WebbFarry Lawyers

Employment Resolutions

What Employment law changes in 2016 require much of employers moving forward and those advising them. Here are my top three employment law resolutions for 2017.

1. Prioritise People

The Health and Safety at Work Act 2015 demands businesses take health and safety seriously. More fundamentally, it ensures people are prioritised. Statistics reveal that 49 people died at work last year (details on the WorkSafe website).

If doing the right thing fails to motivate, then perhaps the business cost of accidents will. Costs like lower productivity, increased absenteeism, higher turnover, reputational harm, along with possible fines and costs involved in defending any prosecution. Prioritising people not only feels better, it makes good business sense.

But we work in an office - not exactly risky is it? As a lawyer I am less likely to suffer a serious physical injury. I am more likely to become depressed (see *LawTalk* 889). Work related stress left unchecked causes health issues that could result in time away from work and in some cases can end a career. Mental health problems are generally not covered by ACC leading to financial concerns. Nurture a culture in your workplace that encourages good mental health habits to keep people happy and healthy at work.

2. Get the Basics Sorted

Businesses are being penalised for breaching basic employment laws like failing to pay at least the minimum wage, keep compliant time, wage and leave records and provide adequate holidays. Recent headlines indicate the Labour Inspectorate is cracking down on breaches of minimum entitlements, making it more likely non-compliant businesses will be caught.

What about inadvertent breaches? Unintentionally underpaying staff might explain how it happened but will not justify any breach. The Employment Court has given us clear guidance about the steps to take when setting the level of any penalty: Identify the breach, assess its severity, consider ability to pay, and apply proportionality to ensure a fair penalty overall (151, *Borsboom v Preet PVT Limited and Ors* [2016] NZEmpC 143).

Any appetite for awarding penalties for breaches of minimum entitlements will likely increase. New Part 9A of the Employment Relations Act 2000 (**ER Act**) creates consequences for employers including pecuniary penalties, compensation, banning orders, and personal liability for officers involved in breaches.

The effort required to ensure compliance is well worth it.

3. Consider Alternatives

An employee can choose to pursue their personal grievance (**PG**) under section 112 of the ER Act or complain under the Human Rights Act 1993, if the facts fit. Trends in employment law remedies demonstrate that no one gets rich pursuing a PG. Remedies are modest when compensating for humiliation, loss of dignity and injury to feelings (**emotional harm**) caused by a PG. Average awards made in the Employment Relations Authority and Employment Court for emotional harm frequently fail to get far beyond $6,000. Because of this, it is worth considering what an appropriate case might be worth in the Human Rights Review Tribunal. For example, the Tribunal awarded damages of $120,000 for the emotional harm caused by "*deliberate, systematic, egregious and repeated*" breaches of a confidential settlement of a sexual harassment complaint (112 and 149.5, *MacGregor v Craig* [2016] NZHRRT 6).

Choosing a legal forum requires careful consideration. Given the much higher remedies being awarded it could be tempting to tout trigger words like discrimination and harassment alongside a PG if you are an employee. It would be unwise to do so without good grounds. Rodney Harrison QC warned against this in his paper "*Employment Law and Human Rights – A Crucial Interface*," Employment Law Conference, 2014, at 191.

Future Developments

Employment law promises yet more change. For example, we could see anyone earning a salary of at least $150,000 being able to agree to forego the protections afforded under the ER Act against unjustified dismissal. We must come to terms with what the Pay Equity principles require in wage negotiations. International businesses can agree to a non-New Zealand jurisdiction applying to peripatetic employees (Held to be valid in *New Zealand Basing Limited v Brown and Ors* [2016] NZCA 525). Genuinely interested employers may use information subject to non-publication orders in the District Court (43, *ASG v Hayne, Vice-Chancellor of the University of Otago* [2016] NZCA 203). This year's general election could result in different priorities and more legislative change.

Everyone plays a role in developing employment law, whether as an advocate, employer or employee, or just an observer. Play well informed. Getting employment law right really matters.

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