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THE ADVOCATE

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a regular newsletter for clients of
mcphail gibson & zwart ltd

Fair Pay Agreements

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

On Friday 7 May 2021, the Government announced its plan to introduce a new Fair Pay Agreement ("***FPA***") system. This was against the background of the Working Group report released in December 2018 and the Discussion Paper released in October 2019.

It would be fair to say, with all that has happened in the last 12 months, this has lost the attention of the public. However with the announcement and planned implementation in 2022, it is likely this will occupy attention over the coming months.

A Bill has yet to be drafted. However, the announcement has outlined the general principles of the system.

FPAs will be occupation or industry based and will set out minimum terms of employment for those covered by it. This means that multiple employers across an occupation or industry may be covered by an FPA. This is reflective of the awards system prior to the introduction of the Employment Contracts Act 1991. As a simple example, an FPA may cover front of house hospitality workers, i.e. wait staff and café servers. This could then mean that all cafés, restaurants, hotels and potentially catering venues would be required to engage workers on the applicable FPA and the terms provided in it. Additional terms agreed pursuant to a Collective and/or Individual Employment Agreement would then sit on top of the FPA.

Unions will initiate bargaining on behalf of employees. The threshold is relatively low, only requiring 10% of the workforce or 1,000 employees in coverage, whichever is lower. Where an occupation or industry has a relatively unionised workforce (e.g. DHBs) it is likely this threshold will easily be met. However, the initiating union need only have one union member within the coverage.

There is also a public interest test. This requires evidence that an occupation or industry is subject to "*certain labour market issues, such that an FPA would be in the public interest*" (Cabinet Paper – Fair Pay Agreements: Approval to draft 7 May 2021). The public interest test is where one of the following four conditions are met:

i. Low pay;

ii. Low bargaining power;

iii. Lack of pay progression; or

iv. Long or unsocial hours, or contractual uncertainty, that is not adequately compensated.

In each case, MBIE will then assess the application for initiation and may call for evidence as needed to ensure the required conditions are met.

As noted above, FPAs will cover occupations or industries. The initiating union(s) will decide the cover. On the MBIE website it is noted that "*[i]f there is an overlap in coverage between two FPAs, the second one only applies if the workers would be better off overall*". This has the potential for dispute between unions, especially in cases of multiple unions operating in one sector.

In the same way that unions will represent employees, employers will require representation. Unlike most collective bargaining now, which is generally one employer and a union, multiple employers will have an interest. Concerns were raised about the current resources for employers, and BusinessNZ has agreed to assist.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor or David Appleton.**

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In this context, further comment has been provided on representation generally in the Cabinet Paper and the Minister has sought authority:

"*to make decisions on any requirements for employer bargaining representatives … [and] these may also need to be mirrored for union bargaining parties. To make sure bargaining sides are balanced and support efficient bargaining this may include limits on bargaining side size (which would apply on both bargaining sides)*".

Once bargaining is initiated, there will be a number of obligations on employers to pass on details about employees (unless they opt out) and to provide time off to employees to attend meetings, and unions will be able to access workplaces without consent.

In bargaining, the parties will be required to engage in efficient and constructive bargaining, which will no doubt be supported by codes and subject to the principles of good faith. While a FPA can include any term of employment, the Cabinet Paper provides terms that are "*mandatory to agree*" and "*mandatory to discuss*" terms as follows:

Mandatory to agree	**Mandatory to discuss**
Base wage rates	Redundancy
How wage rates will be adjusted during the term of an FPA.	Leave requirements
Whether employer superannuation contributions are included in base wage rates	Objectives of the FPA
Ordinary hours, overtime, penalty rates (rates that apply when working overtime or shifts etc.)	Skills and training
Coverage	Health and safety
Duration of FPA	Flexible working
Governance arrangements (such as what, if any, ongoing responsibilities bargaining parties have)	

Disputes on initiation and about bargaining will be heard in the Employment Relations Authority ("***Authority***").

On the basis that once bargaining has commenced for an FPA, agreement must be reached, the Authority will have the jurisdiction to set terms where:

(a) The parties have first tried to resolve differences by mediation or by any other process recommended by the Authority; and

(b) The Authority is satisfied that:

(i) all other reasonable alternatives for settling the dispute have been exhausted; or

(ii) a reasonable time period has elapsed within which the bargaining sides have used their best endeavours to identify and use reasonable alternatives to negotiate and conclude an FPA.

The framework of the power of the Authority to set terms is still being worked through. However, an issue we see, as the proposed system reflects the current framework in collective bargaining, is the concern that this power could be applied by one Authority Member with appeals limited to whether the criteria for setting terms have been met, as opposed to the terms determined by the Authority.

As we see it currently, this will be a significant piece of legislation that will require detailed terms to cover initiation of a FPA, clear bargaining protocols and a robust, competent and credible body for dispute resolution and setting terms as needed, among any number of other matters.

We at MGZ will be watching the progress of this closely. We will work with clients on making submissions on the Bill when it is drafted. We will also ensure we engage in the process of the appointment of representatives for employers. The team at MGZ has extensive experience representing employers in collective bargaining across multiple industries, with Dean Kilpatrick alone having more than 20 years' experience in collective bargaining.