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90 Day Trial Period

Effective from 1 March 2009, the Government has passed legislation granting employers the right to dismiss an employee within the first 90 days of employment with no right to lodge a personal grievance against the employer.

The Government has introduced this legislation in an effort to encourage employers to provide employment opportunities to people, without financial risk to the employer if the employment relationship does not work out. In an announcement on 11 December 2008 the Minister of Labour, Hon. Kate Wilkinson, stated that “By lowering the legal risks employers face, they will be more confident in giving people the opportunity to prove themselves” and that “The 90 day trial will provide real opportunities for people at the margins of the labour market”.



As with any legislation, it is not as simple as it sounds. The probation period provisions only apply where the employer employs “fewer than 20 employees”...“at the beginning of the day on which the employment agreement is entered into”. However, in some cases the point at which an employment agreement is entered into can be unclear. For example, is the agreement entered into when the offer is made and accepted orally or when the agreement is signed by the first or second party to affix their signature?

In addition, in order for the 90 day period to be in effect the legislation requires a trial period provision to be written into the employee's employment agreement. However, some employers in small businesses still do not enter into written employment agreements with their staff, even though they have been a legal requirement since 2000. If the agreement and trial

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provision are not in writing there is no protection under this legislation.

The requirement for an employer to employ fewer than 20 staff for this protection to apply may lead to debate. Small private businesses often include family members as employees, although they might not be actively involved in the business in the same way as other employees. This provision appears to be based on a 'headcount' methodology as opposed to full time equivalent staff. Hence, the cleaner who comes in for 2 hours each day will be included in the headcount, as will job sharing part-time workers.

Help After a Redundancy

As part of the National Party's election platform, it promised an assistance package to help workers made redundant as a result of the current economic climate. The "ReStart" package has now been put in place and commenced from 1 January 2009. The package was formulated by amending existing assistance mechanisms thereby speeding up implementation and avoiding the need for new legislation.

The package is intended to assist individuals whose employment positions have been eliminated by their employer. It does not apply to individuals who have been fired, or who have completed a fixed term or seasonal contract. The package can also apply to the previously self employed as long as they are now eligible for the unemployment benefit.

On a financial level the package comprises two types of payment (both non-taxable) that an individual can receive for up to 16 weeks:

- "ReCover" - this effectively replaces the in-work tax credit (the working for families credit paid to eligible working parents). The person must have been eligible for the in-work tax credit prior to being made redundant. For parents with one to three dependent children the "ReCover" payment is \$60 per week and a further \$15 for each additional child, and
- "RePlace" - complements the accommodation supplement, and can be up to \$100 per week. People who receive a redundancy payment of more than \$25,000 are not eligible for "RePlace".

However, a person whose redundancy

The method of counting staff will become critical as once the employer hits the 20 staff threshold, further employees will not be subject to the provisions.

If an employee is not dismissed within the 90 day period the employer will be subject to the normal provisions to justify a dismissal and will have no protection from this section of the Act. This will be strictly applied.

The changes to the Act do not protect the employer from a grievance for unjustified action. That means that if the employer changes the employee's role or reduces their pay, the full procedural requirements still apply.

payment exceeds \$25,000 may be eligible for the Accommodation Supplement. A person's assets are taken into account when determining eligibility for the accommodation supplement. Only the portion of a redundancy payment in excess of \$25,000 is taken into account for this purpose.

The "ReCover" and "RePlace" payments are only available to one spouse in the family. This means that a person who has been made redundant is not entitled to either of these payments if their spouse or partner is already receiving them.



The "ReStart" package also consists of assistance with finding a new job through support to develop a CV, interview preparation and career planning. This element of the package is referred to as "ReConnect".

In order to be eligible for "ReStart" assistance, the individual must:

- be a New Zealand citizen or permanent resident and usually live in New Zealand
- have been made redundant from a full-time job
- be looking for a full-time job
- have been working for the six months before being made redundant, although not necessarily with the same employer, or
- have been self employed and now entitled to the unemployment benefit.

For an individual, full time work consists of 30 hours or more per week, for a solo parent 20 hours or more and for a person in a relationship, 30 hours or more when combined with those of their partner.

Under the package, an individual who has been made redundant will have 20 working days to

apply for assistance.

What's in a name?

Who is the legal owner of shares in a company? That all depends on whose name is on the company's share register.

In a recent case, *Gillespie v Kinloch Golf Resort Ltd*, the High Court had to decide whether legal ownership of shares had been transferred. Following some difficulties with the management of MG Corporations Limited, the major shareholder (Gillespie) decided to sell its shares to Kinloch Golf Resort Limited (KGRL). After lengthy negotiations, the parties entered into a sale and purchase agreement for the shares for \$3.2 million. In the interim, the company was placed into voluntary liquidation. The sale of the shares was not registered before the company was placed into liquidation.



The Court discussed various issues but ultimately re-iterated that legal title can only be passed on registration of a company's shares in the share register. Until the transfer is registered on the share register, the purchaser only retains an equitable interest in the shares. Before then, an agreement for the sale and purchase, and even the delivery of the share transfer to the registered office, does not pass legal title. The process of transfer is completed only when the name of the purchaser is placed on the share register of the company. In this case the Court dismissed a summary judgement application by Gillespie to allow the transfer of the shares, stating it was arguable that KGRL should not have to suffer the consequences of the liquidation.

Under the Companies Act 1993, once a company is in liquidation, its shares are prohibited from being transferred, unless expressly permitted by the court. Therefore, even though there was an agreement for the sale and purchase of the shares, they could not be transferred from the major shareholder to the intended purchaser.

Parties to an agreement for the sale and purchase of shares should take note of this case. It is not sufficient just to have an agreement that is signed, sealed and delivered. The most important part of the process is getting the purchaser's name onto the share register – for until that happens, the purchaser is not the legal owner of the shares in the company and has no legal title to the shares.

Reimbursements and Honoraria Paid to Volunteers

In New Zealand, services provided by a large number of community organisations are dependent on individuals who donate their time for the benefit of the community. In some cases the organisation may reimburse costs incurred, such as travel expenses or provide a gift to the person in appreciation of their sacrifice. Alternatively, the person may receive an honorarium payment. The correct tax treatment in these situations has often been unclear. The payer is often unsure whether to deduct withholding tax or pay fringe benefit tax (FBT), while the recipient may be unsure whether or not the receipt is taxable.



speaker received a payment to reimburse expenses, the receipt may technically be self employed income and the expenses incurred would be deductible.

Draft legislation is currently before Parliament to clarify how to treat reimbursement and honoraria payments. With respect to amounts received to reimburse volunteers for expenditure that they incur, the reimbursement will be defined as exempt income, i.e., non-taxable and related expenses non-deductible. The amount of the reimbursement may be an estimate of the expenditure incurred, eliminating the need for the volunteer to provide invoices or other supporting documents. It should also be noted that a reimbursement can be in the form of gift vouchers, as a reimbursement "amount" can be paid in "money's worth".

Consider a guest speaker at a University who receives gift vouchers in appreciation of the speaker's contribution. The speaker receives no other payment. One interpretation of the tax legislation is that the speaker is defined as a "resident entertainer" and FBT is payable based on the value of the vouchers (subject to the FBT exemption thresholds). Alternatively, if the

Honoraria are currently, and will continue to be, captured as a 'scheduler payment' (formerly referred to as a 'withholding payment') and tax is

required to be withheld. The draft legislation confirms that where a payment is a combined honoraria and reimbursement payment no portion will qualify as exempt; the full amount will be taxable income. In order to benefit from the exemption a reimbursement payment separate from the honoraria would be required.

Snippets

Update – Associated Persons Bill

On the dissolution of the previous Parliament leading up to the election 78 Bills lapsed, one of which was the Taxation (International Taxation, Life Insurance, and Remedial Matters) Bill. This Bill consisted of draft legislation affecting a number of different areas, including the taxation of offshore companies controlled by New Zealand residents, life insurers and the introduction of rules specific to employee relocation payments. However, of widespread interest are the provisions in the Bill that relate to the reform of the definition of “associated persons”.

In the context of land transactions the provisions of the Bill, if passed in their existing form, will result in a significant



expansion of what persons will be deemed to be associated. The Bill in its lapsed form has been re-instated and the closing date for submissions was 15 January 2009. At the time of writing it is unclear if the “associated persons” rules as drafted are likely to be altered pursuant to the new Government’s position on the issue.

KiwiSaver – Comparing Salaries

Changes introduced by the last Government which prohibited an employer from paying employees on KiwiSaver at a different rate than those who were not receiving KiwiSaver were to come into effect on 1 April 2009. Consequently, KiwiSaver members were in essence to receive a higher rate of pay. The National Government has repealed this move and employers are now free to look at the total remuneration for each person.

New Thresholds for SMEs

New compliance thresholds were introduced in the July 2008 Tax Bill to provide some concessions for SMEs. Some of those thresholds have been adjusted further and new measures introduced by the new Government as part of its relief package for small to medium sized businesses, generally with effect from 1 April 2009. These concessions are meant to assist

It is important to note that the draft legislation does not cover the treatment of honoraria payments or gifts in appreciation of a volunteer’s service. It only applies to reimbursement of expenses. This should be taken into account when characterising what a payment to a volunteer is for.

SMEs to reduce compliance costs. These changes are set out in the following table.

Area of compliance	Thresholds	
	Original	New
PAYE – Taxpayer able to file once a month if total PAYE / SSCWT deductions below this level.	\$100,000	\$500,000
FBT - Taxpayer able to file FBT returns annually if PAYE / SSCWT deductions below this level.	\$100,000	\$500,000
Use of Money interest safe harbour – residual income tax threshold below which use of money interest will not be charged.	\$35,000	\$50,000
GST registration – GST registration required for turnover above this level.	\$40,000	\$60,000
GST 6 monthly filing – 6-monthly filing allowed for turnover below this level.	\$250,000	\$500,000
GST payments basis – Payments basis allowed for turnover below this level.	\$1.3M	\$2M
Low value trading stock valuation – No stock revaluation required if estimated closing stock is below this level.	\$5,000	\$10,000
IRD use of money interest rate – Reduction of the interest rates on overpaid and underpaid tax. (<i>This change is effective from 1 March 2009</i>).	14.24% <i>underpaid</i>	9.73%
	6.66% <i>overpaid</i>	4.23%
Legal fees – Total level of expenditure under which full amount is deductible irrespective of whether item is of a capital or revenue nature.	\$0.00	\$10,000

If you have any questions about the newsletter items, please contact us, we are here to help