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14 APRIL 2022

ADLS EMPLOYMENT LAW COMMITTEE

SUBMISSIONS ON THE FUTURE OF WORK TRIPARTITE FORUM'S DISCUSSION DOCUMENT ENTITLED A NEW ZEALAND INCOME INSURANCE SCHEME

INTRODUCTION

The ADLS Employment Law Committee ("Committee") is comprised of lawyers primarily in the Auckland region who practice employment law. Committee members collectively have significant experience on the ending of employment relationships in circumstances of redundancy and incapacity, as well as representing clients in the Employment Relations Authority and the Employment Court.

Given the wide-ranging effect that the introduction of a New Zealand Income Insurance Scheme would have on the practical operation of employment law in New Zealand, the Committee welcomes the opportunity to provide feedback on the Forum's Discussion Document.

The Committee has reviewed the Discussion Document and wishes to provide some general feedback which are relevant to lawyers and their clients rather than answer the particular questions from the Submissions Template.

Key points arising from consultation with the Committee are as follows:

1. The Committee welcomes, in principle, the introduction of an insurance scheme for workers who are unable to work through no fault of their owing to illness or disability, which is independently certified through a medical practitioner. The Committee does, however, have significant concerns about the scheme applying to situations of redundancy.

2. Redundancy has been the subject of significant common law precedent over the last few years, which has developed along the direction of preserving employees' rights to ensure redundancies are not only genuine but have sufficient evidence to justify the rationale of the redundancy.[1] This has had the effect of making it more difficult for employers to implement "sham" redundancies where they simply get rid of employees for reasons such as poor performance, misconduct, incompatibility or personality issues. The introduction of the insurance scheme for redundancies would, in our view, be a major step backwards in terms of providing employers with an opportunity to use redundancies for non-genuine reasons. We do not think that the 28 day "bridging" payment would act as a sufficient deterrent for employers not to use redundancies in this way. Employees may also feel under pressure to agree to being made redundant in order to access the scheme, if they might not otherwise be entitled to redundancy compensation.

3. We think that the redundancy aspect of the scheme should either be removed in its entirety, or significantly altered to tighten any prospect of it being used for non-genuine redundancies. If redundancy is retained in the scheme then we suggest that the scheme must make it clear that employers are still required to justify redundancies in the usual way in accordance with common law and must follow a process prior to reaching any decision of redundancy. It should

[1] See, for example, the Court of Appeal decision of *Grace Team Accounting Ltd v Brake* [2014] NZCA 541.

also be made clear that employees who receive redundancy insurance still have the right to bring claims pursuant to the Employment Relations Act, Human Rights Act or otherwise.

4. In relation to this last point, our Committee is unanimous in its view that the insurance scheme must not operate as a bar to employees' rights to bring claims, whether in relation to disability or redundancy, and that this ought to be made clear in the scheme. This is important in order to maintain fundamental employment law rights for employees in a range of circumstances.

5. Additionally, we are concerned that redundancy situations where the insurance scheme is invoked might be settled with a full and final Record of Settlement under s 149 of the Employment Relations Act 2000, rendering the ability to unpick such an agreement constrained. This would not be remedied by requiring evidence of notice of termination on the ground of redundancy to be provided because satisfying the requirements of the scheme could be part of any full and final Record of Settlement. For this reason we think it is important that it is made clear that any use of the scheme in itself does not constitute a settlement for the purposes of section 149 of the Employment Relations Act and must not be used as such.

We also have a number of more general comments about the scheme, which are as follows:

- Concern has been raised in relation to the timing of when the scheme would be implemented. Some members stated that the scheme should not be implemented at a time where employers were already under significant financial pressure due to the headwinds of COVID-19 and the effect of the war in the Ukraine. Others were of the view that no time was a good time and that there should not be too much emphasis on the current context. An alternative was to have a lengthy lead in time so that the scheme would not take effect until 2025.

- **Questions 1, 85 and 90:** Some members felt that such a scheme need not be compulsory and there could be automatic enrolment in the scheme with the ability to opt-out of the scheme like KiwiSaver. This would allow employees decide what is best for their individual circumstances on a case-by-case basis. For employees at the beginning of their careers, this may not be a desirable option but for employees who have developed careers, this is likely to be more attractive. An alternative would be to have compulsory coverage but allow for accredited employers to manage their own scheme for their own employees (like ACC).

- **Question 1:** Most members agreed that the scheme should cover health and disability issues. However, where health and disability issues have been directly caused by the employer such as bullying and harassment, how those should particular situations should be managed should also be considered. In this respect, experience rating may be appropriate (see below on question 33 and 34).

- **Questions 6 and 8:** The reference to the definition of displacement as involving the "involuntary" loss of work does not take into account situations where an employer seeks from its employees people who wish to take "voluntary redundancy". Voluntary redundancy should be encouraged by employers and employees alike to stem the need for broader (and potentially further unsettling) redundancy selection processes in an organization.

- **Questions 7, 48 and 83**: As noted in points 2 to 5 above, all members were concerned about the integrity of the scheme and the potential for abuse in redundancy situations.

- **Questions 33 and 34:** All members recorded the overlap between the scheme and ability for reimbursement for lost remuneration under s 128 of the Employment Relations Act 2000 in the event of a substantively unjustified dismissal. As the law currently stands with payments from MSD or ACC, an employer is required to make payments for lost remuneration in the event of a substantively unjustified dismissal and the employee is to account for those payments to MSD or ACC respectively. The result can be a form of double dipping. Most members agree that there should be some form of legislative requirement to take such payments into account. However it is important to note that this should not exclude a claim for lost wages *per se*, and there is a risk that excluding lost wages might further reduce the already paltry access to justice as there would be even less hope of a net gain from employees form pursuing a case. Furthermore excluding lost wages claims would probably also increase the risk of abuse of redundancy, as employers might persuade employees that if they bring a claim they would not get lost wages anyway. It is also noted that existing commercial unemployment schemes do not offset lost wages claims and therefore there is an argument for them not to be offset at all.

- **Questions 33 and 34:** Some members recorded the overlap between the scheme and existing entitlements to redundancy compensation in employment agreements. How this is to be dealt with is left unclear in the discussion document. From a Union perspective, it is understood that claims under the scheme would be "in addition to" any entitlement to redundancy compensation. From an employer perspective, employers see this as double dipping as this would result in two payments in the event of loss of a job. It should not be assumed that these would be renegotiated as Unions will be extremely reluctant to forgo hard fought (and at times substantially more generous) redundancy entitlements in employment agreements.

- **Questions 41, 42 and 61:** Some members believed that the 6-month support from the scheme should be 3 months support to align it with s 128 of the Employment Relations Act 2000 which sets out that an employer is to pay 3 months ordinary time remuneration in the event of a substantively unjustified dismissal. Another suggestion was to keep the support to 6 months but provide tighter mechanisms for requiring an employee to secure another job such as being required to take jobs that offer more than the scheme rate of 80% rather than offers of employment that provide lower remuneration than what the employee had received in their previous employment. This would incentivize re-employment.

- **Questions 63 and 64:** The proposal of 28 days where payment would continue in order to be able to travel overseas by employees supported by the scheme was raised by members as concerning. The possibility of the integrity of the scheme would be undermined as the payments involved would not be at a subsistence level like JobSeeker support. It could result in employees exercising this right in order to effectively take an overseas "holiday" funded by the scheme. A better approach would be for payments under the scheme to be suspended

immediately upon travel overseas with the possibility that they could be recommenced when the employee returns. This ensures the employee remains committed to re-employment.

- **Question 24:** Most members agreed that there should be a better limit on claims rather than just limiting claims to a total of six months within an 18-month period which allows for relatively unlimited claims. The form of that better limit could be a cap on the total number of claims such as 4 time over the lifetime of an employee except for exceptional circumstances or a limit on the claims of one every 5 years except for exceptional circumstances.

CONCLUSION

The Committee hopes the above feedback is of assistance and looks forward to learning the next steps for the New Zealand Income Support Scheme. We would be happy to meet in person or remotely via Zoom for further discussion or clarification of our feedback.

Yours sincerely

Privacy of natural persons

CATHERINE STEWART

Convenor, ADLS Employment Law Committee