

Pre-Termination Negotiations – Panacea or Poisoned Chalice?

The Employment Relations (Termination of Employment by Agreement) Amendment Bill has now come back from Select Committee and is due for its second reading.

The Bill seeks to facilitate protected conversations between employers and employees to allow them to come to a mutual agreement to terminate employment.

The Bill would achieve this by amending the Employment Relations Act 2000 (**Act**). It would introduce 'pre-termination negotiations' – protected conversations between employers and employees for the purpose of terminating employment, regardless of whether or not there is an existing employment relationship problem. It would establish the framework for a termination agreement, following successful pre-termination negotiations.

The Bill also seeks to prevent employees from making a legal complaint against their employer once a settlement has been agreed to.

'Pre-termination negotiations' are defined as *all discussions, correspondence and other interactions between the employer and employee about the termination of the employment relationship*.

Under the proposed legislation, an employer may ask an employee to begin pre-termination negotiations.

To meet the legal requirements, the employer's request must inform the employee of their right to obtain representation before responding and at any other time in any process that follows. It must give the employee reasonable opportunity to obtain that representation and provide the employee with specific information.

Those concepts are already familiar to those practicing in the employment jurisdiction. Employees must be

given a reasonable opportunity to seek advice in relation to proposed employment agreements and in relation to 90-day trial periods.

The Employment Relations Authority and the Employment Court are likely to interpret these amendments extremely restrictively. That is because they seek to remove a number of fundamental protections currently available to an employee under the Act. The Act specifically acknowledges the power imbalance between employer and employee, and seeks to protect employees from abuse of power.

The high-water mark in relation to 90-day trial periods was the case of *Blackmore*¹ where Judge Colgan ruled that, even though the employee had signalled they did not wish independent advice, the employer was required to provide a reasonable period of time for the employee to obtain such advice. It is likely that similar standards will be applied to pre-termination negotiations.

The employee will be entitled to decline an employer's request. However, if the employee agrees, the employer must make a record of the request and of the employee's response.

The request can be made in circumstances where there is no existing employment relationship problem. The request, in and of itself, does not provide grounds for an employee to raise a personal grievance.

A request cannot be made more than once in any six month period unless there is a genuine reason based on reasonable grounds.

However, a reminder of a request given a reasonable time after the request is made is not a new request.

The employer must provide the employee with the following information:

- that they may decline the request to begin the pre-termination negotiations;

¹ *Blackmore v Honick Properties Limited* [2011] NZEmpC 152

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- that negotiations may not begin without the employee's agreement;
- that the duty of good faith under s 4 is met during pre-termination negotiations if the parties do not, whether directly or indirectly, do anything –
 - to mislead or deceive each other during the negotiations; or
 - that is likely to mislead or deceive each other during the negotiations.
- that the employee's employment may be terminated only if the parties enter into a termination agreement;
- that the employee is entitled to obtain independent advice on the proposed terms of a termination agreement;
- that the terms of the termination agreement are in full and final settlement of any cause of action arising out of the employment relationship between the parties.

Termination agreements must:

- specify the sum the employer is to pay the employee for agreeing to terminate the employment relationship;
- state the agreement is made under the relevant legislation;
- be in writing;
- be signed by the employer and the employee;
- before the employee signs the termination agreement, the employer must inform them that they are entitled to seek independent advice on the proposed terms and provide them with a reasonable opportunity to obtain that advice;
- specify that terms are in full and final settlement of any cause of action arising out of the employment relationship between the parties and are final and binding on, and enforceable by, the parties.

Again, the Courts are likely to adopt a very restrictive interpretation of this provision.

The proposed amendments include a prohibition on employers engaging in unfair pre-termination negotiations. If the Authority finds that the employer

has engaged in unfair pre-termination negotiations, it may make an order cancelling the termination agreement, reinstate the employee to their former position and reimburse them for lost wages and/or compensation for humiliation, loss of dignity and injury to feelings.

'Unfair pre-termination negotiations' are defined as *knowing or ought to have known that the employee at the time of pre-termination negotiations or entering into the termination agreement is unable to adequately understand the provisions or implications of the agreement by reason of diminished capacity due to, for example:*

- *age;*
- *sickness;*
- *mental or educational disability;*
- *disability relating to communication; or*
- *emotional distress.*

Unfair pre-termination negotiations also include circumstances in which an employee reasonably relies on the skill, care or advice of the employer or the employer's representative or is induced to enter into the termination agreement by oppressive means, undue influence or duress.

Evidence of pre-termination negotiations is inadmissible in any proceedings before the Authority or Court. However, if the Authority or Court determines that there have been unfair pre-termination negotiations, evidence may be admissible of a defective process resulting in the employee being treated unfairly; failure to comply with the terms of a termination agreement resulting in an employee being treated unfairly; or where evidence of pre-termination negotiations is required to prove the terms of a termination agreement or the existence of a termination agreement.

Opinion

It has always been difficult for employers to navigate discussions with employees they wish to terminate. Anything indicating an employer has already formed a

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view that the employment relationship needs to come to an end, may be evidence of predetermination.

That has resulted in employers often adopting alternative processes to achieve the end goal. Restructuring is a case in point. Performance management and disciplinary processes are time consuming, resource intensive and require particular attention to detail to ensure a fair process.

Sometimes employers seek the sanctity of a 'without prejudice' mediated setting to have such conversations.

While the proposed amendments will provide a degree of protection for employers seeking to have such conversations, they also provide an employee with protection in the event that they don't wish to have such a conversation or in the event of negotiated settlements.

Currently negotiated termination settlements do not require an employee to seek and obtain independent legal advice (although it is recommended). In circumstances where an employer is seeking to take advantage of an employee, they may do so if the employee doesn't take advice beforehand. When advisors become involved, an employee will generally end up with a better outcome.

Under the proposed legislation, for a termination agreement to be binding, an employee must not only be told of their right to seek independent advice but also given a reasonable time to obtain that advice.

The new legislation will enable difficult conversations to be had without the same degree of risk that currently exists. However, employers should carefully consider the fallout of such conversations. Learning that your employer wishes you to leave is incredibly demotivating and could result in loss of productivity, obstructive and difficult behaviour, and even active undermining of an employer. While these behaviours may give rise to disciplinary and performance processes, the ultimate goal of terminating the employee in a low-key and timely fashion may be undone.

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