

MAY 2011

Summarised here are a number of recent changes in wage, employment and KiwiSaver legislation that have relevance to employment agreements for the farming sector.

Employment Legislation Changes now Law

Changes to the Employment Relations Act and Holidays Act last year passed into law and then came into effect on 1 April and 1 July 2011. Most relevant in the farming sector:

- All employers are now obliged to retain a signed copy of the employment agreements of all current employees. Employees are entitled to request (and receive) a copy of their employment agreement.
- All employers will be able to agree a 90 day trial period with new employees (previously limited to employers with less than 20 employees). Employees may not bring a personal grievance if they are dismissed during this trial period.
- An employer and an employee may agree to "cash in" the fourth week of annual leave.
- If it is not practicable to determine an employee's relevant daily pay (or daily pay varies during a pay period) an employer may use the new "average daily pay" calculation to determine what is to be paid on public holidays, alternative holidays, sick leave and bereavement leave.
- An employer and an employee may agree to transfer the observance of a public holiday to another 24 hour period.
- An employer may now direct an employee to take an alternative holiday on 14 days' notice (previously this could only occur if 12 months had passed since the holiday was accrued). Employees will no longer be able to nominate when alternative holidays are taken.
- An employer is able to ask for a medical certificate after one day of sick leave without forming a reasonable suspicion regarding misuse of sick leave. An employer will, however, be liable to pay for the cost of any medical certificate requested if the employee has been sick for less than three days.

Important Recent Employment Court Decision involving 90 Day Trial Period

The Employment Court's decision is a reminder to employers who are considering including a 90 day trial period in their employment agreements that it is critical to comply with the procedural requirements of the Act. In particular, employers must ensure that the trial period clause is included in writing in the new employee's employment agreement and that the **agreement is signed before the employee commences** employment.

Employees who are dismissed under the trial provision must be given notice strictly within the terms of the employment agreement. Trial conditions should stipulate a notice period (usually this will be shorter than the normal notice period), and should also state that this can be paid in lieu. The Court clarified that it is fine if the employee works past the end of the trial period – the important point is that notice of dismissal has to be given before the 90 days expire. *See 90 Day Trial Period info below.*

Another point to clarify is that if asked, as the employer you are required to give a reason for the dismissal. While the trial period provisions exempt employers from having to provide formal written reasons for dismissal they state that general obligations of good faith still apply. This means employers (and employees) must be "responsive and communicative". The Court says an employer will have to give an answer if the employee wants to know (at the time) why they are being dismissed, and this answer cannot be misleading.

Minimum Wage at \$13.00 from 1 April 2011

The current adult minimum wage is \$13 per hour (previously \$12.75 per hour). By law, employers must pay at least the minimum wage - even if an employee is paid by commission or by piece rate. The minimum wage applies to all workers aged 16 years or older, including casuals, temporary and part-time workers.

Holiday pay must be paid in addition to the minimum wage. If an employee receives "pay-as-you-go" holiday pay, this payment must be a separate and identifiable part of their pay.

The 90-day Trial Period for New Employees

From 1 March 2009, employers with fewer than 20 staff could hire new employees on a trial period of up to 90 days. During this period the new employee can't pursue a personal grievance for unjustified dismissal.

Although this provision is flexible, it's well to keep in mind that basic employment rights remain unchanged. Standard protections regarding pay, conditions, leave, and health and safety remain in place throughout the trial period. Personal grievances may also be pursued if issues such as discrimination arise.

Keep in mind also a trial period can only apply if the new employee has not previously been employed by you. If the employee has either worked for you before or is currently on your staff and being promoted to a new position then the new provision isn't available. In these circumstances, existing dismissal procedures will apply.

Negotiating in good faith is important for both parties. The good faith provisions of the Employment Relations Act 2000 still apply to the negotiation of trial periods. It is essential for any employer recruiting staff on a trial period, that they outline right at the recruitment phase, that this is their intention. Failing to notify an employee of the intention to recruit on a trial period basis, or not being transparent in the employment agreement that this is the case may result in the employer failing to demonstrate 'good faith'. You and your employee must approach the trial period in a fair way and the employer must consider and respond to any issues raised by the new employee. In order for there to be a trial period, both parties must agree to a "trial provision" in the employment agreement at the time of hiring. Agreement must be mutual and voluntary.

It's essential to put your agreement in writing. If you don't it won't be valid and can't be applied. First, determine the length of the trial period and the amount of notice you will give the employee if the trial is unsuccessful. The employment agreement needs to state that the employee will serve a defined trial period and that if he or she is dismissed during this period personal grievance or other legal proceedings cannot be taken. It's also a good idea to record how you plan to give notice if the trial isn't successful. Make sure you include the notice provisions for the trial in the employment agreement.

Keep your staff informed. If the trial is unsuccessful, you will need to give notice within the trial period — even if their last day of work is after the trial period.

The new legislation only protects employers from unjustified dismissal claims. Employees can still bring personal grievances for unjustified disadvantage, discrimination, sexual or racial harassment, duress and failure by an employer to comply with the continuity of employment provisions in the Employment Relations Act.

KiwiSaver Changes from 1 April 2009

As an Employer you must automatically enrol all new eligible employees in KiwiSaver when they start in their new job. You then must deduct KiwiSaver contributions and make compulsory employer contributions along with your PAYE payments.

An employee who is automatically enrolled can then opt out of KiwiSaver. The "opt out" period begins on the 13th day after the date on which the person started the new employment and ends on the close of the 55th day after the date the person started the new employment. This allows a total of six weeks for a new employee to decide if they want to remain in the scheme. Employees use a KS 10 form from the IRD to request this opt-out.

Employees make regular contributions of 2%, 4% or 8% of their gross salary or wages. If an employee does not choose the rate, the contribution rate is automatically set at 2%. These contributions are deducted from the employee's pay and sent to Inland Revenue by the employer. The employee's contributions to the KiwiSaver scheme begin with the first pay after the employee starts their new job. For further details please refer to the IRD website (www.KiwiSaver.govt.nz).

Employers are required to make compulsory employer contributions in respect of any employee who is over 18 and making contributions from their salary or wages to the KiwiSaver scheme or complying superannuation fund. Compulsory employer contributions will increase to 2% from 1 April 2009.

The KiwiSaver Act 2006 requires that the employer's contribution needs to be in addition to an employee's gross salary or wages unless the parties agree otherwise. An employee's take home pay cannot be reduced because of the fact that an employer must make a compulsory employer contribution when the employee joins KiwiSaver. Any variation to this has to be negotiated between the employer and employee in good faith. Take it or leave it negotiations are not considered to be good faith bargaining.

For further details on employer contributions please refer to the Inland Revenue Department's website (<http://www.ird.govt.nz/kiwisaver/employers>).

KiwiSaver Changes from the Budget May 2011

The specific changes are – the \$1,000 Kick-Start remains unchanged:

- From 1 April 2012: The tax-free status of employer contributions to KiwiSaver and other complying superannuation funds will end. All employer contributions will be subject to Employer Superannuation Contribution Tax (ESCT) paid at the employee's marginal tax rate.
- For the year ending 30 June 2012 and beyond: The Member Tax Credit rate will be halved from \$1 to 50c for every \$1 contributed by members, up to \$521 a year – half the current maximum. These payments are made annually after the government financial year, so the first payments at these new levels will occur in the second half of 2012.
- From 1 April 2013: The minimum employee contribution rate will rise from 2 per cent to 3 per cent. This will apply to existing and new members. This will also be the new default rate, but members will still be able to select a higher contribution rate of 4 per cent or 8 per cent.
- From 1 April 2013: The compulsory employer contribution rate will also rise to 3 per cent.

Rest Breaks and Unpaid Meal Breaks

From 1 April 2009, employers are required to provide workers with paid rest breaks and unpaid meal breaks. Most agricultural employment agreements already accommodate this new legislation, but there are new clauses in this agreement to cover off when these rest breaks are to be observed within the work period. Without such agreement the legislation specifies that so far as is reasonable and practicable the rest breaks and meal intervals must be provided in the middle of the applicable work period.

This will not be convenient for most dairying situations. However, employers can change the times by negotiation and through their employment agreements as allowed here.

As background, workers are entitled to the following paid rest breaks:

- One 10-minute paid rest break if their work period is between two and four hours;
- One 10-minute paid rest break and one unpaid 30-minute meal break if their work period is from four to six hours;
- Two 10-minute paid rest breaks and one 30-minute unpaid meal break if their work period is from six to eight hours.

Where employees work for periods longer than eight hours, these provisions automatically re-apply to each succeeding work period.

The legislation does not define the term rest break, but the intent of a rest break is to ensure that employees have the opportunity for rest and refreshment, and to attend to personal needs. The details as to how an employee's work might be managed and the level of connection they need to have with their work while on their rest break will depend on the type of job that the employee does. For this reason, it is best that an employer and employee discuss how work will be managed during the break.

Sources Acknowledged and for more information:

Department of Labour - www.dol.govt.nz

Employment Relations - ers.govt.nz

Inland Revenue – KiwiSaver for employers - www.ird.govt.nz/kiwisaver/employers/?homepage-bus

KiwiSaver - www.kiwisaver.govt.nz

Simpson Grierson - <http://www.simpsongrierson.com/employment-law-sept-2010/>

Bell Gully – <http://www.bellgully.com/areas/area.hi.0010.pubs.asp>

Chapman Tripp - <http://www.chapmantripp.com/pages/Publication.aspx?ItemID=783>