BUDDLEFINDLAY

Legal update - Changes to Employment Relations Act to take effect March 2015 but health and safety reforms delayed

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After over five years in gestation, the amendments to the Employment Relations Act 2000 (Act) were passed last Thursday 30 October 2014. The passage of the Employment Relations Amendment Bill had been delayed after the conviction of MP John Banks left the Government without enough supporters of the Bill prior to the election.

The final version is largely as anticipated, with some small changes, especially in relation to the obligation to disclose information under the duty of good faith, as summarised below. The changes introduced by the Bill will come into force four months after Royal Assent is given, so in early March 2015.

The Select Committee's report on the Health and Safety Reform Bill, which we discussed in our March 2014 legal update, is now not due until 30 March 2015. WorkSafe New Zealand has indicated that the Bill will be passed and come into effect next year, although we anticipate that this will now not happen until mid-late 2015.

Duty of good faith and disclosure of information

The disclosure of information under the duty of good faith is amended to allow employers to withhold confidential information (information subject to an express or implied mutual understanding of secrecy) that is about a person other than the affected employee, but only if it involves unwarranted disclosure of the affairs of that other person. This condition was added by the Select Committee and, in our view, means that complainant and witness identities will still need to be disclosed during investigations into an employee's conduct.

While an employer's obligations under the Privacy Act 1993 (and the Official Information Act 1982) will be expressly recognised in the Act, the Select Committee removed the proposed exception that would have allowed employers to withhold "evaluative" or "opinion" material about an individual and the identity of the person who created that material. This was strange given that the Government's apparent intent was to address the decision in *Massey v Wrigley & Kelly* that such information had to be disclosed by employers whilst running a contestable selection process following a restructuring.

However, employers will still be able to refuse to disclose confidential information that is subject to a statutory requirement to maintain confidentiality, or where it is necessary to maintain confidentiality for any other good reason, for example, to avoid "unreasonable prejudice" to their commercial position. But given past history, we expect that the Employment Court and Employment Relations Authority will read down all of the exceptions so that they are narrowly confined.

Finally, the changes expressly require an employer not to withhold access to information simply because it is in the same document as confidential information. This means that the document will have to be provided with the confidential information redacted.

Collective bargaining

Revisions to the collective bargaining regime are the most significant to be introduced since the Labour Government's changes in 2004.

Removal of the requirement to conclude a collective agreement

Parties will no longer be required to conclude a collective agreement, or to continue bargaining where they have reached a deadlock on a matter. This change should allow employers to walk away more easily from bargaining, although employers may not refuse to conclude a collective agreement simply on the basis of principle and will continue to be obliged to act in good faith.

Parties to collective bargaining will now be able to apply to the Authority for a declaration as to whether bargaining has concluded. The Authority must consider whether mediation and facilitation have been used and direct further use of those

tools, unless that would be futile.

If the Authority determines that bargaining has concluded, there will be a 60-day grace period before bargaining can be re-initiated, unless otherwise agreed. If it is determined that bargaining has not concluded, then the Authority may recommend what is to happen next to resolve the difficulties (and these must be followed before another application can be made). If the Authority makes no recommendations, which would seem unlikely, then there is a 60-day stand down period before another application can be made, unless otherwise agreed.

Permitting employers to initiate bargaining at the same time as unions

Both unions and employers will be permitted to initiate collective bargaining at the same time, 60 days before the current collective agreement expires. In practical terms, this is a minor change in our view. The initiation of bargaining prior to the expiry of a collective agreement will continue to extend the expiry of the collective agreement by 12 months, although now this will apply regardless of who initiates first.

Allowing employers to opt out of multi-employer bargaining

Employers will have 10 days from receiving the initiation notice to opt out of multi-employer bargaining by serving an 'opt-out notice'. This will assist employers who do not want to be drawn into bargaining with parties such as their competitors or service providers.

Removing the 30-day rule

The '30-day rule' will be removed, so that employers can offer individual employment agreements to new employees, whose work is covered by a collective agreement but who are not union members, from the outset of the relationship (rather than waiting 30 days). Employers will still be required to inform such employees that the collective agreement exists, give them a copy, and tell them how to join and contact the union.

This change will not necessarily remove an obligation to apply the 30-day rule, if it has been incorporated expressly into a collective agreement, as some do.

Requiring unions and employers to provide notice of a strike or lockout

Advance written notice will be required of all strikes or lockouts, not just those in essential services, and failure to give notice will render the strike or lockout unlawful. There is no prescribed timeframe for notice but the nature of the action, and its time, date and place, must be provided. This may give some employers time to plan their business arrangements, although the absence of any minimum notice period will likely lead to very short notice periods in many cases. Primarily it will give employers certainty as to the nature and existence of a strike, and the employees who are on strike. This will give employers greater scope to plan their response and deal with breaches that fall outside the terms of the notice.

Allowing partial pay reductions for partial strike action

Partial pay reductions may be applied for employees taking partial strike action, by one of two methods: a proportionate pay deduction made by reference to the time on strike, or a fixed 10% deduction. Processes are prescribed in effecting such deductions, as well as for the union to challenge them.

Part 6A - Protection of continuity of employment

The changes to Part 6A of the Act, which protects employees affected by transfers of business, reflect those announced last year. The most significant change is to exempt employers with less than 20 employees from most of Part 6A's requirements. An "employer" is to include all "associated persons" (eg holding and subsidiary companies) so that larger employers cannot exploit this exemption by, for example, moving their employees into separate entities. The employer must also provide a warranty to all other employers affected by the restructuring that it (including its associated persons) employs 19 employees or less.

The other changes to Part 6A are to:

- Enhance administration, eg by requiring "vulnerable" employees to make their election to transfer within five working days and apportioning liability between employers for their service-related costs
- Deal with anomalies highlighted by recent case law, eg by enhancing the employee information requirements and by implying a warranty from the previous employer to the new employer that it has not, without good reason, changed the work or employees' terms and conditions in a way that would adversely affect the new employer.

Rest and meal breaks

More flexible rest and meal break provisions will be introduced by the incorporation of the changes initially proposed by the Employment Relations (Rest and Meal Breaks) Amendment Bill, in October 2009. By the new provisions, employers will only have to provide employees with a reasonable opportunity for "rest, refreshment, and attention to personal matters" appropriate for the work duration. The actual timing of breaks should be agreed but, failing agreement, may be determined by the employer, having regard to its operational environment and without compromising business continuity. If breaks cannot be provided, then they can be replaced with reasonable "compensatory measures", which may include an equivalent break at an alternative time.

Flexible working arrangements

The right to request flexible working arrangements will be extended to all employees, not just those who are responsible for dependants. Employees will be able to ask for flexible work arrangements from the start of their employment and the current limit on the number of requests is to be removed. Also, employers will be required to consider requests within one month (down from three months). The reasons for which a request for flexible working arrangements may be declined by employers remain unchanged.

Timeframes for authority determinations

The Authority will be required at the conclusion of the investigation meeting to give an oral determination or an oral indication of its preliminary findings, where practicable. Oral indications may be subject to any further evidence or information from the parties. Where the Authority gives an oral indication or reserves its determination, unless exceptional circumstances exist, it then has three months to issue its final written determination. Oral determinations must be confirmed in writing within one month.

The obvious aim of this reform is to speed up the resolution of cases before the Authority. In practice, we expect oral determinations will only be given in the simplest of cases, and that oral indications will likely be the norm.

We would be pleased to advise on the implications of these changes for your workplace or to answer any queries.

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