THIS WEEK'S ARTICLES

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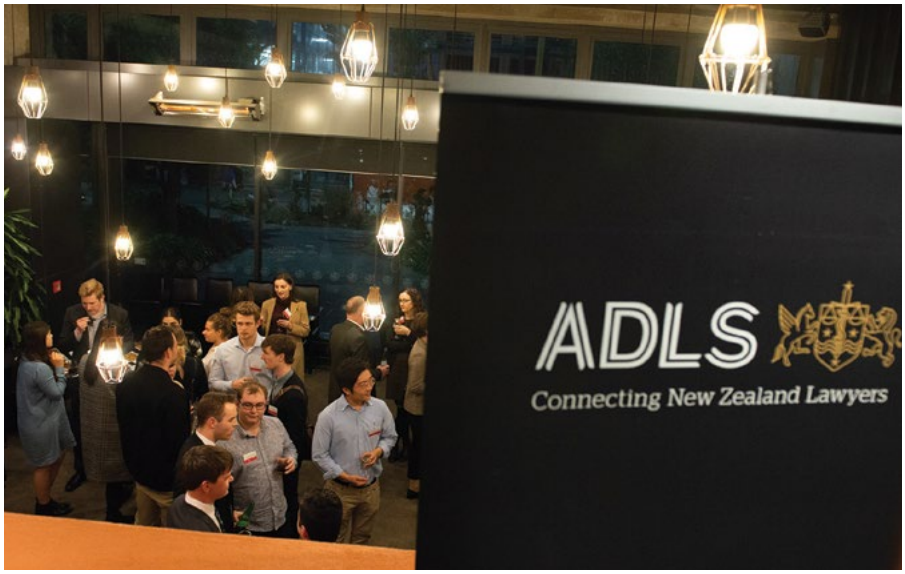
UPDATE FROM ADLS' EMPLOYMENT LAW COMMITTEE

Recent submissions on two employment relations Bills



As part of ADLS' ongoing outreach initiatives to younger members of the profession in centres around the country, ADLS recently hosted (in conjunction with LAWSOC) its annual Newly Suited Lawyer & Student Buddy Programme evening at the University of Canterbury. For photos from the evening and more on what's coming up in Christchurch, turn to page 5.

By Catherine Stewart (Committee Convenor) and Philip Skelton QC, on behalf of the ADLS Employment Law Committee

ADLS' Employment Law Committee takes seriously its mandate of speaking up on important questions of law reform in the employment law context. This year has been an especially busy year for reform in the employment arena, with a number of legislative changes being proposed, and the Committee making written and oral submissions on two proposed Bills.

The Employment Relations Amendment Bill makes a number of significant changes to the rules around collective bargaining and the role of unions in the workplace and in collective bargaining. This Bill also proposes changes to the ways in which trial periods and rest breaks and meal breaks are governed, and restores reinstatement as the primary remedy in cases of unjustified dismissal.

Another piece of legislation currently before Parliament, the Employment Relations (Triangular Employment) Amendment Bill, aims to ensure that employees who are employed in a triangular arrangement (i.e. employed by one employer but working under the control of another) may still be covered by a collective agreement with the secondary employer and may allege a personal grievance against both the primary and secondary employers.

The Government has also signalled further employment law changes down the track, including the introduction of "Fair Pay Agreements" (similar to Australia's National Awards) and revision of the so-called "Hobbit law".

At the time of writing, the deadline for the Select Committee's report on the Employment Relations Amendment Bill is 7 September 2018, and for the Employment Relations (Triangular Employment) Amendment Bill is 21 September 2018. The extended deadline from the standard six months for reporting on the Employment Relations Amendment Bill may suggest that significant changes to the Bill will come about as a result of the Select Committee process, and we will be watching this space with interest.

While neither Bill has yet passed, the Committee considers it worthwhile to draw practitioners' attention to several aspects of each Bill and its recommendations as to how these could be amended and/or clarified to better achieve their underlying aims, and avoid possible unintended legal and practical consequences should they become law. A selection of the Committee's comments are summarised below. The full submissions on both Bills can be accessed on the "Submissions" tab of the Committees page on the ADLS website – see https://www.adls.org.nz/for-the-profession/committees/.

Employment Relations Amendment Bill

Collective bargaining and unions

The Committee has concerns about various proposed amendments in relation to collective bargaining and unions. For example, the terms "reasonable" or "unreasonable" have been used in conjunction with phrases such as "reasonable paid time undertaking union activities" and "unreasonably disrupt the employer's business". The concern is the potential for litigation to arise out of what (in practical terms) is meant by these terms. Further clarification of what would be

Continued on page 2

Recent submissions on two employment relations Bills

Continued from page 1

considered "reasonable" or "unreasonable" would be of assistance.

This might be simply an addition stating that what is reasonable will be assessed on an objective basis. Or, it might involve clarifying what activities are captured by the phrase "union activities" (for example, would this include attendance of union delegates as support persons/representatives at disciplinary meetings for other union member employees facing disciplinary processes?), or what types of things would be considered to "unreasonably disrupt the employer's business" (for example, whether an employer is or is not required to bear additional costs to engage another employee during the time the union delegate is performing union activities).

The Committee also notes a new reference to the *Defamation Act 1992*. Of concern is that, if a matter comes before the Employment Relations Authority about whether information that has been provided or that an employer has refused to provide is "defamatory", the Authority has no jurisdiction over the *Defamation Act*, nor does it have experience in defamation claims. If the intention of this clause is that information provided must be "truthful" or an "honest/genuine opinion", the Committee considers that this could be better reflected in the clause by removing the reference to the *Defamation Act* and instead requiring the information provided being tied to the section 4 obligation of "good faith", which is a concept well-known to and understood by employers, employees, unions and the Authority alike.

Trial periods

The Committee also submitted on a new subsection in relation to trial periods that defines "employer" as someone who employs fewer than 20 employees at the beginning of the day on which the employment agreement is entered into. The Committee has concerns that this may encourage small businesses to prefer full-time workers over part-time, to ensure their quota of 19 employees is not so readily met, thus disadvantaging female and vulnerable workers.

A further issue for consideration is whether casual employees should be included in the numerical calculation of employees. Again, the Bill would appear to favour businesses who engage a mixed workforce of contractors and employees (conceivably enabling some larger businesses with a substantial contractor base to obtain the benefit of 90-day trials). The Committee accordingly recommends that the definition of "employer" in that context be amended to "an employer who employs fewer than 20 full-time equivalent employees at the beginning of the employer's working day, on which the employment agreement is entered into".

Catherine Stewart

Philip Skelton QC

The Committee also had some comments about the definition of "notice" in relation to trial periods, including the potential detrimental impact the 90-day trial period may have for persons whose profession requires a mandatory report to a regulatory body in dismissal situations (such as teachers or nurses and other health practitioners), and invited the legislator to consider whether safeguards should be implemented into the principal Act to protect those employees.

Employment Relations (Triangular Employment) Amendment Bill

Definition of "primary employer"

The Explanatory Note to the Bill indicates that its purposes are to ensure certain rights are available to "employees employed by one employer, but working under the control and direction of another business or organisation" (i.e. employees in a triangular employment arrangement). That being the case, the Committee considers that "primary employer" is defined too broadly and that the definition should be tightened to avoid any unintended consequences. It should be amended to include the additional words "and supplies that person to perform work for the benefit of another person", to make clear that it refers to employers such as labour hire agencies who supply employees to perform work for a third party.

Collective agreements

As currently drafted, the Bill provides that where the qualifying conditions in section 56(1)(c) are met, the relevant collective agreement "binds and is enforceable by … the employees of any primary employer in respect of the primary employer" – effectively, the primary employer steps into the shoes of the secondary employer, and must carry out all the obligations in the collective agreement as if it were an employer party to that agreement. The Committee consider this could prove problematic in practice, and notes by way of comparison that the UK's Agency Workers Regulations 2010 (SI 2010/93) guarantee agency workers the same access to workplace facilities (such as onsite cafeterias, childcare and transport services) enjoyed by the end user's employees. However, the UK Regulations place the obligation to comply on the end user rather than the agency. Given that it is the end user who controls these workplace facilities, we consider this makes more sense than placing the obligation on the agency. The Committee accordingly included a suggested redraft of a number of the Bill's provisions to better achieve what appear to be the Bill's desired intentions.

Triangular employment arrangements and personal grievances

A proposed section provides for an employee in a triangular employment arrangement to join both their primary and their secondary employer to a personal grievance proceeding in the Employment Relations Authority or the Employment Court. As currently drafted, the Bill requires the employee to apply for leave to join the secondary employer. This "gatekeeping" provision is necessary because the consequences of granting leave are serious. Once leave is granted and the secondary employer is joined, all of the secondary employer's actions are deemed to be the actions of the primary employer, and the secondary employer is jointly liable for any remedies awarded.

The Committee considers that this structure unnecessarily complicates the procedure for determination of personal grievances. The way the section is currently drafted, the employee can only join the end user to a personal grievance if the end user is a "secondary employer". Thus before the Authority or the Court could even consider whether to join the end user to the personal grievance, it would first have to determine, at least to an arguable case standard, whether the level of control over the employee exercised by the intended party to be joined fulfilled the definition of

Continued on page 6

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APPOINTMENTS

A round-up of recent appointments

New appointments bolster top-tier dedicated private client team
Chapman Tripp is proud to announce the promotion of Phillippa Wilkie to special counsel and to welcome Jarrod Walker back to the firm as a partner in the firm's Private Client and Trusts team.


Phillippa Wilkie

Phillippa Wilkie, whose appointment took effect from 1 July, specialises in private client and trust work, acting for families in establishing and adapting trust structures, for trustees and for counterparties dealing with trustees. She has a particular focus on for-purpose structures and makes a significant contribution to Chapman Tripp's pro-bono legal work and CSR programme. In the recently-released 2018 Chambers HNW rankings, Ms Wilkie was listed as an "Associate to watch" and was described as a "respected and very capable" practitioner.


Jarrod Walker

Jarrod Walker, whose appointment took effect from 1 August, focuses on asset structuring and personal asset planning for New Zealand families and advising clients on trusts and relationship property matters. He also works with charities on establishment and governance issues. He has extensive international and domestic experience in tax, banking and finance. In the 2018 Chambers HNW rankings, Mr Walker was listed as a Band 2 lawyer and described as "a well-respected figure and someone who knows his stuff".

Specialist environmental law firm continues to flourish
Specialist environmental law firm Berry Simons continues its rapid growth and development with the promotion of senior environmental lawyer Helen Andrews to partner.


Helen Andrews

Helen Andrews joined Berry Simons from another boutique firm as a Senior Associate in June 2015 and has been involved in a wide range of large and complex projects, including the Auranga development, the first private plan change to be approved under the Auckland Unitary Plan, to which she made an enormous contribution. She has recently been working closely with EDS on RMA Law Reform, including co-presenting a workshop with EDS. She graduated with LLB (Hons) and Bachelor of Arts (Geography major) from the University of Auckland in 1999 and was admitted as a solicitor the same year, giving her almost 20 years in legal practice.

Wynn Williams appoints new National Managing Partner
Wynn Williams is very pleased to announce Philip Maw has been appointed to the role of National Managing Partner, following the retirement of Jared Ormsby.


Philip Maw

Philip Maw has been a partner of the firm since 2011 and has led the nationally-renowned Resource Management & Environmental Team since 2012. He first joined the firm in 2004 as a law clerk. He is recognised by both Chambers & Partners and Legal 500 as a recommended and recognised leader in his field. Mr Maw started as National Managing Partner on 2 August 2018. Mr Ormsby will retire from the partnership on 31 October 2018.

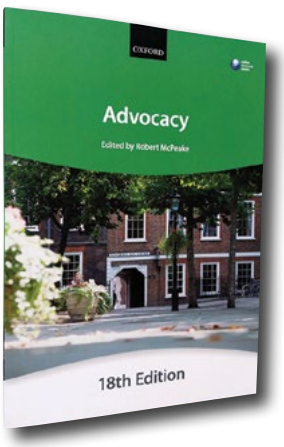
Anthony Harper announces new Special Counsel


Luana Nickles

"We are pleased to announce the promotion of **Luana Nickles** to Special Counsel within our national employment team," said Jackie Behrnes, Employment Partner, Anthony Harper. Ms Nickles has considerable expertise in industrial relations, health and safety, employment and discrimination law and has worked on some of the largest industrial disputes in Australia. She is based in the firm's Auckland office. Ms Nickles is from Te Whakatōhea and Ngāi Tai and is a fluent speaker of Te Reo Māori.

BOOK

Advocacy, 18th Edition (UK Title)



Editor: Robert McPeake

This 18th edition of *Advocacy* covers both criminal and civil court proceedings, and includes a number of how-to-do-it guides illustrating how particular applications should be made when in practice.

Written by experienced advocates and advocacy trainers, *Advocacy* provides an excellent introduction to the skills and techniques required to be an advocate. Coverage includes guidance on making opening and closing speeches; planning and delivering examination-in-chief and cross-examination; questioning witnesses; as well as examples of specific questioning techniques which may be employed in practice. Additionally, authors highlight the ethical boundaries and rules within which an advocate must work.

Price: $95.23 (plus GST)*

Price for ADLS Members: $85.71 (plus GST)*

(+ Postage and packaging)*

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Continued from page 2, "Recent submissions on two employment relations Bills"

"secondary employer" – effectively necessitating a "trial within a trial".

The Committee accordingly suggested alternative wording doing away with the need, as a preliminary step, to seek leave to join the end user, but providing that the end user is only liable if the Authority or the Court determines that the end user is in fact a secondary employer and that its actions have resulted in or contributed to the grounds of a personal grievance – a lowering of both the threshold to commence a claim against an end user, and the stakes for joinder.