

## REVIEWING LAW ON PERSONAL GRIEVANCES

The Minister of Labour, Hon Kate Wilkinson, asked the Department of Labour to conduct a review of the personal grievance system outlined in Part 9 of the Employment Relations Act 2000. A Discussion Paper issued this month seeks your submissions on the personal grievance system. The paper discusses and questions whether the existing provisions are effective and efficient, strike a fair balance between employer flexibility and employee protection, impose excessive costs or obligations on parties or promote workplace productivity. Thirty questions center on the operation of the personal grievance system generally and seek feedback on what form any necessary improvements might take.

### CURRENT LAW

An employee raises a personal grievance with their employer where they consider that they have been unfairly dismissed from or unfairly disadvantaged in their employment. The test of justification and the mutual duty of good faith underpin the employment relationship and inform any claim on a personal grievance. The test of justification requires a decision maker to objectively assess whether the employer acted as a fair and reasonable employer would in all the circumstances. The duty of good faith prohibits parties from misleading each other and requires at least active, constructive, responsive and communicative behaviour. Although mediation forms the primary problem-solving mechanism for resolving personal grievances, claims may proceed to the Employment Relations Authority or Employment Court for resolution and further if necessary.

### CALL FOR SUBMISSIONS

We will be submitting our views on all aspects of the personal grievance system and welcome your input by 26 March on any of the following:

- Your Experience with the Personal Grievance System including the Costs Involved in Resolving Personal Grievances for You and Your Business
- Whether the Existing System Treats Employees and Employers of Small and Medium-sized Businesses Fairly
- Are the Mediation Services, Authority and Court Easy to Understand and Access? How could Issues be resolved Earlier and Services be Improved?
- Timeframes for Raising and Taking Legal Action for a Personal Grievance (currently 90 days and 3 years respectively)
- Should Unfairly Dismissed Employees be Primarily Reinstated or Compensated?

We note that the review will not examine the grounds on which a personal grievance or claim of discrimination may be raised or the functions of the Labour Inspectorate.

Following the consultation period the Department will prepare a final report for the Minister of Labour who may recommend amendments to the law as a result.

### REVIEWING PART 6A

The Minister also sought submissions on the operation and effectiveness of Part 6A as part of the statutory review. The Discussion Paper specifically addresses issues relating to:

- Level of Awareness amongst affected employers and employees and Transference of accrued entitlements
- Employee transfer costs information including timeframes, privacy issues and commercial sensitivity
- Transfer of employment where a service is performing poorly or only some of the employee's work is subject to automatic transfer
- Defining vulnerable workers and Employment Protection Provisions

Submissions closed on 15 March 2010 and Parliament will receive a final report in July that may result in law changes.

## TRIAL AND PROBATIONARY PERIODS – DECIPHERING THE DIFFERENCE

We have all heard about the new trial period legislation but what about the probationary period? Do any differences exist between trial and probationary periods at all? In this article, we explain what a trial period is, when you can use it and how it differs to the probationary period.

### TRIAL PERIODS

From 1 March 2009 employers could enter into a written employment agreement with a new employee that provided for a trial period. A trial period may be for a specified period not exceeding 90 days starting on the first day of employment. During the period, the employer may dismiss the employee without fear of being faced with a personal grievance or other legal proceedings in respect of the dismissal.

In order to be eligible to use a trial period, an employer must only have 19 or fewer employees and the employee cannot have been previously employed by the employer. Although a disgruntled employee cannot bring a personal grievance in respect of the dismissal, they may still bring proceedings based on other grounds including unjustified disadvantage, discrimination or harassment.

### PROBATIONARY PERIODS

In contrast to a trial period, a probationary period does not affect the application of the law relating to unjustifiable dismissal. At the outset of employment the parties may agree to a probationary period of any length for the purposes of assessing the employee's performance with a view to assisting the employee to meet performance expectations. We recommend that the parties schedule regular meetings to discuss the employee's performance. Where the employer becomes dissatisfied the employer may raise this with the employee. The employer should provide the employee with all relevant information. This includes the details of what aspects of the employee's performance are unsatisfactory, what standard of performance is expected, a reasonable timeframe to meet those performance expectations, and any assistance necessary to achieve those standards.

The employer must make an objective assessment of the employee's performance during the probationary period and discuss this with the employee. Failing improvement the employer should again provide all relevant information with the aim of improving the employee's performance. Failing improvement following second and subsequent reviews may require the employer to deal with the issue in accordance with any disciplinary procedure.

### DECIPHERING THE DIFFERENCE

Far from being an easy way for an employer to dismiss an underperforming employee, the probationary period provides parties with an expected process to undertake in the instance of underperformance. Similar to a trial period, potential outcomes of a probationary period include confirmation of the employee as a permanent employee (this naturally occurs where the timeframe lapses without notification of any perceived performance problems or termination in the context of a trial period), an extension of the probationary period, or disciplinary action up to and including dismissal.

Employers should utilize the trial and/or probationary period provisions in employment agreements to ensure that they engage, train and retain the best staff possible.

*If you have any questions about trial or probationary periods we are happy to help by reviewing your employment agreements or offering practical tips on how to lawfully engage an employee on a trial and/or probationary basis.!*

## REMINDER: MINIMUM WAGE INCREASE

The adult minimum wage increases from \$12.50 to \$12.75 from 1 April 2010. The new entrant and training wage increases from \$10.00 to \$10.20.

## HOLIDAYS ACT REVIEW

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Last year the Government sought submissions during a review of the Holidays Act 2003 with the aims of making the Act easier for businesses and employees to understand and apply, reduce compliance costs and make the Act more readily applicable to a range of employment patterns. We submitted our views incorporating feedback provided from a range of interested parties.

Following the Consultation period, the Ministerial Advisory Group publicly provided a report to Parliament. Although not all proposals they made were by consensus, the germane recommendations included the following:

- **Relevant Daily Pay:** The Group recommended changes to simplify calculations about how all statutory leave accrues and is paid. For example, the Employer Representative proposed that one rate be used to pay all leave events and that the accrual and taking of all holidays and leave be calculated in time units best suited to the workplace.
- **Trading in Annual Holidays for Cash:** Although Union Representatives opposed trading in annual holidays for cash, Employer Representatives recommended that this occur.
- **Casual Employees:** The Group recommended that the legislation maintain existing entitlements for casual staff and educate employers and employees on these entitlements.
- **Transferring Public Holidays to Another Day:** The Group recommended that the practice where parties agreed to observe public holidays on a different day be restored.
- **Alternative Holidays:** Union Representatives opposed any change to the accumulation of alternative holidays but the Employer Representatives recommended that employees gain annual holiday entitlements instead of an alternative holiday when employees work on a public holiday that is a normal working day.
- **Treatment of Public Holidays:** The Group recommended that no change occur in relation to the existing 11 public holidays. Union Representatives considered that Easter Sunday should be promoted to become the 12th public holiday.

*We will keep you informed of any changes the Minister proposes following the Group's recommendations.*

## MINIMUM WAGE AND STRIKE LAW CHANGES PROPOSED

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### MINIMUM WAGE (MITIGATION OF YOUTH UNEMPLOYMENT) AMENDMENT BILL.

Parliament introduced a Bill promoted by Hon Sir Roger Douglas on 23 February called the *Minimum Wage (Mitigation of Youth Unemployment) Amendment Bill*. This Bill proposes to restore the ability for the minimum wage to be reduced for youth as a way to address growing youth unemployment, particularly with Maori and other minority groups. The Bill specifically targets 15 to 17 year olds to allow a reduced rate of pay along with trainees and apprentices. The proposed change would abolish the recently adopted concept of new entrants that currently entitles 15 to 17 year olds to the adult minimum wage after working 200 hours or 3 months or if they supervise other employees.

### EMPLOYMENT RELATIONS (WORKERS' SECRET BALLOT FOR STRIKES) AMENDMENT BILL

A second member's Bill, the *Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill*, endorsed by Hon Tau Henare, would require unions to hold a secret ballot vote of their members to approve a strike before undertaking any strike action. The Bill proposes to expand the definition of strike to prohibit strike action until the employees who would become party to the strike if it proceeded have voted on it. No such requirement currently exists.

## EMPLOYMENT LAW SEMINAR SERIES 2010

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Our Seminars provide relevant advice and sensible solutions to every employment relationship. Topics this year include the Holidays Act, Employment Agreement Basics, Every Employer's Guide to Disciplining and Dismissing Employees and Practical Privacy Training:

- Prevent privacy problems with our practical Privacy training tailored specifically for your workplace or join in on our public sessions. Contact Julia to discuss dates today!
- Avoid penalties for failing to have Written Employment Agreements and attend our seminar on Employment Agreement Basics.
- Discipline and Dismiss employees the right way with Every Employer's Guide to Navigating the key issues in Disciplinary Processes.
- We will inform and update you on the Holidays Act 2003 and any amendments in our Holidays Act seminar.

Book your spot in each seminar and mark it in your diary now! All seminars run for 3 hours from 9:00 am, cost \$100 plus GST per person, and will have capped numbers to enable attendees to ask questions and receive feedback.

### EMPLOYMENT AGREEMENT BASICS

9 June	Dunedin
10 June	Queenstown
11 June	Invercargill

### HOLIDAYS ACT 2003

30 June	Dunedin
1 July	Queenstown
2 July	Invercargill

### EVERY EMPLOYER'S GUIDE TO DISCIPLINING AND DISMISSING EMPLOYEES

4 August	Dunedin
5 August	Queenstown
6 August	Invercargill

Register by emailing Bridget at [Bridget.Carter@WeAreHr.co.nz](mailto:Bridget.Carter@WeAreHr.co.nz) or call her on 03 211-0153.