



FOCUS ON EMPLOYMENT LAW



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Introduction

Welcome to our Focus on Employment Law.

This newsletter, which is available online at www.abmm.co.nz, takes a brief look at a number of employment law areas including the basic statutory requirements for individual employment agreements, determining the real nature of certain employment relationships by using the key principles arising from the *Bryson* and *Patching* decisions, and the need for your business to be alert to new technology such as blogging.

We begin with a quick reminder to ensure that your business follows a fair process when investigating disciplinary matters.

This newsletter is by necessity brief, so please feel free to contact either Murray McEwen or Jamie Gibson with any employment law questions you may have.

As always, we are happy to help.

Disciplinary Matters

We cannot overstate the importance of employers following a fair process when investigating an employee on employment performance, misconduct or serious misconduct grounds.

The Employment Relations Act 2000 test of justification states:

"The question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred."

Before taking any disciplinary action, the employer must make thorough and impartial inquiries.

The employee should be given an opportunity to respond to allegations.

The employer should draw a reasonable conclusion based on credible evidence and exercise discretion at all times.

If the employee has an express right under his or her employment agreement to be represented at a disciplinary meeting, failure to observe that right will place the disciplinary process and outcome at serious risk.

Unless you have a very good understanding of your obligations as an employer, you should seek specific legal advice before commencing any disciplinary proceedings to reduce the risk of a personal grievance being raised by an employee.

Disclaimer

The articles contained in this newsletter are intended for general information purposes only and should not be construed as legal advice. If you require legal advice, please contact Auld Brewer Mazengarb & McEwen

Contractor or Employee?

Determining the real nature of an employment relationship is important because an employee can pursue a personal grievance under the Employment Relations Act 2000 while an independent contractor cannot.

The leading New Zealand case on the subject is the 2003 Employment Court decision in *Bryson v Three Foot Six Limited*. Mr Bryson was a film industry worker engaged as an independent contractor.

The Employment Court determined, by applying **key principles**, that the real nature of the employment relationship was that Bryson was an employee rather than an independent contractor.

The *Bryson* case went all the way to the Supreme Court in 2005, where the Employment Court decision was upheld.

The Employment Relations Authority applied the *Bryson* decision in its February 2006 decision in *Patching v KSM Installations (NZ) Limited*.

Key Principles

The key principles, emerging from the *Bryson* and *Patching* decisions, used to determine whether a person is an independent contractor or employee include:

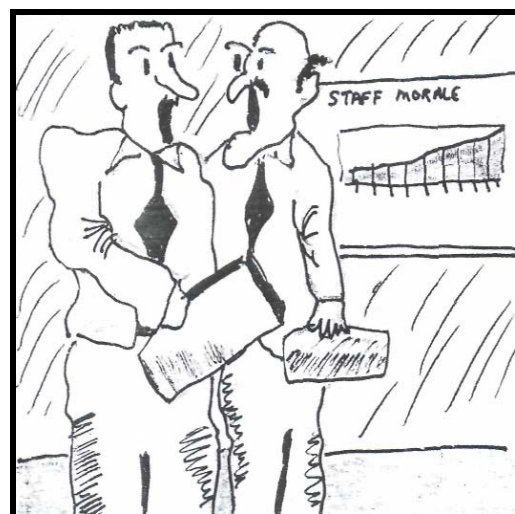
- Determining the real nature of the relationship of the parties
- Analysing the terms that the parties agreed to
- The intention of the parties
- Industry practice
- Applying the control test, which considers the degree of control the principal/employer has over the person in the work involved
- Applying the integration test, which considers how the person was integrated into the business of the principal/employer
- Applying the fundamental test, which considers whether the person was in business on their own account

Mr Patching worked as a labourer for KSM Installations. Even though Patching issued invoices through his company (which he had incorporated for an earlier business venture) the Authority was satisfied that Patching's company was used to enable the employer to obtain administrative benefit, rather than because of a genuine agreement reached by the parties that Patching would subcontract to KSM Installations.

There was no written agreement between Patching and the employer recording the nature of the relationship between the parties, which was a major error on the employer's part.

The determination means that Patching is now able to pursue a personal grievance for unjustified dismissal in terms of the Employment Relations Act, despite what the employer understood the real nature of the relationship to be.

It is important that parties entering into contracting arrangements have well drafted contracts of service. If the **key principles** were applied to a contractor working for your business, could you be sure that the contractor's real status is not actually that of an employee?



"Staff morale has never been higher. We must be paying them too much."

Have You Been *Blogged*?

A “*Blog*”, or weblog, is an online journal or newsletter which is frequently updated and intended for general public consumption. Blogging has emerged as a simple and popular means of communication, affecting public opinion and media around the world.

A number of overseas cases have arisen from disgruntled and misbehaving employees using a personal blog to upset an employer.

Blogging Gone Bad . . .

These bloggers have had to look for new jobs:

- a British employee fired for calling his boss “evil” and referring to his employer, book store Waterstones, as “Bastardstones” on his website
- an American airline attendant fired for posting “inappropriate images” of her posing in her airline uniform on her website
- a Canadian Starbucks supervisor fired for posting “ignorant and rude” comments about his manager and employer on his website
- an American Microsoft contractor fired after posting photos of Apple computers arriving at Microsoft’s headquarters on his website

While we are not aware of any New Zealand cases of a blogger being disciplined by their employer because of their online activities, employers should make it clear that employees who breach employment agreement confidentiality provisions or make derogatory remarks about their employer or employer’s customers online can be disciplined and, for serious breaches, summarily dismissed.

To remove doubt, employers should introduce written guidelines setting out employees’ responsibilities with respect to blogging. Employers should be careful to balance freedom of expression against possible harm to their business.

The Dominion Post recently reported that a former National Business Review journalist has set up a website in response to his allegedly “having been made summarily redundant” from the NBR. We await news of any response by the NBR with interest.

Individual Employment Agreements

Pursuant to the Employment Relations Act 2000, the employment agreement of an employee whose work is not covered by a collective agreement must be in writing and include:

- the names of the employee and the employer
- a description of the work to be performed by the employee
- an indication of where the employee is to perform the work
- an indication of the arrangements relating to the times the employee is to work
- the wage or salary payable to the employee
- a plain language explanation of the services available for the resolution of an employment relationship problem
- an *employee protection* provision that sets out the employer’s obligations in the event of a restructuring situation, such as the sale of a business

From 1 December 2005, all employment agreements must contain an employee protection provision.

Please contact us if you need assistance in updating your organisation’s employment agreement.

Public Holiday Pay

Pursuant to the Holidays Act 2003, new employment agreements must also include a provision confirming the right of the employee to be paid at least his/her relevant daily pay (less any penal rates) that relates to time actually worked on a public holiday plus half that amount again.

BILLS BEFORE PARLIAMENT

Employment Relations Amendment Bill

This Bill is intended to implement Government policy to protect vulnerable employees in situations where their employer loses a contract for services to a new contractor. A recent Employment Court decision means that the policy behind the Employment Relations Amendment Act (No. 2) 2004 has not been implemented as the Government intended.

The Select Committee report is due by 31 August 2006.

Employment Relations (Probationary Employment) Amendment Bill

This Bill, introduced by the National Party's Wayne Mapp, provides for a 90 day probation period for new employees during which no personal grievance proceedings would be able to be initiated.

According to Dr Mapp, this Bill will *"enable employers to take a chance with new employees without facing the risk of expensive and protracted personal grievance procedures that will enable people who have not had previous work experience to find their first job and make it easier for others to re-enter the work force."*

According to the Green Party's industrial relations spokesperson, Sue Bradford, this Bill is *"mean spirited, anti-worker legislation"* that would end up *"stripping protections from the most vulnerable workers."* Already there have been union threats of *"massive industrial protest"* if the bill is not withdrawn.

The closing date for submissions to the Select Committee is 19 May 2006, with a report due by 14 September 2006.

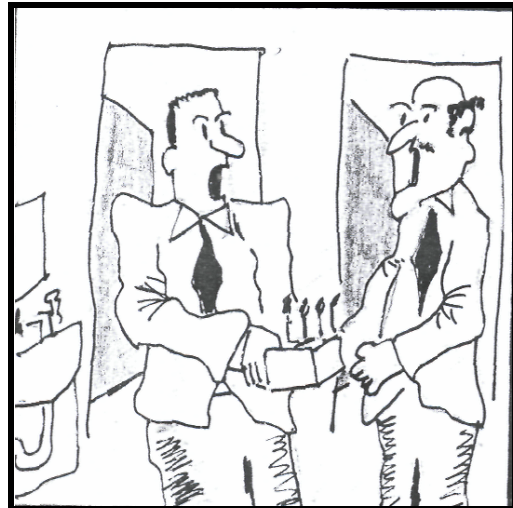
This Bill appears mild in comparison to the recently vetoed "easy hire easy fire" First Job Contract in France, which proposed the introduction of a two year probationary period for anyone aged under 26 and during which time employees could be dismissed for any reason.

The French government changed its mind following widespread rioting and industrial action. The Contract is not expected to be reintroduced.

Employment Relations (Flexible Working Hours) Amendment Bill

The purpose of this Bill, introduced by the late Green MP Rod Donald, is to provide employees with young and dependent children the statutory right to request part time and flexible hours in a framework in which they can negotiate reduced working hours.

The Select Committee is putting this bill aside until April 2007 to enable the committee to, among other things, gather more information and consult more widely on the principles of flexible working hours.



"To open up better lines of communication with my employees, I want you to plant these listening devices in all the toilets"

Minimum Wage Increase

The minimum wage for people over 18 years old increased from \$9.50 to \$10.25 per hour with effect from 27 March 2006.

The Government's stated goal is for the adult minimum wage to reach \$12 per hour by the end of 2008 – economic conditions permitting.