EMPLOYMENT NEW ZEALAND

Training Material

The Employment Relations Amendment Act 2018 first set of law changes:

This document provides more information on the first set of employment law changes that recently came into effect after Royal assent with the passing into law of the Employment Relations Amendment Act 2018 (The 2018 Amendment Act).

Note the remaining changes not detailed below will come into effect on 6 May 2019. The changes to discrimination will come 6 months after the date of Royal assent.

1. Reinstatement

Previous position

Previously, if an employee had been unjustifiably dismissed and the employee requested reinstatement, the Employment Relations Authority may have awarded reinstatement if it was practicable and reasonable to do so.

Changes made by the 2018 Amendment Act

The 2018 Amendment Act makes reinstatement the primary remedy. This means if an employee successfully raises a personal grievance and actively requests reinstatement, the Authority must provide reinstatement wherever it is practicable and reasonable for both parties.

Any personal grievance filed with the Authority or Employment Court but not finally determined or considered before the date of Royal assent will be considered under the law as it was prior to the 2018 Amendment Act coming into force.

2. Union representative accessing the workplace without consent in certain circumstances

Previous position

Previously, union representatives must have obtained the consent of an employer or representative of an employer before entering any workplace. An employer could not have unreasonably withheld consent for a request to enter, and must have responded to the request by the working day after the date of the request. Consent was treated as having been obtained if an employer did not respond to a request within two working days after the date of the request.

Changes made by the 2018 Amendment Act

The 2018 Amendment Act provides that a union representative does not need to obtain consent from an employer before entering a workplace if either:

- a collective agreement is in force that covers work done by employees at that workplace; or
- a collective agreement is being bargained for that covers work done by employees at that workplace.

In all other circumstances, a union representative is still required to gain the employers consent according to the existing procedure (described in current position).

This change aims to reduce potential delays in union representatives performing their roles by needing to wait for consent before entering a workplace where there are union members at that workplace, or there is about to be union members at the workplace (in the case where collective bargaining has been initiated but no collective agreement exists yet).

3. A union representative's purposes for entering a workplace

Changes made by the 2018 Amendment Act

The 2018 Amendment Act adds an additional purpose for which a union representative may enter a workplace. This is to assist a non-union employee with matters relating to health and safety if that employee has requested their assistance. The other purposes for which a union representative may enter a workplace include purposes relating to the employment of union members or purposes relating to union business.

This change aims to reflect the important role that union representatives play in providing advice and support in relation to health and safety matters in the workplace, both to members and non-members.

Note, Union Representatives must still:

- access a workplace at reasonable times and in a reasonable way, having regard to the normal business operations in the workplace
- comply with any reasonable procedures relating to health and safety or security
- provide an employer with the purpose of their entry and give evidence of their identity
- where a union representative cannot find the employer or an employer representative, they are required to leave a written statement outlining their identity, union, date and time of entry and their purpose for entry

There are limited circumstances where a union representative can be denied access to a workplace. This includes where entry may prejudice the security or defence of New Zealand or the investigation or detection of offences, or where an employer has a certificate of exemption based on religious grounds.

4. Timeframes for initiating bargaining

Previous position

Previously, under the law, either the employer or union could initiate bargaining up to 60 days before the date on which the collective agreement expired. If there was more than one applicable collective agreement in force, either an employer or a union could have initiated bargaining before the later of two possible dates:

- Within 120 days before the date the last applicable collective agreement expired; or
- Within 60 days before the date the first applicable collective agreement expired.

Changes made by the 2018 Amendment Act

The 2018 Amendment Act amends the timeframes for when unions and employers can initiate collective bargaining where an applicable collective agreement is already in force. It allows unions to initiate bargaining 20 days ahead of an employer, which was the position in the law prior to 2015.

The proposal is intended to support orderly collective bargaining by allowing unions to initiate ahead of employers, reducing the likelihood of disputes arising from unions and employers making simultaneous claims for bargaining.

In the case of a single collective agreement between one union and employer, a union can initiate bargaining within 60 days of the expiry of the applicable collective agreement, while an employer can initiate within 40 days.

If there is more than one applicable collective agreement in force, the earliest date that a union can initiate bargaining is the later of two possible dates:

- Within 120 days before the date the last applicable collective agreement expires; or
- Within 60 days before the date the first applicable collective agreement expires.

For employers, the timeframes are 100 days and 40 days respectively.

An applicable collective agreement refers to an agreement which binds employees whose work is intended to come within the coverage clause for bargaining.

5. Removal of the opt-out ability for multi-employer bargaining

Previous position

Employers may have opted out of bargaining for a multi-employer collective employment agreement through having provided written notice.

Changes made by the 2018 Amendment Act

This largely reverts the law to the position held prior to 2015, in which businesses must enter into bargaining for multi-employer collective agreements when they received a notice of initiation from a union.

This change aims to support bargaining efficiency by encouraging higher-level bargaining among multiple employers, as opposed to a potentially more resource-intensive process of a series of single-employer agreements.

Note that from 6 May 2019 the 2018 Amendment Act reintroduces the good faith duty to conclude bargaining. However, parties will not have to settle a multi-employer collective agreement if their reason for not wanting to settle is based on reasonable grounds. For example, if there are significant differences between two employers such as one operating in Auckland, where prices and wages are higher, and the other in Invercargill. It could be reasonable for an employer to negotiate a single-employer collective agreement instead.

6. Removing the ability for employers to deduct pay for partial strikes

Previous position

Previously, employers were able to deduct pay where employees engaged in partial strikes. A partial strike could include (but was not limited to):

- low level strike action where typically employees partially discontinue their work by refusing or failing to accept engagements that fall within their duties, or reducing their normal performance, output or rate of work
- an act where employees break the conditions of their employment agreement, whether or not this results in a reduction of their normal duties, performance, output or rate of work. For example, a partial strike where employees perform their role but refuse to wear their uniform.

The law previously provided a framework for assisting employers to work out how much pay they may have

deducted. Alternatively employers could opt to deduct a flat 10 per cent from wages regardless of the level of impact of the strike on the employers business.

Changes made by the 2018 Amendment Act

The 2018 Amendment Act removes the option for employers to deduct wages when employees engage in a partial strike. Employers can respond to a partial strike action the same way as any other strike, which could include suspending employees without pay or a lockout.

7. Amending the categories of workers that receive the protections under Subpart 1 of Part 6A

Previous position

Previously, the only way to amend the categories of workers listed in Schedule 1A of the ER Act, which receive the protections afforded by Subpart 1 of Part 6A, was through a full legislative process.

Changes made by the 2018 Amendment Act

The 2018 Amendment Act restores the ability to add, vary or omit categories of employees from Schedule 1A through a recommendation by the Minister for Workplace Relations and Safety via Order in Council. This power was in the ER Act prior to 2015.

Restoring section 237A will mean that the Part 6A protections are more responsive and adding, varying or omitting categories of employees would not necessitate going through the full Parliamentary process every time a change to Schedule 1A is required.

If an applicant wants to add, vary or omit a category of employees

An applicant must make a request to the Minister to add, amend or delete a category of employees from Schedule 1A of the ER Act.

The request must:

- clearly identify the category of employees to which the request relates; and
- specify the sector in which the category of employees provides the service; and
- include evidence that the employees either satisfy (if a new category is to be added) or does not satisfy (if a category is to be deleted) the applicable criteria.

The applicable criteria are that the category or employees:

- are employed in a sector in which restructuring of an employer's business occurs frequently; and
- have terms and conditions of employment that tend to be undermined by the restructuring of an employer's business; and
- have little bargaining power.

When can a minister make a recommendation to add, vary or delete a category of employees?

The Minister before making a recommendation must have received a request as detailed above and:

- receive a report from the department about whether the category of employees satisfy the criteria
- provide that report to, and consult with, employers, employees, representatives of employers or employees as the Minister considers appropriate.
- be satisfied that the criteria have been met (in the case of adding or amending the categories of employee) or satisfied the criteria is not met (in removing a category).

The Minister may then make a recommendation for the making of an Order in Council to amend Schedule 1A accordingly. The Governor General may then via Order in Council amend Schedule 1A.

This amendment aims to ensure that those categories of employees who meet the criteria are able to be added to Schedule 1A in a responsive manner so that they can receive the protections afforded under Subpart 1 of Part 6A.