BUDDLE FINDLAY

Legal update on employment law - May 2018

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21 May 2018

Court rules that pre-work meetings must be paid

The Employment Court recently ordered Smiths City Group, a national retail chain that operates over 34 stores, to pay employees for the unpaid 15-minute meetings employees were expected to attend before the stores opened each day.

The core issue was whether these meetings constituted "work" under the Minimum Wage Act 1983. The Court looked at the real nature of the activity, including the constraints placed on the employees, the responsibilities of the employees and the benefit to the employer of the meetings. It also considered whether the meetings were an integral part of the employee's principal activities.

It found that the meetings were an integral part of each employee's work as sales staff. While there was no contractual requirement to attend, employees were expected to attend so as not to be seen as poor performers and they were required to sit, listen to and absorb the work-related information being imparted at the meetings. As such, the morning meetings constituted work, and Smiths City was required to pay employees for their attendance at work. Smiths City argued that the commission and discretionary incentive payments made to employees covered its requirements to pay for those meetings. The Court disagreed. The employees in question were paid by the hour, and commission or incentive payments were additional income earned over and above the contractual hourly rate.

The Labour Inspectorate has indicated that this case is a useful reminder that employers must pay individuals for all work they do, including briefings, handovers and in some situations, travel time to and from a work site. Further, as in this case, while there may be no contractual requirement to attend a meeting, in practice, an expectation to attend may be just as binding.

Progress towards achieving pay equity across New Zealand

New Zealand can expect changes to pay equity legislation in mid-2018.

Following the election, the newly-elected coalition Government withdrew National's pay equity Bill and reconvened the Joint Working Group on Pay Equity Principles. The Working Group recently reported back to Ministers with new recommendations that it considers will make it easier and simpler for Kiwi women to lodge pay equity claims and work towards improving fairness in the workplace.

The Working Group's recommendations include the clarification and simplification of the process for initiating a pay equity claim, retaining the principle of comparators (but possibly eliminating the strict hierarchy of comparators suggested in National's Bill), utilising existing employment resolution mechanisms (including the concept of good faith) to advance pay equity claims, and amending the Equal Pay Act 1972 to implement the principles.

Under National's Bill, female employees that wanted to make a pay equity claim needed to first establish that their claim had 'merit'. A claim had merit if the work was predominantly performed by women and reasonable grounds existed to believe that the work had been undervalued and continues to be undervalued today. Employees were required to set out in writing all of the factors and evidence relied on in establishing that their claim had merit. An employer was only required to engage with an employee's claim if it accepted at the outset that the claim had merit. If an employer decided that the claim did not have merit, the employee could not take the substantive claim to the court. Rather, the employee could only challenge the employer's position that the claim did not have merit.

The Working Group considered that the concept of 'merit' in National's Bill set too high a threshold for employees. It therefore recommended that, in order for an employee to ask an employer to address a pay equity claim, the work simply needed to be predominately performed by women. In addition, the Working Group recommended that it should merely be 'arguable' that the work is currently or has been historically undervalued, and that consideration should be given to whether gender-based systemic undervaluation has affected the remuneration for the work.

This would mean that employees wanting to bring a pay equity claim need to show only that the work is predominantly performed

by women. They would not need to prove that the work has been undervalued and continues to be undervalued, or that this undervaluation has affected the remuneration. Obviously, these factors will be relevant to negotiations, and information in support of these factors will assist an employee justify a pay equity claim.

While legislation implementing these new principles has not yet been introduced to Parliament, the Government has signalled that it expects changes to the law to occur mid-2018. In our view, the Working Group's recommendations are a positive step in the right direction towards achieving pay equity for women. However, implementation of the Working Group's recommendations will not in themselves solve wider issues of disparity and gender pay discrimination. Technically, New Zealand has had legislation that has "required" equal pay for work of equal value for over 40 years. Given the priority that the new Government has given to pay equity to date, we expect other changes such as pay transparency / gender pay reporting measures will follow to help deliver pay equity.

Payment in lieu of notice during a trial period can be lawful – clarification from the Court

A 2018 Employment Court judgment has simplified the legal position around payment in lieu for employees on trial periods.

Currently, termination by giving notice under a valid trial period bars employees from bringing a personal grievance to challenge their dismissal. To rely upon that bar, employers must comply strictly with all of the requirements applicable to trial periods including the requirement that the employer give notice.

Whether notice can be paid in lieu has been a vexed question until recently.

In *Ioan v Scott Technology NZ Ltd t/a Rocklabs* [2018] NZEmpC 4 the Employment Court held that, when giving notice to an employee during a valid trial period, employers are entitled to pay in lieu of the employee working out the notice period if:

- Notice is given, and accords with the employment agreement
- The notice is clear and unambiguous, and explains how and when employment will be terminated.

The Court was careful to emphasise that employers are still required to give notice of termination in the usual way (ie, payment in lieu of notice is not sufficient notice in and of itself).

The Court's pronouncement on payment in lieu comes at a time when trial periods are likely to change. The Employment Relations Amendment Bill, currently with the Select Committee, proposes to restrict trial periods to employers with fewer than 20 employees. This change is likely, in our view, to go ahead and to take effect later this year.

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