BUDDLE FINDLAY

Legal update - Employment law changes take shape

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The much anticipated Bill amending the Employment Relations Act 2000 (Act) was introduced into Parliament on 26 April 2013. The Bill's machinery implements the Government's changes announced last year but some of it may have more far-reaching consequences than the Government's stated intention, particularly changes to information disclosure requirements on employers. The Bill also includes one new (and already controversial) change under which the Employment Relations Authority (Authority) would be required to orally deliver its ruling in a case, or an indication of what it will be, at the conclusion of the investigation meeting.

It is proposed that the Bill will come into force four months after it is enacted. This may be before Christmas but is more likely to be in early 2014. We will know more once the Bill is (likely) referred to Select Committee after its first reading on around 9 May 2013.

The Bill implements Government policy aimed at increasing "flexibility and choice", ensuring "a balance of fairness for employers and employees", and "reducing compliance costs", particularly for small to medium size enterprises. Employer organisations have come out largely in favour of the Bill and are supportive of the efficiency and flexibility (from an employer's perspective) that it would introduce. However, unions have voiced strong opposition to the Bill saying that it will be easier for employers to cut pay and conditions.

In this update we provide a summary of the changes that the Bill would introduce.

Duty of good faith and disclosure of information

As outlined in a previous update, changes proposed to the information disclosure requirements under the duty of good faith are in response to the Employment Court's 2010 decision in *Massey University v Wrigley & Kelly*. There disclosure requirements under the Act were held to go further than the Privacy Act 1993, which allows the non-disclosure of evaluative or opinion material created in determining an applicant's suitability for employment.

However, the changes proposed by the Bill are not limited to selection processes and may allow employers to withhold information in other areas. It is proposed that employers may withhold confidential information that is:

- About identifiable individuals other than the employee – this could be used to counter the long-standing principle that the identity of a complainant or witnesses in a disciplinary investigation must be disclosed to the employee concerned
- Evaluative or opinion material compiled in making a decision that may adversely affect the continuation of an employee's employment – evaluative material created by a decision-maker in a disciplinary investigation could potentially be withheld under this ground
- About the identity of the person who supplied such material – again, this may run counter to the principle of full disclosure in disciplinary investigations
- Subject to a statutory requirement to maintain confidentiality – this mirrors the existing provision
- Where any other good reason exists to maintain confidentiality, such as unreasonable prejudice to the employer's commercial position – again, this mirrors the existing provisions.

Timeframes for authority determinations

A surprise inclusion in the Bill is a requirement on the Authority, at the conclusion of the investigation meeting, to give an oral determination or an oral indication of its preliminary findings. Oral indications may be subject to any further evidence or information from the parties. Unless exceptional circumstances exist, the Authority then has three months to confirm its oral determination in writing or issue its final written determination.

The obvious aim of these reforms is to speed up the resolution of cases before the Authority. That is laudable but it cannot be at the expense of the proper consideration of evidence and legal submissions. The reforms may in fact lengthen Authority investigation meetings and increase costs, as Authority members are required to more carefully consider the evidence as it is

presented. They may also lead to bad decisions or settlements based on incorrect indications. In practice, we would expect oral determinations only to be given in the simplest of cases, and that oral indications would likely be the norm.

Collective bargaining

The changes to collective bargaining proposed by the Bill incorporate all of those we reported on in a previous update. They are the most significant since those made by the last Labour Government in 2004, and favour employers.

Removal of the requirement to conclude a collective agreement

The Bill proposes to reinstate the original section 33 of the Act, which provided that good faith does not require the parties to collective bargaining to enter into a collective agreement or to agree to any terms. Also to be repealed is the current requirement on the parties to keep talking where they have reached a deadlock on some matters. While the parties' good faith obligations will still require some engagement, arguably employers will be able to resist a collective agreement now in principle, and be able to walk away more easily from bargaining.

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, being 60 days before the current collective agreement expires. This is to bring equality to the initiation process by taking away any advantages unions currently enjoy by initiating first. One of those advantages is to automatically extend the expiry of the collective agreement by 12 months, which the Bill provides will occur despite who initiates first.

Allowing employers to opt out of multi-employer bargaining

Employers would 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.

Allowing the Authority to declare that collective bargaining has ended

In recognition of a need by the parties to have certainty as to when bargaining has concluded, the Bill allows the parties to collective bargaining to apply to the Authority for a declaration as to whether bargaining has concluded. The Bill does not provide guidance on when a declaration would be given but does require the Authority to consider whether mediation and/or facilitation has been used and to 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.

Removing the 30-day rule

As expected, the Bill would repeal what is known as the 30-day rule, so that employers can offer from the outset of the relationship (rather than waiting 30 days) individual employment agreements to new employees whose work is covered by a collective agreement but who are not union members. 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.

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

More certainty about intended industrial action is proposed by requiring advance written notice of all proposed strikes or lockouts, not just those in essential services. Failure to do so will render the strike or lockout unlawful. A notice period is not required 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 existence of a strike and the employees who are on strike.

Allowing partial pay reductions for partial strike action

Two options are proposed for reducing the pay of employees on a partial strike: a proportionate pay deduction made by reference to the time on strike or a fixed 10% deduction. Certain 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 proposed change is to exempt employers with less than 20 employees from most of Part 6A's requirements, subject to a couple of fishhooks. First, 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. Secondly,

the employer must also provide a warranty to all other employers affected by the restructuring that it (including its associated persons) employ 19 employees or less.

As reported previously, 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

The Bill incorporates the provisions of the Employment Relations (Rest and Meal Breaks) Amendment Bill introduced in October 2009 and as reported by Select Committee in September 2010.

Flexible working arrangements

Consistent with what we reported previously, the Bill will extend the right to request flexible working arrangements 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 Bill does not propose to change the reasons for which a request for flexible working arrangements may be declined by employers.

Submissions?

It will be fascinating to see whether and how the Bill changes in the Select Committee process. In the meantime, we would be pleased to assist you with any submissions you might like to make on the Bill or to answer any questions you may have. A copy of the Bill can be found here.

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