DYHRBERG DRAYTON

EMPLOYMENT LAW

What's New Update

October 2014

Employment Amendment Bill

On 26 April 2013 the Labour Minister at the time, Simon Bridges, announced proposed changes to the Employment Relations Act intended to improve fairness and flexibility in workplace relations. Since our May 2013 update the Employment Amendment Bill has gone through the select committee process and passed its second reading.

Below we list the major changes to the Bill through that process, namely:

- The provisions of the Bill that remove the requirement for parties to conclude a collective agreement and provide for the Authority to declare that bargaining has concluded have been strengthened to require the Authority to direct the parties to facilitation before it will consider a declaration if any of the grounds in section 50C(1) exist (eg if a party has not complied with the duty of good faith in a serious and sustained manner, which has undermined the bargaining).
- Where a declaration cannot be made, the Authority can make recommendations to bargaining parties as to the process the parties should follow.
- In relation to the exclusion of small to medium sized businesses from the transfer provisions of Part 6A, the definition of "associated person" in the Bill has been amended to exclude a franchisor where the franchisee bids for and manages the contract independently of the franchisor. This will enable franchisees who are essentially independent from their franchisor to access the exemption.
- Also, the Bill has been amended to clarify that any failure of an outgoing employer to comply with Part 6A, does not affect the employee's entitlement to transfer or obligations of the new employer.
- The definition of 'partial strike' in the Bill has been clarified.
- While the Bill as introduced required the Authority to make an oral determination or give an indication of its findings at the conclusion of an investigation meeting, the amended Bill enables the Authority to reserve its decision.
- The Bill has been amended to simplify the confidential information exception, which now provides that an employer is not required to allow access to confidential information regarding individuals other than the employee concerned, if it would result in an unwarranted disclosure of information about another individual. As amended, the Bill may not overturn the *Massey v Wrigley* case as the Authority/Court may find that the release of relevant information is always warranted. Careful consideration of the precise facts will be necessary.
- The ability to withhold evaluative and opinion material has been removed from the Bill.
- The Bill has been amended to clarify that information cannot be withheld because it is contained in a document that also contains confidential information – i.e. employers will need to redact the confidential parts, rather than whole documents.

The Bill is currently at the committee stage and has sat at number 1 on the order paper for 22 and 23 October 2014, showing that it is a key priority for the new government. We also note that the new government has changed the name of this portfolio from '*Labour*' to '*Workplace Relations and Safety*'.

Being untruthful during disciplinary investigations

In a recent decision, the Court of Appeal held that an employer may expand the scope of an investigatory process to cover untruthfulness of an employee in his or her response to allegations of misconduct.

In *George v Auckland Council* [2014] NZCA 209, Ms George, Chartered Accountant, held the position of Team Leader in the Transactional Services unit of the Auckland Regional Council (later the Auckland Council) at the time of her dismissal. Ms George recruited a casual employee in late 2009.

The Council alleged that Ms George recruited the employee without obtaining approvals required under the Council's recruitment policy. Ms George's responses to initial queries about the recruitment of that employee indicated inconsistency with recruitment policy and her manager's instructions as to recruitment.

The Council then decided to commence a formal investigation into the allegations. A contractor was

tasked by the Council to carry out the investigation to achieve objectivity.

Ms George provided a detailed written response to the allegations and presented her views at a formal meeting. It appeared that Ms George's responses were inconsistent with those given by other witnesses.

As a result, the Council decided to widen the scope of the investigation to cover the alleged untruthfulness as a result. Ms George was given notice and an opportunity to be heard on the later issue.

The Council ultimately decided to terminate Ms George's employment at the conclusion of the investigatory process. Ms George filed for proceedings at the Employment Relations Authority. The matter was removed to the Employment Court.

In the Employment Court, Judge Inglis held that while the initial allegation of failing to comply with the Council's policy on recruitment was relatively minor, the termination of employment was warranted in all the circumstances, taking into account the allegations and findings of untruthfulness. The case was appealed to the Court of Appeal. The Court of Appeal agreed with Judge Inglis.

The Court of Appeal held that an employer may seek to rely on the untruthfulness of an employee in his or her responses to other allegations of misconduct.

The Court acknowledged that provided a fair process is followed with a proper opportunity for the employee to respond to the allegations (which must be adequately detailed), it is unnecessary for the employer to commence a fresh disciplinary process.

The Court of Appeal also held that:

'We emphasise that mere differences in recollection are likely to be commonplace during the course of the disciplinary process including any earlier investigation stage. Differences of recollection or inconsistencies are not in themselves sufficient to support a finding that the employee has lied. An employee may honestly, but mistakenly, have a different recollection of events. In order to establish that the employee has lied, there must be proof of a deliberate untruth on the employee's part. The standard of proof is the civil standard but to a level commensurate with the seriousness of such an allegation.'

This decision should be applied carefully. The nature and impact of the lie would generally determine whether disciplinary action ranging from an informal reprimand to dismissal is warranted. Advice should be sought before taking disciplinary action in these circumstances.

Facebook activity during investigation

Another recent case shows how inappropriate use of social media may lead to dismissal in a process which may not have otherwise ended in dismissal.

In *Blylevens v KidiCorp Ltd* [2014] NZERA Auckland 373, Ms Blylevens was a childcare centre manager and was facing an investigation into complaints made against her by parents and staff.

However, before the investigation could be completed, Ms Blyleven's advocate wrote two Facebook posts, which included disparaging comments about KidiCorp and comments about a current investigation into bullying allegations against an unnamed centre manager.

Ms Blyleven 'liked' each post and made a comment in relation to one (which she later claimed was to her daughter) saying the article was interesting and '*as a parent looking at childcare it's good to be informed*.'

Ms Blyleven denied any wrongdoing. She argued that she was being punished for someone else's actions, and that 'liking' a comment does not mean she endorsed or approved of it.

KidiCorp argued that Ms Blylevens' actions breached their social networking policy, her obligations of fidelity and good faith, amounted to serious misconduct, had destroyed their trust and confidence in her and, for those reasons, her dismissal was justified.

The Authority considered that a fair and reasonable employer could have concluded that by liking the post, the employee would have created the impression to other Facebook users that she 'agreed with, endorsed or supported the post.

The Authority upheld KidiCorp's decision and in doing so observed that liking a comment on Facebook was *'analogous to her standing outside the Centre she managed handing out copies of'* the Facebook post.

The Authority 'found *'that it was open to a fair and reasonable employer to have concluded that publishing derogatory comments about it to a potentially unlimited audience is a fundamental breach of an employee's duty of fidelity.'*

Wage Deductions

Section 5 of the Wage Protection Act 1983 makes it unlawful to make deductions from an employee's wages without the employee's written consent or unless the employee requests it in writing.

Many employment agreements make provision for this consent, but consent can be varied or withdrawn at any time and the Employment Court has indicated that it considers it necessary to consult with an employee before making any such a deduction.

In *Jonas v Menefy Trucking Ltd* [2013] NZEmpC 200 the Employment Court stated that *'where a general deductions clause in an employment agreement is relied upon rather than an individualised written consent then, consistently with its good faith obligations under the Act,*

an employer must, at a minimum, consult with the worker before making any deduction.'

The Court went on to state that *'It may also be that no deduction can be made on the basis of a general clause without that worker's express consent, although this was not submitted by the plaintiff and, therefore, does not fall to be decided.'*

Even where there is consent, this does not provide free rein to make deductions. In *Donald v Pollard Contracting Ltd* [2014] NZERA Christchurch 83, the employer deducted $816 from the employee's final pay to cover the cost of replacing locks (because the employee was seen as risk and had allegedly not returned the keys).

The Authority found that the deduction was unlawful because the consent provided in the employment agreement referred to a situation where an employee was indebted to the employer for failing to return company property rather than any consequential losses arising out of such a failure. Accordingly, while the employer could have recovered the cost of a new key, it could not recover the cost of changing the entire lock system (which, incidentally, it had not done in any case).

Also, a general consent in an employment agreement to deduct monies owing does not override a provision dealing with the repayment of a specific debt owed.

In *Tuhura v Action Plumbing, Gas and Drainage Services Ltd* [2013] NZERA Christchurch 194, the employment agreement in question contained a standard clause allowing the employer to deduct any amount owing at the date of termination. The employer deducted $1,147.65 from an employee, which included the debt on his tool account.

However, the employment agreement also provided that in certain circumstances staff could purchase goods and services on a staff purchase account and that all accounts must be paid in full by the 20th of the following month. There was also provision for staff to pay the account by weekly deductions from their wages, if agreed to by the employer. The Authority found that the general deduction provision could not be read to override the specific provisions in the employment agreement around the tool account and ordered the employer to repay that part of the deduction.

It should be noted that the Wage Protection Act has a savings provision. Section 15 of the Act 1983 states that '*subject to sections 6(2) and 16 of this Act, this Act shall be read subject to the provisions of any other Act.'*

The recent case of *Geenty v GR &TL Burnett Ltd* [2014] NZERA Auckland 171 dealt with this provision and whether it only relates to other Acts that specifically allow for the deduction of wages (e.g. Government Superannuation Fund Act 1956).

In that case, the employee was dismissed and subsequently convicted of theft as a servant and ordered to pay the employer $23,682 by way of reparation.

The employee sought unpaid wages and holiday pay of $1,263.36 and the employer sought to deduct it from the reparation payment it was owed.

The Authority held that section 15 does not only relate to other Acts that specifically deal with deductions from wages and that the Wage Protection Act must be read subject to the Set Off Acts 1729 and 1735, which enables mutual debts between the plaintiff and defendant to be set-off against each other irrespective of the fact that the debts may be different in nature.

A key factor in that case was that the debt was mutually agreed; neither party disputed the fact that each debt was owed, nor did they dispute the quantum of the debts.

Tracking employees with GPS

The use of Global Positioning Systems (GPS) tracking devices in employer owned vehicles is no longer a foreign concept. Employers often install GPS tracking devices to enhance productivity and increase efficiency and sometimes to improve security.

Most modern mobile phones (such as those distributed as work phones) also contain a location tracking function and there are apps available that could enable employers to monitor where their staff are or have been.

Under the Privacy Act 1993, employers can collect such data provided that the information is being collected for a lawful purpose that is connected with a function or activity of the agency and the collection is necessary for that purpose.

Determining whether the purpose is 'lawful' and the collection is necessary will depend on the situation and we recommend employers always seek legal advice before tracking staff.

Once it is determined that the purpose is lawful and the collection is necessary, employers should consider when the data is to be gathered and how it will be used with minimum intrusion to employee privacy.

There may be periods where the employer need not collect tracking data, such as during periods where the employee has access to the vehicle for personal use.

Before installing a GPS tracking system or collating location information from staff phones, employers should check the employment agreements, consult with employees, put a clear policy in place and communicate it to staff. It is important to seek advice prior to initiating the process.