

No more unjustified dismissal claims for high-earning employees?

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Minister for Workplace Relations and Safety Brook van Velden recently announced that Cabinet has agreed to prevent employees earning a base salary of \$180,000 or more from bringing personal grievance claims for unjustified dismissal.

Subsequently the Minister has also announced a number of other proposed changes to:

Remove all remedies for employees whose behaviour amounts to serious misconduct.

- Remove eligibility for reinstatement in a role and compensation for hurt and humiliation when the employee's behaviour has contributed to the issue, for example repeated instances of poor performance.
- Allow remedies to be reduced by up to 100% where an employee has contributed to the situation which gave rise to the personal grievance.
- Require the Employment Relations Authority and Employment Court to consider if the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations.
- Increase the threshold for procedural error in cases where the employer's actions against the employee are considered fair.

Our view

Although we have concerns about many of the details, we do agree with the overall direction of most of these proposals.

An underperforming senior executive can do enormous damage to an organisation, its staff and ultimately the people it serves. Under current laws it is normally very difficult (and often totally impractical) to exit these employees legally.

Consequently, exits are inevitably agreed, but these arrangements are generally very expensive for the organisation. Ultimately that cost is born by consumers (or, in the public sector, by taxpayers and ratepayers)

Similarly, we think that the law relating to grievance claims needs to be rebalanced.

We think the current law focuses too heavily on the employer's wrongdoing. Not enough weight is given to the employee's wrongful actions, even though those actions may have started the chain of events that led to the dismissal.

Where an employee's misdeeds lead to dismissal then that should impact how much they win.

However, when rebalancing the law Parliament must keep in mind that it is always very difficult for an employee to bring a claim against their former employer, even where they have been badly wronged. The time, cost, stress and stigma of bringing a claim are already significant hurdles. If the law places too many barriers in front of claimants then that will allow employers to act unfairly with impunity. In our view, the Government must move carefully here. We need a firm tweak – what we don't need is a full reset.

Balancing the rights of high earners

We think the \$180,000 threshold is clearly too low. The real problems we see are when employees are earning \$250,000 and above, and we think the threshold needs to be set closer to that level. Pinning this number to the top tax rate is convenient, but we think the threshold needs more thought and debate.

In our view there should be some sort of trade off for losing the right to bring a personal grievance, instead of that right simply being removed, as is proposed.

For example, a senior employee's right to bring a personal grievance might only disappear if they are paid, say, the equivalent of three months' base salary on exit. This would ensure that they have some level of buffer, and would mean the employer has to pay a relatively small amount in exchange for certainty, and the ability to move the senior employee on.

Contractual exit payments at (and indeed above) the three-month level will almost certainly be negotiated into most senior executive agreements, so in reality we don't think a statutory requirement for a three-month payment would cost employers very much (or any) more. It would just provide a minimum safety net.

A real difficulty here will be transition - how will the government deal with senior employees who negotiated their employment agreements believing they had personal grievance protection, only to find that the law has now taken that away? Options include delaying implementation for existing employment arrangements, or perhaps providing a larger buffer payment (six months?) for existing senior employees, for a transition period of say two years.

Keep calm and carry on, but get prepared

What should you do?

It's not uncommon for employment law changes to be announced with great fanfare, but then fail to materialise (or to change, almost unrecognisably, in the lawmaking process).

Therefore, we don't suggest any major moves, yet, because we don't yet know what the law will look like, or if it will pass.

However, we do recommend the following:

- If you are a senior employee negotiating a contract now, or in the next little while, then you should bank on having no personal grievance protection. Make sure your notice period is long enough (or consider negotiating a separate payment that applies if you are dismissed), and make sure you have an emergency fund. It is probably worth getting specific advice on your agreement, and thinking very carefully about what each of the provisions in your contract will mean, if your right to bring a grievance challenging your dismissal is taken away.
- If you are an employer bringing on a new senior hire you should, again, think about what your contractual provisions will look like if the employee has no personal grievance protection. It also appears that parties may be able to opt in to the grievance provisions. Will any clauses in your agreement unintentionally opt in to that regime, when you don't want to? Or would you want to rethink any of those clauses (for example, no fault termination), if personal grievance protection did not apply?

If you need assistance with any of these issues, please get in touch.