

SEMINAR SERIES

Fears of restructuring in the workplace, coupled with still further legislative changes, make this a more challenging time than ever for employers.

The onus is on employers to ensure they are well-informed.

We are running a series of informal seminars throughout the year, designed to address the most topical issues:

Redundancy and Restructuring

Employers will need to take the time to dot every 'i' and cross every 't' to avoid disruption to the business and minimise the risk of costly personal grievances.

New developments in Employment Law

The practicalities of the new landscape, including: the 90-day trial period; nine day working fortnights; and the Holidays Act Reform.

Managing Poor Performance How to manage under-performing employees.

Disciplinary Proceedings Taking effective, appropriate and fair action.

Parental Leave Navigating the labyrinth of rights and obligations.

Holidays Act Practical aspects of leave entitlements including public holidays, closedowns and shift work.

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DUNCAN COTTERILL IS A FULL SERVICE LAW FIRM WITH SPECIALIST AREAS IN:

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LITIGATION & DISPUTE RESOLUTION

Trial periods back in fashion

Many employers are watching with interest how the new 90-day job trial period, which came into effect at the beginning of March, unfolds.

Under the new regime, an employer with fewer than 20 staff, can employ a person on a trial period, during which the employee can be dismissed "at will". The employee cannot bring a claim of unjustified dismissal.

There are several requirements, which must be met before a valid trial period can begin. The employment agreement must clearly provide that:

- The employee is to serve a trial period;
- The employer may dismiss the employee during that period;
- The employee is not entitled to bring a personal grievance in respect of the dismissal;
- The employee must not have been previously employed by the employer;
- The employer must employ fewer than 20 members of staff on the day on which the employment agreement is entered into (not including the new employee).

But what if I employ more than 20 staff? Can I still hire someone on a trial basis? The answer is yes. In recent times, probationary periods have become unfashionable and, as a result, under-utilised. There is a common misconception that they are not legal or simply don't work. This is not the case. So long as an employer follows certain guidelines, a probationary period can be a very useful and effective tool to determine whether an employee should become permanent.

If you are using a conventional probationary period, the following steps are important:

- During the course of the probationary period, actively supervise and monitor the employee's performance;
- Point out any performance problems;
- Help to get the employee up to the standard you require by providing the necessary coaching and training;
- Warn the employee that if his/her performance does not improve, i.e. they may not be offered a permanent job;
- If, near the end of the probation period, you do not believe you want to offer a permanent job, it is important to follow a fair procedure before making any final decision about your employee's future. You need to meet with the employee to discuss your concerns and to give



the employee the opportunity to respond to your concerns. Your employee needs to be given advance warning of the meeting and told that there is a possibility that they will not be offered permanent employment. The employee should also be notified of their right to have a support person or representative present at the meeting. At the meeting, listen to the employee's responses with an open mind. You should also consider alternatives to dismissal, including whether the probation period should be extended.

If these steps are followed, an employer can minimise the risk of a personal grievance being raised at the end of the probationary period if the person has not worked out.

CONCLUSION

It's early days but, in our view, the new trial period regime may not be as straightforward as it seems - because of the principle of good faith, which runs through all employment relationships. It requires the employer to be active, communicative and focused on doing things to maintain the relationship. Whether someone is hired under a conventional probationary period or under the new trial period regime, an employer should still follow the steps outlined above. If an employer stands on the sideline and does not actively assist a trialling employee, you may run the risk of a claim of breach of good faith or unjustified disadvantage.





Moving to a four-day week

A year ago, with skilled staff shortages and a booming economy, the idea of a four-day working week would have seemed far-fetched.

Now it is a measure, which is being increasingly considered by businesses struggling to make ends meet, but reluctant to shed skilled and loyal staff.

Moving to a four-day week requires the agreement of employees and can only be imposed after a period of consultation with staff and the union. However, faced with the choice of working a four-day week or being made redundant, many employees are agreeing to this type of arrangement. To others, working a four-day week is an attractive lifestyle choice, provided that the

reduced wages still cover the cost of living.

There are other cost cutting methods and alternatives that are also being mooted, including reducing overtime, redeploying staff from quiet worksites to busier areas, or using employees who are not busy and who have the necessary skills to carry out work previously contracted out. Some employers have also asked staff to take accrued annual leave, long service leave or even a period of unpaid leave during quiet periods.

In a bid to avoid redundancies, Tiwai Point in

Invercargill has shed at least 20 fulltime positions by offering workers reduced weekly hours and unpaid leave of up to two years.

Europe's biggest firm of accountants is offering its staff sabbaticals or a four-day week as it braces itself for the recession.

KPMG has made the proposal to its 11,000 British workers because it wants to avoid redundancies. Employees can apply for between four and 12 weeks of partially-paid leave. They also have the option of moving on to a four-day week, with the fifth day unpaid.

Companies across the UK have been putting staff on part-time contracts and asking them to accept lower pay as they attempt to avoid waves of redundancies.

Employers can also seek to improve productivity in their workforce by cracking down on absenteeism and poor performance. On a worst case scenario, if those employees did not lift their game they could be dismissed, leading to a cut in overall numbers. Naturally, following the correct procedures will be crucial in managing performance and absenteeism and any subsequent dismissals.

Whether the above alternatives are possible in every workplace will depend on the circumstances, including applicable employment agreements and policies. However, these cost saving opportunities are likely to be generally available in most businesses.

Employers should take care that they comply with the law in implementing redundancies or any of these alternative cost saving measures. Challenges from disaffected employees are the last thing a struggling company needs.

Important ruling on holidays

It is two years since the minimum entitlement to annual holiday for employees increased from three weeks to four.

But what about people who already received four weeks' holiday or whose agreements provided for an "extra week's holiday" for long service? Under the new regime, should they now be entitled to five weeks?

Although some employers agreed to increase the entitlement in those situations to five weeks' holiday, many others opted for the status quo and kept the entitlement at four weeks. That resulted in several claims being brought by employees.

The recent Employment Court decision in *New Zealand Tramways and NDU v Transportation of Auckland and Cityline*

appears to have settled the issue. In that case, a collective agreement negotiated after the Holidays Act 2003 came into force - but before 1 April 2007 when the four weeks became law - contained an entitlement to three weeks' annual leave.

An additional week per annum was granted in recognition of the nature of the work performed by the employees, giving a total entitlement of four weeks' holiday each year. The union argued that, with the increase in the minimum holiday entitlement from three weeks to four, employees covered by the collective agreement were now entitled to five weeks' holiday.

The Employment Court disagreed. It said that employees were not entitled to five weeks' holiday under the terms of their employment agreements. It found that the parties had explicitly agreed to a total of four weeks' holiday,



not five. There was nothing in the agreement which stated that employees would be entitled to an additional week of annual holidays, in addition to any increases in statutory holiday entitlement.

This decision suggests that it will only be in exceptional circumstances where there is a clear contractual intention that employees be entitled to five weeks' holiday, that such an entitlement will exist.

Make-up at work - more than meets the eye



It's fair enough for employers to expect their staff to be well-groomed. But some employers, particularly those in the retail or hospitality industry, give directions to employees about hairstyling, use of make-up and nail grooming. Is this legal?

To women who already wear make-up, a requirement to put some on for work may not seem a big deal. But other employees consider that they should not have to be "tarted up" for work, that it's a throwback to years gone by, and should not be a lawful requirement of any job.

If the employment agreement sets out that employees must wear make-up, the employer may be able to lawfully issue these kinds of instructions. However, there is an argument that such an approach is discriminatory and in breach of the Human Rights Act because it is generally directed at women. The Employment Court has to date declined to rule on this.

In a 2006 case (*Williams v Kimberleys Fashions Ltd*), an employee, Ms Williams, argued that she had been discriminated against on the basis of her sex because Kimberleys required her to wear make-up at work. Foundation reacted badly with her skin and she objected to wearing make-up as it was no longer the 1950s and she said women should have a choice.

The Employment Relations Authority found against Williams and said that "there is nothing unreasonable in a fashion retailer wanting its staff to look good, and that must include, within reason, the requirement to wear make-up."

On appeal, the Employment Court noted that "there may well be workplaces where the nature of the work requires facial make-up. One obvious example could be a women's cosmetic retail shop.... it is not beyond argument that an employer in a women's clothing

boutique could require staff to wear facial make-up so long as it was a mutual, contractual requirement."

The Court declined to look at the matter in terms of discrimination and whether the instruction was contrary to human rights, preferring to look at it as a contractual issue. The Court made it clear that unless wearing make-up is a condition of the employment, there is no legal basis for an employer to require it.

The Court allowed Williams' appeal, saying that the make-up requirement was not a term of her employment. Williams was found to have been constructively dismissed.

Whether directions to employees to wear make-up breach human rights/discrimination principles is still unclear.

CONCLUSION

In the meantime, employers will need to look at the circumstances to balance whether the advantages created by made up employees outweigh risks of challenges from disgruntled employees. If wearing make-up is genuinely a requirement of the job, this should be included in the employment agreement. Otherwise an employer cannot reasonably require an employee to wear make-up. If an employer requires an employee to wear make-up and the employee raises an issue about it, the employer should treat the matter with care and seek legal advice.

This article has been published in The Press.

KEY DATES

1 MARCH 2009

90 Day Trial

- Applies only to employer with fewer than 20 employees.
- There must be a "trial period" clause complying with legislation in the employment agreement.
- 90 day stand down period for personal grievances.

1 APRIL 2009

KiwiSaver

- The minimum employee contribution rate reduces to 2% of a member's gross pay.
- The compulsory employer contribution increases to 2% - and won't increase further in future years.
- The employer superannuation contribution tax (ESCT) exemption is capped at the compulsory employer contribution rate of 2%.
- The employer tax credit is removed.

Minimum Wage increases to \$12.50/hour



Australia: Impending legislative change

To the uninitiated, employment law in Australia has always appeared confusing, not the least because of the combination of Federal and State laws which can apply.

The Workchoices platform of the previous Howard Government simplified that situation to some extent, by using the Federal Government's Corporations power to provide Federal regulation of many aspects of employment law for constitutional corporations under the Federal Workplace Relations Act 1996 (the WRA).

The current Federal Rudd Labor Government was elected on a platform that included repealing many aspects of the WorkChoices amendments to the WRA, and claiming to restore rights to workers in the employment relationship.

The significant legislative reform of the Rudd Labor Government will most likely begin on July 1 2009, with the rescinding of the WRA and the introduction of the Fair Work Bill 2008 (FWB). Some aspects of the latter will not start until early 2010.

The FWB represents a significant realignment of the Australian employment scene. It will continue to rely on the Federal Government's Corporations power to regulate many aspects of employment law, although employers will still be subject to State law in critical areas, such as occupational health and safety and workers compensation. Some of the more significant changes include:

1 The establishment of Fair Work Australia to replace the century old Australian Industrial Relations Commission, and various other



regulatory bodies. Fair Work Australia will encompass both the administrative arms and the tribunal aspects of matters arising under the FWB. There will also be Fair Work Divisions of the Federal Court and Federal Magistrates Court. Fair Work Australia is intended to be less formal than the current AIRC.

2 An expanded statutory minimum set of conditions of employment to be known as the National Employment Standard (NES). The expanded conditions will include a minimum redundancy formula, and the ability for employees to request flexible working arrangements where they have children under school age.

3 A system of "modern awards" prescribing minimum terms and conditions of employment in particular occupations and industries.

4 Workplace agreements under the legislation will be collective agreements with employees or

distinct groups of employees. Parties must bargain in good faith, and agreements must satisfy a "better off overall test" (the boot test) i.e. each employee must be better off overall under the agreement than if the relevant modern award applied. Where bargaining is unsuccessful, Fair Work Australia will have certain powers to make workplace determinations to resolve the matter.

5 Expanded access for employees to bring "unfair dismissal claims". The exemption for employers with fewer than 100 employees under the current WRA is removed. Importantly, the "operational reasons" defence available to employees under the WRA will be replaced with a narrower "genuine redundancy" test. There will, however, be a separate regime for small business, being those with fewer than 15 employees.

6 Expanded rights for unions in entering workplaces and the bargaining process.

7 New rules will apply to the "transfer of business". This includes not just the purchase of a business, but outsourcing or insourcing of work.

As with all new legislation, the introduction of the FWB adds an element of uncertainty to the Australian employment scene, including at this stage the unavailability of both the transitional provisions and the Regulations.

CONCLUSION

Employers operating in Australia will need a heightened sense of awareness for the next year or so to ensure compliance with the changing legislation, and to make sound decisions as the impact of the Fair Work Bill becomes clearer.

Disclaimer: This newsletter provides general information and is not intended to be comprehensive or a substitute for legal advice. Legal advice should be sought before applying it to particular circumstances. Whilst care has been taken in the preparation of this newsletter, no liability is accepted for any errors.

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