the background checks are known. Ideally the offer should state that it is conditional on your being satisfied with the results, and that the employment relationship will not start until you have confirmed this.

If the employee starts work before the results are known, you will be deemed to have waived this precondition.

'Second best practice' in that instance is to be very clear in the offer that the applicant may be dismissed if you are not satisfied with the results or the applicant has misled you. Because the applicant will be an employee by that time, you will have to act fairly and have a good reason to dismiss in the usual way.

Many employers will not be concerned if the employee has been honest, and the offending is minor or historical. However to protect yourself you should think carefully about how you word the employment offer, including the effect of any complete agreement clause, and the approach you take in any dismissal process. It may not be justifiable to dismiss an employee who was genuinely confused (eg I didn't realise a traffic offence was a criminal offence, or I thought the Clean Slate Act applied). This is an area in which 90-day trial periods may be useful.

A note on the Vulnerable Children Bill

The Vulnerable Children Bill has been through the Select Committee stage and should be passed shortly.

Once it becomes law, specified organisations who provide regulated activities such as education, childcare and health and welfare services will be required (among other things) to conduct safety checks on all new and existing employees who work closely with children. Fines will apply if they don't.

In other news

The proposed changes to the **Employment Relations Act** are on hold. Whether and when they progress will depend on the make-up of the Government following the election.

Significant changes to **New Zealand privacy laws** have been announced, including:

- Mandatory reporting of material data breaches to the Privacy Commissioner, and to individuals in serious cases
- A new power for the Privacy Commissioner to issue compliance notices, together with enhanced investigation powers
- New Zealand agencies will be accountable for information outsourced to offshore service providers (eg overseas based 'cloud computing' services or call centres), and will have to ensure acceptable privacy standards are in place when disclosing information overseas
- Additional funding for the Office of the Privacy Commissioner to provide more guidance on compliance
- New offences for failing to notify breaches, impersonation and for destroying documents where a person seeks access to that information. Maximum fines will increase from $2,000 to $10,000.

An exposure draft bill will be released for targeted technical consultation, and submissions can also be made when the Bill goes through Select Committee phase. More information about the proposed changes can be found here.

The government has introduced a **fortnightly minimum wage rate** ($1,140 per fortnight for 80 hours) to apply from 26 June 2014. The change responds to a recent Employment Court decision. Employers with salaried workers can now apply the Minimum Wage Act requirements over each fortnight, instead of each week as before.

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555
F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242
F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747
F: +64 3 379 5659