

3rd Annual HR Directors' Forum

Employment Relations – A legal update

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Agenda

- KiwiSaver
 - Automatic enrolment provisions
 - How KiwiSaver will work
 - Employer obligations
 - Existing superannuation arrangements
 - The Impact KiwiSaver will have on HR
- Case law update
 - New test of justification – Fuiava
 - Serious misconduct – Wood
 - Unjustified actions – Chin and Subway
 - Without prejudice discussions - McDonald
- Regulatory update
 - Employment Relations (Flexible Working Hours) Amendment Bill
 - Minimum Wage (Abolition of Age Discrimination) Amendment Bill
 - Minimum Wage and Remuneration Amendment Bill

KiwiSaver



Automatic enrolment provisions (1)

- From 1 July 2007, all permanent employees aged between 18 and 65 who start new employment must be enrolled
- Exceptions are:
 - casual and temporary employees employed for 28 continuous days or less
 - ACC recipients
 - recipients of paid parental leave
 - private domestic workers
 - those employed by an “exempt employer”
- KiwiSaver applies to New Zealand citizens and those in New Zealand indefinitely

Automatic enrolment provisions (2)

- Opting-in
 - existing employees, self employed people and beneficiaries can opt in
 - employees of “exempt employers” can opt in
 - to opt in a person must be less than the age of entitlement to New Zealand superannuation (65)
 - employees can contract directly with KiwiSaver scheme provider, or give their employer a KiwiSaver deduction notice

Automatic enrolment provisions (3)

- Opting-out
 - employees who are automatically enrolled in KiwiSaver can opt out of the scheme at any time in the period beginning on the 13th day and ending on the 55th day from which they began their employment
 - employee can give opt out notice to employer or IRD
 - employee and employer contributions refunded
 - a late opt-out period of three months may apply in some circumstances

How KiwiSaver will work (1)

- Contributions are calculated at 4% or 8% of employees' gross salary or wages – note that tax continues to be paid on the full gross salary
- All taxable income - so includes bonuses, commission, extra salary, gratuity, overtime and redundancy compensation
- Employers can make lump sum contributions, or, until April 2008 contribute to the minimum employee contributions
- An employer may also make a contribution over and above any employee contribution

How KiwiSaver will work (2)

- After 1 April 2008, an employer cannot make contributions to make up an employee's minimum contribution of 4%. After that date the employee must contribute the minimum 4% (although there are transitional arrangements for employees who are already in the scheme and receiving employer contributions which make up the 4%)
- From 1 April 2008, an employer must contribute to an employee's KiwiSaver account, beginning at an amount calculated at 1% of the employee's gross salary or wages. This will be phased in over 4 years to eventually match the employee's minimum 4% contribution rate as follows:
 - from 1 April 2008 – 1%
 - from 1 April 2009 – 2%
 - from 1 April 2010 – 3%
 - from 1 April 2011 – 4%

How KiwiSaver will work (3)

- Benefits that may be available to participants:
 - \$1,000 kick-start
 - administration fee subsidy
 - SSCWT exemption
 - first home purchase assistance
 - mortgage diversion
 - employee and employer tax credits

How KiwiSaver will work (4)

- KiwiSaver scheme choice:
 - an employee may choose the scheme which they wish to join and either inform their employer or contract directly with the scheme provider
 - if the employee does NOT choose a scheme, and their employer has a preferred scheme, the employee will automatically join the employer preferred scheme
 - if neither of the above options apply, employee is allocated to a default scheme
- Employees can transfer between schemes (voluntarily and involuntarily)

How will KiwiSaver work? (5)

- Contributions holidays

- employees can take a contributions holiday after the first 12 months of contributions
- minimum period 3 months, maximum period 5 years
- can re-apply for contributions holiday after period is up (i.e. can have “rolling” contributions holidays)

- Permitted withdrawals

- contributions are “locked in” until the age of entitlement to NZ superannuation, or 5 years membership, whichever is the later
- permitted withdrawals:
 - first home
 - significant financial hardship
 - serious illness
 - emigration
 - death
- mortgage diversion (under some providers’ schemes)

Employer obligations

- Provision of employee information pack (KS 3)
- Notification obligations to IRD
- Deduct contributions and forward to IRD
- Act on opt-out notices (KS 10)
- Act on contributions holiday notices (KS 6)
- Record keeping

Existing superannuation arrangements

- Options:
 - operate the existing superannuation scheme alongside KiwiSaver
 - wind up or close off existing superannuation scheme and only have KiwiSaver going forward
 - convert the existing scheme to a KiwiSaver scheme
 - modify the existing scheme to become a complying fund
 - modify existing scheme to add KiwiSaver and split contributions (umbrella trust)
 - apply for an exemption from automatic KiwiSaver enrolment provisions

Impact KiwiSaver will have on HR

- Pressure on employers from individuals and unions
- KiwiSaver policy can pre-empt such pressure and differentiate the employer in the marketplace
- Utilise KiwiSaver by:
 - allowing salary sacrifice
 - provide employer contributions above minimum levels
 - provide additional benefits

Case law and regulatory update



New test of justification (1)

- Statutory test – s103A Employment Relations Act
- Whether a dismissal (or action) is justifiable:
 - determined on an objective basis
 - the employer's actions
 - what a fair and reasonable employer would have done, in all the circumstances
 - at the time the dismissal or action occurred
- A reasonable employer, not a disinterested bystander

New test of justification (2)

- *Fuiava* (EC)
- Employee's wife packed 2 aerosol cans into package for air carriage and employee declared he had packed items and there were no aerosols
- Employee dismissed for serious misconduct
- Relevant factors as to whether dismissal justified:
 - conduct of worker and employer
 - history of the employment
 - nature of the industry, its customs and its practices
 - good industrial practice
 - terms of the employment agreement
 - circumstances of the dismissal
- Dismissal justified

Serious misconduct

- *Wood* (ERA)
 - employee forwarded an email depicting obese body images and woman's head on body of male
 - employee dismissed for serious misconduct
 - ERA held dismissal did not meet s103A test
 - employer was not consistent in applying its email policy
 - fair and reasonable employer would not have considered the email offensive

Unjustified actions (1)

- *Chin* (EC)
 - employee was accused of conspiring with her husband, who had failed business dealings with employer and client
 - employee told to sign employment agreement or there wasn't a position for her
 - employee and her husband visited at home by employer about business transactions – Police had to remove employer
 - Court held clear breaches of duty, constructive dismissal

Unjustified actions (2)

- *Subway* (settled)
 - employee dismissed for sharing a drink with a friend during a break
 - employer contacted police; employee arrested; held in custody for 2 hours; charged with theft of two cups of diet coke
 - case settled but note unintended consequences of employer's actions – employer may be liable for police action if decision to treat employee that way is unjustified

Without prejudice discussions

- *McDonald* (EC)
 - disciplinary inquiry
 - “off the record” discussion between solicitors
 - no settlement; constructive dismissal claim
 - no “dispute”, employee could give evidence

Regulatory update (1)

- Employment Relations (Flexible Working Hours) Amendment Bill
 - employers to consider requests for flexible working hours
 - Select Committee report due on 31 July
- Minimum Wage (Abolition of Age Discrimination) Amendment Bill
 - seeks to make the Minimum Wage Act 1993 consistent with the anti-discrimination provisions of the Human Rights Act
 - Select Committee report has been tabled and is awaiting second reading

Regulatory update (2)

- Minimum Wage and Remuneration Amendment Bill
 - provides for contractors to be entitled to a minimum wage
 - Select Committee report is due on 31 July

Questions?



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