

Changes to Employment Law

1. The government's announcement yesterday all but completes delivery of the commitments made by the government prior to the 2008 election.

ELECTION COMMITMENTS

2. The National party campaigned on a small number of promised changes to employment law. These were;
 - a. Introduction of a 90 day trial period
 - b. Continue to allow union access to workplaces [but] with the employers consent
 - c. Continue to support the social partnership with Business NZ and the CTU
 - d. Restore workers rights to bargain collectively without having to belong to a union
 - e. Retain the mediation service to ensure it is properly resourced with properly qualified mediators
 - f. Require the Employment Relations Authority to act judicially in accordance with the principles of natural justice, including the right to be heard, and the right to cross examine before an impartial referee
 - g. Allow injunctions and important questions of law to be heard in the first instance in the Employment Court
 - h. Allow a right of appeal to the Court of Appeal
 - i. Keep 4 weeks annual leave, but allow employees to request trade of the 4th week for cash. This can only be at the

employee's request and can't be raised in negotiations for an agreement

- j. Appoint a working party to review the Holidays Act especially the issue of relevant daily pay.
3. Following the 2008 election, the government enacted the 90-day trial period is now law for employers with 20 or fewer employees, as well as introducing a bill to amend the meal breaks provisions.
 4. In addition,
 - a. The government has reviewed the Holidays Act and the vulnerable workers and personal grievance provisions of the Employment Relations Act.
 - b. A private members bill to require secret ballots for strikes is presently before the select committee.
 5. The only outstanding pre-election commitment is that to permit non union members to bargaining for a collective agreement. While it seems unlikely that this issue will be addressed in the current term of government, the government has been silent on its intentions in this regard. Business New Zealand therefore intends to;
 - a. Proceed on that basis that it is still an option to be considered.
 - b. Recommend to government that the whole process of collective bargaining be reviewed with a view to promoting pragmatic and constructive changes where required in time for a second term, should that eventuate.

THE LATEST CHANGES EXPLAINED

6. Most of the changes are relatively self explanatory. Please contact Paul Mackay pmackay@businessnz.org.nz Ph 04 4966553 or 021 577719 at Business New Zealand if you wish to discuss any elements in more detail.

Employment Relations Act

Hiring and firing

7. The 90 day grievance free period is extended to all businesses irrespective of size.
8. The justification for dismissal in section 103A of the Employment Relations Act is amended by reinstating the concept that justification will be determined on whether the actions of the employer in dismissing an employee were what a reasonable employer “could” have done (rather than “would” as at present) in all the circumstances’.
9. The Act will also codify the principles underpinning a fair process of dismissal, and ensure that minor deficiencies in process do not overturn an employer’s decision where those deficiencies would not have made a difference to the outcome.
10. Reinstatement will cease to be the primary remedy for unjustified dismissal. This reflects the reality that reinstatement is only sometimes a productive option for all the parties when an employment relationship has been damaged by a personal grievance.
11. Further guidance for employers and employees on the changes will come in the form of a Code of Practice on good practice in managing dismissals and other personal grievances. This will be prepared pursuant to section 100 of the Employment Relations Act, i.e. it will be the subject of consultation with employee and employer representatives and be signed off the by the Minister of Labour.

Mediation and the Employment Relations Authority

12. More emphasis is to be placed on early resolution of employment relationship problems. Mediation services will be available at an informal level in the first instance (i.e. without external representatives). This will keep costs down and simplify issues for those whose issues are relatively straightforward. More formal mediation, with the ability to have representatives present, will continue to be available.
13. The Employment Relations Authority (ERA) will be required to
 - a. Give priority to cases that have already been to mediation, thus also promoting the use of mediation in the first instance. At present many cases are lodged initially with the ERA.

- b. Permit parties to cases to cross examine each other if they wish to. Currently the ERA decides what the process of examining evidence should be.

14. Mediators and members of the ERA will be able to make recommendations as to an appropriate solution to an employment relationship problem to the parties if they request one. Currently this option is not available to the ERA except in rare cases where it exercises its powers to facilitate collective bargaining. Giving capacity to mediators and the ERA to make recommendations is intended to assist parties in deciding whether to continue a case with the attendant costs and risks of doing so.

15. In the same vein, the ERA will be able to

- a. Dismiss frivolous or vexatious cases, freeing up the system to hear cases with genuine merit. While there are not many such cases in any year, they can and do take up inordinate time, and cost the defendant unnecessarily.
- b. Penalise parties who fail to turn up to scheduled meetings or file late claims without reason
- c. Remove case to the Employment Court without having to wait for one or both parties to apply for that to occur. Cases which, in the opinion of the ERA, are highly likely to end up in the court anyway, will be fast tracked there, freeing up the ERA to deal with other cases.
- d. Decide whether a case should be heard without mediation having first occurred.

16. The Chief of the ERA is given powers to assist in achieving an acceptable and consistent approach by members of the Authority to their decisions. Measure include permitting the Chief to

- a. Issue instructions to ERA members about law and process, including "practice notes."
- b. Giving advice to the Minister of Labour on the (re)appointment of ERA members

- c. Direct the training and professional development of ERA members.

17. The Department of Labour will work with stakeholders in the development of a code of ethics to guide appropriate behaviour among those who advocate on behalf of clients in personal grievance cases.
18. The government will review the existing regulations governing the conduct of ERA investigations with a view to making them more formal. Currently the conduct of an investigation is decided by the individual member hearing the case.

The Employment Court

19. The Employment Court will be permitted to deal with applications for pre-proceeding discovery of documents and other evidence regardless of whether the matter is to be brought before the ERA or the Court in the first instance. Applications for discovery are often fraught with complexity. Having applications delay with by the court will provide consistency in this area.

More powers for Labour Inspectors

20. For the first time, the role of the labour inspector will be defined in law as one of managing complaints and supporting businesses to achieve compliant practices and systems.
21. The Employment Relations Act will also be amended to
- a. Enable penalties to be awarded in relation to an improvement notice (and penalty interest in respect of longstanding or repeated non compliance.
 - b. Require employers to provide employees a written copy of their employment agreement
 - c. Increase penalties for breaches of the Act to \$10000 (now \$5000) for individuals, and \$20000 (now \$10000) for companies)
22. Labour inspectors will be able to

- a. Enter into agreements with employers in respect of commitments employers make to comply with the law or contractual conditions of employees.
- b. Issue improvement notices in much the same manner as health and safety inspectors can in matters relating to compliance with the Health and Safety in Employment Act.
- c. Seek a penalty action in the ERA in relation to employers who do not provide a compliant employment agreement.

Union access to workplaces

23. The Employment Relations Act will be amended to provide that union access to workplaces is conditional on the consent of the employer (consent not to be unreasonably withheld). International law provides that unions should have rights of access to workplaces subject to property rights and management rights being observed. New Zealand's present relatively unfettered rights of access are more permissive than almost any comparable legal jurisdiction, e.g. UK, USA, Canada, and Australia. The proposed change is consistent with international law, and is still more permissive than most.

Collective bargaining

24. The Employment Relations Act will be amended to allow employers to communicate more freely with their employees during period of collective bargaining. Currently such communications are restricted, causing frustration and confusion among many employers as to what and how they communicate to and with their employees. Any communications remain subject to the duty of good faith.

Holidays Act

25. Following the 2009 review of the Holidays Act a lengthy report was submitted to government in December 2009. The government has now announced its decisions on the changes it intends to make to the Holidays Act.

Leave entitlements

26. There are no changes to leave entitlements

Cashing up of annual leave

27. As presaged by the governments election commitments, employees will have the right to request their employer to cash up one week of their four week statutory annual leave entitlement each year
28. Employers may not require, request or otherwise seek agreement from employees to cash up leave, but are at liberty to refuse a request from an employee to do so.
29. The value of the cashed up leave will be the same as it would have been if the leave had been taken at the time of cashing it up.

Relevant Daily Pay

30. Relevant daily pay (RDP) will remain for employees whose incomes are regular or fixed. This is because RDP does not change from day to day in such cases.
31. Employees whose incomes are irregular will have their holiday pay for public holidays, sick and bereavement leave calculated on the basis of "average daily pay" i.e. the daily value of their gross earnings over the 12 months prior to taking the leave.

Transfer of public holidays

32. Employers and employees will be able to agree to transfer the observance of one of the 11 statutory public holidays to another day. Criteria to ensure that the transfer does not disadvantage the employee will also be included in the amendments to the Act.

Proof of Sickness

33. Employers will no longer have to wait for 3 days before asking for proof of sickness from employees. However, they will need to meet the costs of medical appointments employees are required to attend.

Alternative holidays

34. Will now be taken at times agreed between the employer and employee, if agreement cannot be reached the employer may decide.

This aligns the taking of alternative days with the criteria for taking annual leave. Presently, employees have the right to decide when to take alternative days within 12 months of becoming entitled to them. After 12 months the employer may decide.

Penalties

35. Penalties for breaches of the Holidays Act are increased to \$10,000 (from \$5000) for individuals and \$20,000 (from \$10,000) for companies.