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EMPLOYMENT RELATIONS ACT 2000

This issue of Truckers' Guide to the Law summarises some provisions of the Employment Relations Act 2000 that are relevant to transport service operators.

Freedom of Association

Employees are free to choose whether or not to form or join a union for the purpose of advancing their collective employment interests. In relation to employment issues, no person can prefer another person because they are (or aren't) a union member, and no person can apply undue influence on another because that person is or isn't a union member.

Duty to act in Good Faith

All parties to employment relationships must deal with each other in good faith at all times, and must not do anything which misleads or deceives the other person.

Penalties

Breaching certain sections of the Employment Relations Act, breaching an employment agreement or obstructing or delaying an investigation by the Employment Relations Authority can result in a penalty. The maximum penalty for individuals is $10,000, or $20,000 for companies.

Employment Agreements

Employment agreements can be individual or collective. Individual agreements bind one employee and one employer. Collective agreements bind one or more unions, one or more employers and two or more employees.

Unions

Unions may represent their members in relation to matters involving their collective interests, as well as individual employees.

Obligation to Keep Records

Employers must keep sufficient records to show compliance with obligations to provide minimum entitlements to employees.

Individual Agreements

Individual employment agreements must be in writing, and the employer must retain a signed copy of the agreement. Employers who don't comply with this requirement face an infringement fine of $1,000, or a penalty, for each breach. Other matters which must be included in a individual employment agreement to avoid a penalty are:

- The parties' names and a description of the work to be performed;
- An indication of where the employee will work.
- Agreed hours of work, or an indication of the arrangements for hours and days of work.
- The wages or salary payable;
- A plain language explanation of the services available for resolving employment relationship problems, including a reference to the 90-day period to raise a personal grievance.

Other mandatory provisions are:

- An employee protection provision, which aims to provide protection for employees in restructuring situations where the employer sells or transfers the business to another person or contracts another business to perform work that was being performed in-house (unless the employee is in the category of employees colloquially called vulnerable employees). Restructure clauses deal with:
  - ⇒ The process the employer will follow in negotiating with a new employer about the restructuring as it affects employees;
  - ⇒ Matters relating to the affected employees that the employer will negotiate with the new employer, including whether the affected employees will transfer to the new employer on the same terms;
  - ⇒ In the event that there is no transfer of employment, the process to be followed at the time of restructuring to determine available entitlements.
- The Minimum Wage Act 1983 requires that individual employment agreements must not have more than 40 hours to be worked in a week (excluding overtime), unless the parties agree to more hours.
- The Holidays Act 2003 requires every employment agreement to include a provision that confirms the employee's right to be paid at time and a half for working on a public holiday.

The parties may also include other provisions, such as those relating to holidays and leave, a trial or probationary period, redundancy, restraints of trade, provisions acknowledging confidentiality and other matters.

Opportunity to Seek Advice

Before a new employee starts work, the employer must provide them with a copy of the intended employment agreement, and:

- Advise the employee of their entitlement to seek independent advice about the intended agreement;
- Give the employee a reasonable opportunity to seek that advice; and
- Consider any issues that the employee raises and respond to them.

Employers who fail to comply with these requirements are liable for a penalty.

Collective Agreements

Collective employment agreements must be in writing and must be signed by each union and employer party. They must also contain:

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- A coverage clause specifying the work the agreement covers, by reference to the work, types of work or employees the agreement applies to;
- The wage rates or salary payable to employees bound by the agreement;
- A plain language explanation of how to resolve employment relationship problems, including reference to the 90-day period to raise a personal grievance;
- A clause dealing with how the agreement can be varied;
- An expiry date, or an event on the occurrence of which the agreement is to expire—the maximum term is three years; and
- An employee protection provision.

Good Faith and Collective Bargaining

Good faith bargaining requires the parties to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to. Where a union and employer bargain for a collective agreement they must:

- Use best endeavours to agree to a process for conducting bargaining efficiently and effectively;
- Meet from time to time for the purposes of bargaining;
- Consider and respond to the other's proposals, and continue to bargain about any matters they have not reached agreement on, even though the parties have reached a deadlock situation about a matter;
- Recognise the other party's representatives and only deal with those representatives unless agreed otherwise;
- Not undermine or do anything that is likely to undermine the authority of the other in the bargaining process; and
- Provide each other with information reasonably necessary to support or substantiate claims or responses to claims made during bargaining.

Information to be Provided

During collective bargaining, the parties may ask for information that is reasonably necessary to support or to substantiate the claims or responses to claims made for the purposes of the bargaining. A request for information must be made in writing, specify the nature of the information requested in sufficient detail to allow the information to be identified, specify the claim or response to a claim in respect of which information is sought and specify a reasonable time within which the information is to be provided.

Strikes and Lock Outs

Participation in a strike or lock out is unlawful if it occurs while a collective agreement is in force and which is binding on the employees participating in the strike or lock out. The strike or lock out must relate to the bargaining for a new collective agreement, and cannot occur during bargaining until the parties have been negotiating for a new collective agreement for at least 40 days.

During a lawful strike or lock out an employer can't require non-striking or locked out workers to perform the work normally performed by those striking or locked out. Unless justified on health and safety grounds, an employer can't employ another person to perform the work of those striking or locked out.

Union Access to Workplaces

Union representatives can enter workplaces for purposes relating to the employment of the union's members, the union's business, or the health and safety of any employee on the premises who is not a member of the union, if the employee requests the union's assistance.

Before entering a workplace, a union representative must request and obtain the employer's consent. Employers must not unreasonably withhold consent, and must advise their decision on a request no later than the working day after the date on which the request was received. The employer's consent is treated as having been obtained if the employer does not respond to the request within two working days after the date on which the request was received.

The requirements for consent do not apply to a representative of a union if, at the time of the representative's entry into the workplace:

- There is a collective agreement in force between the employer and the union and the coverage clause in that agreement covers the work done by employees at the workplace; or
- The union or employer has initiated bargaining for a collective agreement, and the intended coverage of the collective agreement covers the work done by employees at the workplace.

Union representatives may enter workplaces:

- To participate in collective bargaining;
- To deal with matters concerning the health and safety of union members;
- To monitor compliance with the operation of a collective agreement;
- To monitor compliance with laws dealing with employment-related rights in relation to union members;
- With the authority of an employee, to deal with matters relating to an individual employment agreement or terms and conditions of employment;
- To seek compliance where non-compliance is detected;
- To discuss union business with union members;
- To seek to recruit union members;
- To provide information on the union and union membership to employees.

Discussions in a workplace between an employee and a union representative entitled to enter the workplace must not exceed a reasonable duration. An employer cannot make deductions from an employee's wages for this time, nor can these discussions be considered union meetings. A union representative may only enter a workplace at reasonable times during any period when employees are working. The union representative must have reasonable grounds to believe:

- A union member is working, or normally works, there; or
- If attending for union business, that a person covered by the membership rule is working or normally works there.

Terms for First 30 Days

Where an employer is a party to a collective agreement that covers work to be done by a new employee, but that employee is not a member of that union, the terms of the collective agreement will apply for the first 30 days of the employee's employment, in addition to any terms and conditions agreed to by the employee and employer that are no less favourable to the employee than the terms and conditions in the collective agreement. The employer must also inform a prospective employee:

- that a collective agreement exists and covers work to be done by the employee;
- that the employee may join a union that is a party to the collective agreement;
- how to contact the union;
- that, if the employee joins the union, they will be bound by the collective agreement;
- that, if the employee enters into an individual employment agreement with the employer, the employee's terms and conditions of employment will, during the first 30 days of employment, comprise:
  - ⇒ the terms and conditions in the collective agreement that would bind the employee were they a member of the union; and
  - ⇒ any additional terms and conditions agreed to by the prospective employee and em-

ployer that are no less favourable than the collective.

The employer must provide prospective employees with a copy of the collective agreement as well as any information about the role and functions of the union that the union has requested the employer to provide to prospective employees. If the union wants information to be provided, they must:

- specify the information that they want the employer to provide;
- specify the form in which the information is to be provided; and
- provide the information to the employer in the specified form.

The employer may only refuse to comply with a request if the information is confidential, or the information is about the employer, and:

- would, or is likely to, mislead or deceive the prospective employee; and
- would significantly undermine bargaining between the employer and the prospective employee.

Union Meetings

Employers must allow union members to attend two paid union meetings (up to 2 hours each) every calendar year. The employer must pay an employee ordinary pay for the time the employee would have worked during the meeting. The union must give the employer 14 days notice of the date and time of the meeting. The union must make such arrangements with the employer as necessary to ensure that the employer's business is maintained during the meeting. Employers who don't allow a union member to attend a union meeting are liable for a penalty.

Employment Relations Education Leave

Union members who are covered by a collective agreement or who will be covered by a collective agreement that is being bargained for are entitled to paid employment relations education leave. The purpose of employment relations education leave is to improve employees' knowledge about employment relations. The amount of education leave which an employer is bound to provide is based on the number of full-time employees they have.

Probationary Periods

Parties may include probationary periods in their employment agreements. If a probationary period is proposed, it must be specified in writing in the employment agreement. A probationary term does not affect the law relating to unjustified dismissal; employment can only be terminated at the end of a probationary period if the employer has good grounds and has acted fairly.

Trial Periods

If an employer has fewer than 20 employees on the day that a new employment agreement is entered into, the parties may include a trial period in their agreement.

A trial period is a written provision in an employment agreement that states that for a specified period (up to 90 days), the employee is serving a trial period and that during that period the employer may dismiss the employee. If the employer does dismiss the employee during that time, the employee may not bring a personal grievance claim in respect of that dismissal. An employer wanting to rely on a trial period must ensure that the provision is drafted correctly and strictly complied with.

Fixed term agreements

The parties to an employment relationship may enter into a fixed term employment agreement by agreeing that the employment will end at the close of a specified date, at the occurrence of a specified event, or at the conclusion of a specified project.

A fixed term employment agreement will only be valid there are genuine reasons for the fixed term and the employer has advised the employee of when or how the employment will end, and the reasons for ending it. Fixed term agreements cannot be used to exclude or limit the employee's rights under the Employment Relations Act or the Holidays Act 2003, or to establish an employee's suitability for permanent employment.

Part-time; Casual Employees

Part-time employees are permanent employees who work for a lesser number of hours than full timers, but whose days and hours of work are set out in the employment agreement. Part-timers may work only on certain days in the week, or for less than a full day. They are obliged to be available to work the hours set out in the agreement, unless agreed otherwise.

Casual employees are available for work as and when required. Otherwise they have no ongoing obligation to report for work on particular days or at a particular time. They work under an employment agreement, but a new agreement commences each time they are offered and accept work. The agreement ends each time the period of work ends, even if the period is only a few days.

Availability Provisions

If an employer wants to require an employee to work additional hours over any guaranteed hours, the parties' employment agreement must provide for the payment of reasonable compensation to the employee for making themselves available, whether or not they are ever called on to work any additional hours. An availability provision will only be valid if:

- the employer has genuine reasons, based on reasonable grounds, for including the availability provision and the number of hours of work specified in that provision;
- the availability provision provides for payment of reasonable compensation to the employee for making himself or herself available to work.

For waged employees, an extra monetary amount must be paid to the employee as compensation. For salaried employees, compensation can be included in the employee's salary. If an availability provision is invalid, an employee may refuse to perform extra work, and the employer may not treat them adversely due to that refusal.

Shift Cancellation

If an employee is required to undertake shift work under their employment agreement, the employer must not cancel an employee's shift, unless the employment agreement specifies:

- a reasonable period of notice that must be given before the cancellation of a shift; and
- reasonable compensation to be paid if the employer cancels a shift without giving the specified notice.

If the employer cancels a shift and does not give the agreed reasonable period of notice, the employer must pay the compensation specified in the employment agreement. An employee is entitled to be paid what they would have earned for working a shift if the shift is cancelled and the employee's employment agreement does not include a valid shift cancellation provision, or if the shift is cancelled but the employee is not notified of the cancellation until the start of the shift, or if the shift is cancelled after it has started.

Secondary Employment

Employers may not restrict an employee from working for another person, unless the employer has genuine reasons based on reasonable grounds for this restriction, and the reasons are stated in the parties' employment agreement. A "genuine reason" includes:

- protecting commercially sensitive information of the employer;
- protecting an employer's intellectual property rights;
- protecting an employer's commercial reputation; or
- preventing a real conflict of interest that cannot be managed without a secondary employment provision.

A secondary employment provision in an employment agreement must not prohibit the employee from working for another person unless it is necessary, having regard to the reasons for the provision. It must not restrict the employee from working for another person to a greater extent than is necessary having regard to the reasons for the provision.

Flexible Working

Employees have the right to request a variation of their working arrangements at any time. A request must be in writing, state the employee's name, the date on which the request is made, and that the request is made under Part 6AA of the Employment Relations Act. The request must also specify the variation requested, whether it is permanent, the date on which the proposed variation would take effect and, if not permanent, the date on which the variation is to end. The request must explain, in the employee's view, what changes, if any, the employer may need to make if the request is approved.

An employer must deal with a request as soon as possible, and no later than 1 month after receiving it, and must notify the employee in writing of the outcome of the request. If the employer refuses a request, they must state that the request is refused on a permitted ground, state that ground and explain the reasons for that ground. The only permitted grounds for refusal are that the request cannot be accommodated due to:

- inability to reorganise work among existing staff;
- inability to recruit additional staff;
- detrimental impact on quality or performance;
- insufficiency of work during the periods the employee proposes to work;
- planned structural changes;
- burden of additional costs;
- detrimental effect on ability to meet customer demand.

An employer must refuse a request if it is from an employee who is bound by a collective agreement, the request relates to working arrangements to which the collective agreement applies, and the employee's working arrangements would be inconsistent with the collective agreement if the employer approved the request.

Flexible Working for those Affected by Family Violence

Employees affected by family violence can request a short-term (2-month or less) variation of their working arrangements for the purpose of assisting the employee to deal with the effects on the employee of being a person affected by family violence. Requests can be made at any time, regardless of how long ago the family violence occurred, even if it was before the person was employed. Stricter requirements than those for normal flexible working requests apply to family violence flexible working requests.

Termination

An employer who dismisses an employee must be able to show good cause for the dismissal, and also that a fair process has been followed to effect the dismissal. If a dismissal is challenged, and the parties are unable to resolve their differences through mediation, the Employment Relations Authority ("**ERA**") will consider the matter.

When deciding if a dismissal was fair, the ERA will consider whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred. In applying this test, the ERA will consider, among other factors, whether, before dismissing the employee, the employer:

- sufficiently investigated the allegations against the employee (having regard to the resources available to the employer);
- raised the concerns with the employee;
- gave the employee a reasonable opportunity to respond to the concerns;
- genuinely considered the employee's explanation (if any).

Dismissed employees are entitled to a written statement of reasons for their dismissal, if they ask for this.

Warnings

For relatively less serious behavior than that warranting dismissal, an employer may decide to warn an employee. Warnings are essential where poor performance is an issue. In warning an employee, an employer should request an improvement in conduct or performance, and the warning must state that in the absence of improvement in conduct or performance, dismissal could follow.

Personal Grievances

A personal grievance is a claim that an employee has against an employer that:

- they were unjustifiably dismissed;
- their employment, or a condition of their employment, is or was affected to their disadvantage by the employer's unjustifiable action;
- they have been discriminated against in their employment on the basis of sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status or sexual orientation;
- they have been sexually harassed in their employment;
- they have been treated adversely in their employment on the ground that they are, or are suspected or assumed or believed to be, a person affected by family violence;
- they have been racially harassed in their employment;
- they have been subject to duress in their employment in relation to membership or non-membership of a union or employee organisation;
- their employer has failed to comply with a requirement relating to the continuity of the employee's work in a restructuring;
- they have been disadvantaged by their employment agreement not being in accordance with the requirements relating to agreed hours of work, availability, shift cancellation and secondary employment;
- their employer has treated them adversely because they have refused to do work under a non-compliant availability provision, or their employer has failed to comply with the notice and payment obligations where a shift is cancelled;
- their employer has engaged in adverse conduct against them for a prohibited health and safety reason, or contravened section 92 of the Health and Safety at Work Act 2015, which prohibits coercion or inducement.

Personal grievances must be raised within 90 days after the date on which the alleged action occurred or came to the employee's notice. Remedies for personal grievances include reinstatement (which is the primary remedy), reimbursement and compensation.

Contractor or Employee?

Independent contractors are not covered by the Employment Relations Act. In determining whether a worker is an employee or an independent contractor, the ERA or Employment Court will:

- consider all relevant matters, particularly matters that indicate the parties' intention;
- not treat as determinative any statement by the parties that describes the nature of their relationship.

Indicators of an independent contract in the road transport industry include the contractor owning the vehicle they operate, obtaining the necessary licences and insurances for themselves, and being responsible for their own tax.

This is not a full summary of the Employment Relations Act 2000. For specific questions or advice on a particular issue, contact the team at Fortune Manning Lawyers.

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