



DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update: December 2017

This update covers:

- A summary of the new Government's announced policies for employment law.

Announced Policies of the new Government

With the new Labour Government in office, many areas of employment law have undergone significant developments. The new Government has already moved through substantial changes and announced policies to initiate further advancements to employment law. The changes and proposed developments are as detailed below.

Hobbit Law

The Government intends to restore film and television workers' rights to engage in collective negotiations.

In 2010 the Employment Relations Act was amended to classify film workers as independent contractors. As such, they could not be afforded the protections and benefits that arise from employee status - in this instance the right to engage in collective bargaining. The amendment reversed the Supreme Court's judgment in *Bryson v Three Foot Six Limited* which stated it was the 'real nature of the relationship rather than what the parties stated' which determined whether a worker was an employee or an independent contractor.

The Minister for Workplace Relations has confirmed this former position will not apply. Workers will remain contractors, but the development is they will now have the right to bargain collectively. This new law may also have a wider application to include workers engaged in short term contracts and casual workers.

Parental Leave

A new bill has amended the Parental Leave and Employment Protection Act 1987. Paid parental leave has now increased to 22 weeks commencing July 2018 and to 26 weeks from July 2020. The issue of shared parental leave will also be put forward as part of a wider employment amendment bill, allowing it to go to select committee for consultation. Extended leave remains the same at 52 weeks (including any paid leave).

Trial Periods

Currently employers can essentially dismiss an employee during a 90-day trial period for any reason. This will be repealed and replaced with a new system. According to the new Government this means an employer who wishes to dismiss an underperforming employee will have to explain why.

The possible development is employers may have to show they have fairly reached a substantial justification for a dismissal.

Claims will be pursued in a newly created body. The employer will not have the right to appeal the decision of the new body.

Questions arise as to how dismissals will fit within existing employment law. Since an employer has no right to appeal to a higher body, case law cannot develop under the new system. It is hoped the system would be regulated by statute, otherwise outcomes could be inconsistent.

There is also a question of jurisdictional issues such as whether claims can be pursued either in this new body or the Employment Relations Authority and the Employment Court.

The end result could be a trial period is effectively pointless and employers are better off not using them.

Equal Pay Act

The landmark pay equity decision of *Service and Food Workers Union Inc and Bartlett v Terranova Homes* demonstrated that the Equal Pay Act 1972 goes beyond ensuring men and women received the same pay for the same work. The case concerned the interpretation of the Equal Pay Act in relation to Ms Bartlett and found women in caregiving roles were paid less than their work would have been worth had it not been traditionally dominated by female workers. This decision was upheld by the Court of Appeal and leave to appeal to the Supreme Court was denied.

This decision means the Equal Pay Act is targeted at both equal pay (same pay for the same work) and pay equity (same pay for work of equal value) for work that is predominantly performed by women.

Following the decision the previous Government convened a Joint Working Group on Pay Equity (JWG). It also negotiated a settlement of the claim of around 55,000 residential aged care, disability and home support workers in 2017. The then Government then introduced a bill which would repeal the Equal Pay Act and input a new pay equity system. This bill was largely criticised by the then opposition.

Labour announced pre-election, if elected, it would scrap the Employment (Pay Equity and Equal Pay) Bill and amend the Equal Pay Act to implement the changes recommended by the JWG.

Fair Pay Agreement

Labour's workplace relations policy states Fair Pay Agreements will be agreed by business within an industry and the unions representing workers within that industry. This will cover all employees and workplaces within the relevant industry. The policy aims to create a framework for fair wages. This is particularly important as some employers attempt to reduce labour costs through low wages and poor conditions. The Minister for Workplace Relations has stated these agreements are designed to give power to the workers whose wages has not risen with the cost of living.

Other Announced Policies

Reinstatement

Reinstatement will be restored as the primary remedy following the unjustified dismissal of a worker (as it was pre-2011). Previously, reinstatement would only be granted '*wherever practicable*'. If this policy does go ahead, it is unlikely we will see an influx of reinstatement cases. The reality is many employees in this situation are not interested in reinstatement as the relationship has broken down or they have moved on to other roles.

Rest and Meal Breaks

One of Labour's policies is to restore the clear right to rest and meal breaks at work. Prior to 2015 the Employment Relations Act provided for prescriptive meal breaks based on the length of an employee's work period. This was replaced with a system where an employee is entitled to a reasonable opportunity, during the employee's work period for rest and so on. If the policy is enacted, it is likely we will see a return of the previous format of prescribed rest and meal breaks.

Redundancy Protections

There is currently no statutory requirement to pay redundancy compensation to an employee affected by restructuring. One of Labour's policies is to begin consultation on improving minimum redundancy protection for workers affected by restructuring, with consideration given to the 2008 Ministerial Advisory Group report on redundancy and restructuring. The report recommends introducing a statutory requirement for redundancy compensation. It will be interesting to see how this develops.

Remuneration Above 40 Hours

Labour has announced its intention to investigate options for ensuring that people who work over 40 hours a week receive adequate remuneration. One of the options it will investigate is mandatory statutory overtime. This will likely be the subject of litigation and case will develop with the changes. This will no doubt alter the landscape of employment law.