BUDDLEFINDLAY

Legal update - Preliminary decisions: in or out?

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

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It is common now in disciplinary processes for preliminary decisions to be issued, in which the employer's preliminary views are set out, and the employee is invited to comment on those before a final decision is made.

In a recent case, *Edwards v The Board of Trustees of Bay of Islands College*, the Employment Court's Chief Judge raised concerns about this practice. The Chief Judge considered that it could risk "*a finding of pre-determination by the employer and, potentially, the dismissal being held to be unjustified.*" He also said that where a preliminary decision is given after a long and complex investigation, the employee may believe that it will be difficult to change the employer's views. On that basis, the employee may decide there is little point commenting on the preliminary decision.

The Chief Judge's comments have to be seen in the context of *Edwards*, where statements made in the employer's correspondence suggested that the employer's mind was already made up before the final meeting. We don't believe they should be read as being critical of preliminary decisions altogether.

From our perspective, preliminary decisions are valuable to both employers and employees, and we'd go so far as to recommend that they be used in most situations where dismissal is seriously being considered, and for more complex matters generally.

Used correctly, preliminary decisions promote sound and fair decision-making. Specifically, they:

- **Ensure there is careful consideration**: Preparing a preliminary decision requires the employer to articulate its thinking in a clear and reasoned way. This is a good discipline for employers to go through before they communicate the ultimate decision, as it tests their thinking and helps to identify gaps.
- **Promote good faith**: An employer has to ensure that the employee has had an opportunity to comment on all matters relevant to the employer's decision. This is not always done as thoroughly as it should be in the disciplinary meeting, where parties are discussing matters in real time, and emotions are running high.
- **Reduce the risk for both parties**: Setting out findings and proposed outcomes in a preliminary way gives the employee an opportunity to correct any inaccuracies or misconceptions. This is in both parties' interests.

Preliminary decisions are of course just that - preliminary - and need to be expressed in that way. This does not mean that employers cannot express their views in a robust and frank way - in fact good faith (and good practice) requires employers to be honest. Employers nevertheless should ensure that they remain, and be seen to remain, receptive to considering further comments by the employee, and to changing their preliminary views if warranted.

Strengthening minimum employment standards

In late March, the Government announced a range of measures to strengthen the enforcement of minimum employment standards, such as the minimum wage and minimum holidays entitlements.

The proposed changes are directed towards employers which are not currently meeting their obligations. They include tougher sanctions for serious breaches of minimum standards, clearer record-keeping requirements for wages, time worked, holidays and leave, and increased powers for labour inspectors. The Government has said that employers which are compliant with minimum standards should not see any increase in compliance costs once the changes become law.

The Government has advised that an Employment Standards Bill will be introduced to Parliament later this year, to enact these changes into law. We will keep you updated as the Bill progresses through Parliament, and can assist if you wish to make submissions on the Bill.

Auckland

PwC Tower
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