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Employment Law Highlights of 2012

April 2013

As the new year gets into full swing, we take this opportunity to look back on some of the employment law highlights (or lowlights depending on your viewpoint) of 2012, as well as to remind you of upcoming changes for 2013.

Collective Bargaining

No one who read the news or watched television in 2012 could have missed the dispute between Ports of Auckland and the Maritime Union. This dispute highlighted both the strengths and weaknesses of our collective bargaining regime. The good faith provisions in collective bargaining have proven to be stronger than an employer's right to contract out union members' work, and the requirement to keep bargaining until a collective is reached has been shown to have some limitations. Changes to collective bargaining announced late in 2012, had they already been in place, would very possibly have changed the progress (and possibly the outcome) of this dispute.

What are these changes?

There are a number of announced key amendments to the Employment Relations Act 2000 which are now overdue for release and expected around mid 2013. They include:

- Revocation of the "30-day rule" which currently requires employers to offer new non-union employees whose work is covered by a collective agreement the terms of that collective for the first 30 days of employment.
- A return to the position prior to 2004 whereby employers and unions engaged in collective bargaining do not have to reach a concluded collective agreement.
- Employers will be able to reduce workers' pay in the case of partial strikes.

Also of interest was an announcement that part 6A of the Employment Relations Act 2000, which provides protection for certain specified "vulnerable" types of workers (such as cleaners and caterers) in a contracting out situation, will be amended so as to only apply to employers of 20 or more workers.

Would, could, should

The test in Section 103A of the Employment Relations Act 2000 relating to unjustified dismissals changed in 2011 from requiring an employer, when making a dismissal or disciplinary decision, to act as a reasonable employer "would" act in all the circumstances, to having to act as a reasonable employer "could" act. In 2012 this continued to provide opportunities for lawyers and commentators to debate the extent and effect of the change. So far, case law has indicated that there

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is a change, not insignificant, but the full parameters of this are yet to be established in the Employment Court or Court of Appeal.

There does seem to be an opportunity for redundancy decisions to be challenged in terms of whether the actual management decision to make a role redundant is the decision that a fair and reasonable employer could have made in all of the circumstances. Currently the position is that the Authority or Court will not look behind the business decision to see whether it is reasonable. The change to Section 103A may therefore in this regard herald a significant change.

Exercising restraint

Claims against employees continued to be a growth area in 2012, including key cases in the area of enforcement of restraints of trade/confidentiality obligations/fiduciary duties. Generally speaking claims against former employees for breaches of fidelity/ confidentiality must be made in the Employment Relations Authority which has exclusive jurisdiction over employment matters. Where the employee has moved to a new employer, there may be claims that the new employer induced the employee's breach of contract, and these must be made in the High Court, as the new employer is not a party to the employment relationship. In a decision of the High Court late last year (*Property IQNZ Limited v Vicelich*) however, the Court assumed jurisdiction over not just the new employer of the employee who had breached her confidentiality obligations but the ex-employee herself, on the basis that the employment relationship had ended. If the High Court has taken the correct approach, it will make progressing claims against former employees much simpler and more cost effective.

In addition, the earlier case of *Rooney Earthmoving Limited v McTague & Ors* saw a new high watermark set for the amount of damages awarded against employees. A number of employees of Rooney Earthmoving acted in breach of their duties of fidelity, trust and confidence and good faith when they set up a new business in competition with their employer, and diverted their employer's business opportunities to their new company. The employer was awarded the lost revenue that it would otherwise have obtained but for the actions of the defendants, a total of $4.29m in damages.

Conclusion

With the detail of the Employment Relations Act 2000 changes yet to be released and areas of case law changing, we can only imagine that 2013 will provide much fertile opportunity for debate, as well as cases to inform both employer and employee obligations.

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