

NEWSLETTER

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Employment Matters

Employment Law

Employment law is becoming more specialised and confusing for employers as successive Governments change employment legislation. There always seems to be new Acts and Amendments which more often than not means more compliance issues for employers.

Employing staff will always have its challenges whether it's the recruitment phase, dealing with employment relationship problems or performance issues.

Employment Agreements

Employment agreements for new staff starting on or after 1 October 2000 must have a written individual employment agreement or be covered by an applicable collective employment agreement.



Agreements must be in writing and must contain a number of specific requirements. The Employment Authority or Employment Court can impose penalties of up to \$5000 per breach of the Employment Relations Act 2000 and its Amendment of 2004.

Personal Grievances

Personal grievances and employment relationship problems are best dealt with at an early stage and often a low key approach is best. Many employers experience personal grievances and they need to be managed from the outset otherwise you end up experiencing litigation with most of the costs falling on the employer.

Employment Disputes

Employment disputes are sometimes confused with personal grievances. A dispute is normally associated with an interpretation of the contractual terms of the employment agreement but can involve other issues from time to time.

The process to resolve such disputes is often not too different to the same process that sees personal grievances resolved.

Discussions with the parties or perhaps mediation may resolve the issue and if there is still a problem the matter may end up in the Employment Relations Authority or Court.

Disciplinary and Behavioural Issues

Discipline and behaviour of employees should be based on standards set by you that fall within the bounds of what is lawfully and socially acceptable. Disciplinary action should be regarded as a method of improving behaviour and performance and it is often the last resort following discussions or counselling.

Many personal grievances are a direct result of poor procedure during a warning or termination process.

Human Resources

Many business people find they just don't have the time to deal with all their human resource matters and are not big enough to employ a full time practitioner. Payroll, performance appraisals and position descriptions are good examples.

Health and Safety

Like employment law, health and safety is fast becoming a significant issue for employers. Having a good health and safety programme in your business can improve productivity and in some cases reduce your ACC levies.

The IRD; Umpiring its Own Game?

Being investigated by the IRD is an unfortunate likelihood for any business. If the IRD proposes an adjustment that a taxpayer disagrees with the 'disputes process' is often the final and only option. The disputes process consists of legislated stages that are designed to produce a 'cards on the table' approach, as follows. The IRD will issue a written Notice of Proposed Adjustment ("NOPA"), outlining its view. Within two months, the taxpayer must issue a Notice of Response ("NOR"), which outlines the taxpayer's position. If a NOR is not issued within two months the taxpayer is deemed to have accepted the IRD's proposed adjustment.



In a recent dispute, the IRD rejected a taxpayer's NOR based on the view of one of its investigators. The investigator "seriously doubted" that the NOR was a valid notice and after discussing the matter with other officers, rejected it. In the IRD's view the NOR did not meet legislative requirements. Based on this rejection, the taxpayer was deemed to have accepted the adjustments.

The taxpayer responded by applying for a judicial review of the IRD's decision. The matter was recently heard before the High Court. The Court not only discussed whether the taxpayer's NOR was valid, but also whether the IRD even had the power to deem the NOR to be invalid.

The Court concluded that the IRD does not have legislative authority to determine if a NOR complies with the legislation, and then to reject it

on the basis that it does not comply. The Court also noted that it would be unusual for the IRD to have such a power when it was itself a party in the disputes process. Whether or not the NOR was valid was a question of statutory interpretation for the Courts. The Court stated that the IRD would need to apply to the Court in order to challenge the validity of a taxpayer's NOR.

The Court reviewed the requirements for a valid NOR and concluded that the taxpayer's NOR was, in fact, valid, despite it being extremely brief. The Court did not appear to consider the NOR's brevity to be an issue. It took a practical approach in assessing the merits of the NOR. The Court noted that the taxpayer's NOR did not have to comprise an arguable case against what the IRD was asserting. The Court stated that a taxpayer is entitled to challenge the IRD's proposed reassessment even if the taxpayer does not have a substantial case. Furthermore, in some cases a taxpayer might not have any more information to put forward in a NOR, however the taxpayer could still have a genuine position to be advanced through the disputes process.

The IRD is a large and powerful organisation and taxpayers often feel overwhelmed trying to deal with it on a day to day basis, let alone in the context of a dispute. Due to the IRD's perceived position of strength it can be easy for taxpayers to feel like they are playing against the umpire. The High Court's decision reinforces the proposition that when push comes to shove, the Court will provide an independent interpretation of the law.

Redundancy Payment Rebate

New legislation makes the taxation of redundancy payments fairer to people who are pushed into a higher tax bracket when they receive the lump sum payments.

Redundancy payments are employment income, and it is fair that they are taxed. However, taxing these payments at a higher rate of tax without taking into consideration the recipient's personal tax rates before and after redundancy has led to many cases of over-taxation. When that happens it can come at what is already a very difficult time for most people.

To resolve the problem, and keep complexity and compliance costs to a minimum, the Government has introduced a tax rebate that applies to redundancy payments made on or after 1 December 2006.

Calculation of the rebate is based on the flat rate of six cents per dollar, up to \$60,000 per redundancy. That means, for example, that someone who receives a redundancy payment of \$20,000 is able to claim a \$1200 rebate. Someone who receives a \$60,000 payout can claim a rebate of \$3600.

Because the maximum redundancy payout that qualifies for a rebate is \$60,000, the rebate itself

is capped at \$3600, so someone who receives a payout larger than \$60,000 is eligible for a \$3600 rebate.

The rebate does not apply to a redundancy payment:

- relating to retirement from employment,
- relating to loss of seasonal employment if the loss arises from the normal seasonal work cycle,
- relating to a contract of employment for a fixed term or for the duration of a project,
- relating to employment for a period following notice of termination of employment,
- paid to a director who is an associated shareholder of a company by the company or associate of the company,
- paid to a person by another person associated with the director who is an associated shareholder of a company,
- paid by a person to an employee who has been paid a redundancy payment by another person associated with the director who is an associated shareholder of a company.

The process for obtaining a rebate is straightforward. Recipients are able to claim a rebate immediately after receiving their redundancy payout by completing an IRD form.

Associated Persons Update

Throughout the Income Tax Act, situations arise that require consideration of whether or not two persons are associated. The definition of 'associated persons' differs depending on what part of the legislation is being considered. In March 2007 the Government issued a discussion document seeking feedback on proposed changes to the associated persons rules. The document received considerable negative exposure and feedback because of its proposed changes to the definition of associated persons for land transactions. The Government received 867 submissions, with the majority focusing on the land related aspects of the changes.

Draft legislation introduced in July 2008 builds on the discussion document and looks to introduce some of the proposals in the discussion document as law. The draft legislation proposes one general definition for associated persons, which will have universal application across the Income Tax Act, accompanied by a number of qualifications and exceptions for specific

circumstances. Consolidating the definitions is aimed at simplifying the law and minimising the opportunity to circumvent the rules through complicated structures.

A number of the unwelcome proposals in the discussion document that related to land have been included in the draft legislation. The friction arises because the current associated persons rules allow a person in the business of dealing in or developing land, or erecting buildings on land, to hold investment property in another entity and not have that property 'tainted'. If a property is tainted it means that it is likely to be taxable on sale if it is sold within ten years of acquisition. The new proposals introduce associated persons definitions that can effectively render land, which is held as



investment property, to be taxable on sale. Taxing land that is in substance held as investment property, such as a rental property, is in effect levying a capital gains tax.

In the context of association, for the purposes of land, key changes include:

- **Trusts** – under the current associated persons rules two trusts cannot be associated. Under the proposed rules, two trusts with the same settlor (or same protector) will be associated, and the settlor of a trust will also be associated with that trust.
- **‘Daisy-chaining’** – currently, in a situation with 3 parties, A and C may not be associated, even though A is associated with B, and B is associated with C. A limited tripartite test will now be introduced where two people will be associated (A and C), if they are both associated with a common third party (B), (i.e. daisy-chaining).
- **Aggregation** – when determining if two companies are associated, shares held by a shareholder in a company will also be deemed to be held by any other person that is associated to that shareholder.

A common current structure involves a development company’s shares being held by a Trust (settled by ‘Mum or Dad’), and for a rental company’s shares to be held by ‘Mum and Dad’. Under the existing rules the two companies are not associated as the same persons (the individuals versus the Trust) do not hold 50% or more of the shares in both companies. Under the proposed rules the individuals as settlors would be associated with the Trust, and therefore the shares held by the Trust would be deemed to also be held by the individuals, resulting in both companies being associated. Due to the association, land purchased by the rental company after the rules come into force is likely to be taxable on sale if it is sold within 10 years of acquisition.

If enacted, these changes will take effect from the 2009 – 2010 income year, although the provisions relating to land will only apply to land purchased, or improved (in the case of builders) from 1 April 2009. Existing holdings of land are therefore unaffected. In isolation, these changes may appear minor. However, their combined effect will have major implications for many taxpayers as illustrated in the example above.

Snippets

Personal Tax Rate Change

A significant announcement made during this year’s budget was the alteration to personal income tax rates.

The changes will be introduced progressively from the current income tax year through to the 2011 – 2012 year. Both the rates of tax and the thresholds to which the rates apply, will change.

The changes are as follows:

Date applicable	Threshold (\$)	Rate (%)
Now	0 – 38,000	19.5
	38,001 - 60,000	33
	60,001 +	39
From 01/10/2008	0 - 14,000	12.5
	14,001 - 40,000	21
	40,001 - 70,000	33
	70,001 +	39
From 01/04/2010	0 - 17,500	12.5
	17,501 - 40,000	21
	40,001 - 75,000	33
	75,001 +	39
From 01/04/2011	0 - 20,000	12.5
	20,001 - 42,500	21
	42,501 - 80,000	33
	80,001 +	39

Recognition of Trans-Tasman Dividend Credit



At present, when a New Zealand company distributes its profits by dividend to an investor across the Tasman, tax credits attached to the dividend cannot be used by the investor; as dividend credits arising in Australia and New Zealand are not recognised by the other country.

On 18 July 2008, Dr Cullen announced that the Australian and New Zealand Governments have agreed to consider proposals for the mutual recognition of dividend credits. This decision acknowledges that the current distortion of investment flows between the two countries does not sit well with wider moves towards a Single Economic Market.

The New Zealand Treasury will make a formal submission on mutual recognition to the ‘Australia’s Future Tax System’ review and is anticipated to issue its final report by the end of 2009.

If you have any questions about the newsletter items, please contact us, we are here to help