



cullings is the newsletter of
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Holidays, Employment Protection and Personal Grievances Revisited

The Government is currently reviewing three significant pieces of employment legislation. They are:

- Part 9 of the *Employment Relations Act* (the *ERA*): Personal grievances, disputes and enforcement;
- Part 6A the *ERA*: Continuity of employment if employees' work affected by restructuring; and
- The *Holidays Act*.

Personal Grievances

The government is currently seeking submissions from employers and employees who have experienced the operation of and/or are affected by the personal grievances system contained in Part 9 of the *ERA*.

No business, regardless of its size, is exempt from the risk of personal grievance claims. The only time employers are not at risk of personal grievance claims is where employees are employed under the limited provisions of the 90 day trial period.

Employees can bring personal grievance claims for unjustified dismissal, unjustified disadvantage, discrimination, sexual or racial harassment, duress in relation to union membership or non-membership, and failure to comply with Part 6A (regarding employment protection in situations of restructuring). The grounds for a personal grievance are not currently up for review but several important features of how Part 9 operates are.

Section 103A, the test for justification

Section 103A was introduced in 2004 and affected a shift in how employers approach the question of whether or not to dismiss an

employee. The test now is whether an objective fair and reasonable employer *would* have dismissed an employee in all of the relevant circumstances. Whether or not this test is fair is a focus of the review.

Mediation

Another focus of the review is mediation. Mediation is a primary mechanism for solving employment relationship problems. Some say it is quick and cost effective and often results in a fair outcome for both/all parties. Others say that it provides employees with a cost effective forum to bring unmeritorious claims. The review focuses on improving the capacity and capability of existing mediation services and extending their scope. Early intervention in individual disputes is also a focus.

Other issues the government is seeking submissions on include:

1. The cost of problem resolution
2. Varying quality (and effect) of employment advocates
3. Balance of fairness in the personal grievance system
4. Ensuring access to justice
5. Negative impact of the responsiveness and timeliness of services
6. Employment relationship problems appear to impact disproportionately on small or medium-sized enterprises
7. Eligibility – raising a personal grievance
8. Effectiveness of remedies

The Department of Labour has produced a discussion paper which presents questions on specific topics but also invites general feedback relating to the operation of Part 9. **Submissions close at 5pm on 31 March 2010.**

Employment Protection

The Department of Labour is also currently reviewing/ seeking submissions on Part 6A of the *ERA*. Part 6A provides that where an employer's business is sold or the services the employees provide are contracted out, the employees can elect to transfer to the new employer on the same terms and conditions. In particular Part 6A affects industries where the contracting out of work occurs frequently. Part 6A is the first legislation of general application in New Zealand to provide for continuity of employment.

There are two main considerations in the review of Part 6A. One is whether the operation of the Part has met its objectives, and if not, whether any amendments are necessary or desirable to meet those objectives. The other is whether it is relevant or desirable to have special protections for specified groups of employees (the so-called "vulnerable" employees), for continuity of employment. These currently include workers who provide cleaning, caretaking, laundry, orderly and food catering services

The Department of Labour has proposed some already identified issues for discussion in the review. These include:

1. The transfer of accrued entitlements at the time of restructuring
2. The disclosure of information about employee costs and any related concerns about confidentiality or commercial sensitivity
3. The partial transfer of employees
4. Transfer of employees in a poorly performing service
5. Applications to become "vulnerable" employees
6. Employment protection provisions for all non-"vulnerable" employees

The review will also look at levels of awareness of Part 6A among affected parties.

Again the Department of Labour has produced a discussion paper which presents questions on specific topics but also invites general feedback relating to the operation of Part 6A. **Submissions close at 5pm on 15 March 2010 (Next week).**

The Holidays Act

In 2009 the Government consulted with employer and employee groups along with a number of other interest groups/organisations in its review of the *Holidays Act*. The idea of the review was to make the Act easier to understand, to reduce direct and compliance costs, and to make the Act more flexible in application.

The Ministerial Advisory Group set up to facilitate the review has now issued a recommendation report. The Group considered the following issues and made the following recommendations in its report:

1. *Relevant daily pay*: Employer representatives considered that there should be one rate for all leave entitlements, that earnings should be averaged over the previous 52 weeks rather than 4 weeks, and that the accrual of annual holidays and sick leave should be calculated in the time unit that best suits the workplace. Employee representatives also considered that holidays should be calculated using one formula but only where RDP presently applies and only if the term 'work units' is replaced by 'hours'.
2. *Trading in Annual Holidays for cash*: Employer representatives considered that employees be able to trade the 4th week of their annual holidays for cash, but with specified limitations. Employee representatives considered that statutory minimum entitlements for annual leave should not be able to be traded for cash.
3. *Casual Employees*: The Group recommended the current entitlements for holidays and leave for casual employees are maintained.
4. *Transferring public holidays to another day*: The Group recommended that employees be able to transfer their public holidays subject to safeguards, such as informed and voluntary agreement.
5. *Accumulation of alternative holidays*: Employer representatives considered that the 'alternative holiday' category be removed altogether and a new system be put in place where 'units' are added to annual leave entitlements. Employee representatives recommended retention of the status quo.
6. *Treatment of public holidays*: The Group recommended retention of the status quo as the current holidays are well established and accepted.
7. *Easter Sunday*: Employer representatives recommended retention of the status quo. Employee representatives recommended that Easter Sunday be a public holiday.

A full version of the Ministerial Advisory Group's report is available on the Department of Labour's website at www.dol.govt.nz.

If you wish to discuss these reviews or want our assistance in making submissions please contact us.