

NEWSLETTER - JULY 2009

Winners of the New Zealand Employment
Law Award in 2007 and 2008

New Zealand
**Law 2008
Awards**

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HAVE YOUR SAY

The Holidays Act 2003 has been loudly criticised as unworkable and nonsensical. Despite some tinkering, concepts like “relevant daily pay”, “average weekly earnings” and “ordinary working day” still appear to require a doctorate in higher mathematics to calculate.

The Minister of Labour, Kate Wilkinson, has set up a Ministerial Advisory Group consisting of employer and employee representatives to review the Act with a view to:

- 1 Simplifying key concepts;
- 2 considering a week for cash trade in respect of the fourth week of annual leave;
- 3 transference of public holidays to other significant days; and
- 4 casual employees.

The Ministerial Advisory Group is calling for submissions, and any employer who may be impacted by any change, or have something valuable to contribute is invited to do so. We suggest that for employers who operate complicated rosters, this is a good opportunity to make sure that your system of operation is taken into account for holiday purposes.

The particular issues of interest and the details for submissions (which close on 21 August 2009) can be found at www.dol.govt.nz/consultation/holidays-act-review/.

REDUCED HOURS LEADS TO RESIGNATION

Many employers are looking at cutting employees' hours as a way of reducing costs. However, a recent decision by the Employment Relations Authority (ERA) highlights that a unilateral decision by an employer to reduce an employee's hours can amount to constructive dismissal.

In *Bregmen-Lyon v Zhao and Dai Limited* (ERA, Auckland, 2009) the applicant resigned from the respondent's restaurant in September 2008 after 15 months of employment.

The applicant argued that his resignation was not voluntary but as a result of unfair treatment by the company's directors at the time. The applicant said his treatment included:

- 1 Cutting his hours from 55 a week to around 30 without discussing those changes with him.
- 2 Removing him from his role as Front of House Manager without discussing that change with him.
- 3 Issuing him two warnings in writing without telling him of the alleged unsatisfactory conduct, or giving him the opportunity to give an explanation, or having the explanation properly considered before any warnings were issued.

The Authority held that even though the applicant did not have a written employment agreement he had the benefit of an implied term of mutual trust, confidence and fair dealing. It was a breach of that term to change his role and hours and unfairly issue him with warnings. The ERA held that in such circumstances it was reasonably foreseeable that the applicant would resign.

The applicant was awarded:

- 1 \$1,980.00 as compensation for lost wages.
- 2 \$3,000.00 as compensation for distress and injury to feelings.
- 3 \$400.00 towards his costs.
- 4 \$70.00 in reimbursement of his fee for lodging the matter in the ERA.

Many employers looking for ways to cut costs see a reduction in hours as a good alternative to redundancy. The Government has even encouraged this with support for a “*nine day fortnight*”. The point to be taken from this case is that any change must be with the free agreement of the employee or following a fair consultation process.

SICK EMPLOYEES CAUSE HEADACHE FOR EMPLOYERS

An employer is not obliged to hold open a job for a sick employee indefinitely, but in fairness to the employee, the employer must give due consideration to a number of factors before dismissal on the grounds of sickness will be justified. The test has been expressed by the Court as to whether the point has come “*at which an employer can fairly cry halt*”.

RELEVANT FACTS

There are a number of factors that an employer must look at when faced with this situation:

- 1 An employer must refer to the term of the employment agreement, including any provision as to sick leave. Where there are agreed procedures in employment agreements these must be followed.

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- 2 Whether the employee was likely to be employed long term if the employee had not been sick.
- 3 The nature of the employment, for example, whether the employee was in a key position.
- 4 The nature of the illness or injury, how long it has continued and what prospects there are for recovery.
- 5 How long the employee has been employed to date, that is, whether the employee was a long standing and valued employee.

PROCEDURAL FAIRNESS

There are also a number of procedural steps that an employer should take before coming to any decision:

- 1 **Warning:** The employer must give the employee adequate warning that if they are unable to obtain a regular standard of health to do the job, that they may be dismissed. It must be noted, however, that warnings are sometimes inappropriate given the condition of the employee.
- 2 **Consultation and Communication:** There is an obligation of trust and confidence with an employee (especially a senior employee) to communicate the employer's intentions and to discuss these by way of consultation.
- 3 **Right to be Heard:** Where there is concern about an employee's state of health, there is a right for that employee to be heard on the issue.
- 4 **Independent Medical Report:** The employer should consider obtaining a report from the appropriate independent medical specialist to ascertain the condition of the employee.

OPTIONS

Dismissal should not be the first option for an employer when faced with these circumstances.

- 1 **Rehabilitation/Reskilling:** If the employee's disability only prevents them from performing part of their work, it may be appropriate to consider retraining or rehabilitating that employee.
- 2 **Redeployment:** Again, if there are other jobs which the employee can do (without rehabilitation and/or reskilling) then that employee should be considered for redeployment.

EMPLOYER FOUND LIABLE FOR INTERVIEW BREACH

A recent decision by the Employment Relations Authority (ERA) highlights the need for employers to take care when advertising a position internally.

In *Smith v Accident Compensation Corporation* (ERA, Christchurch, July 2009), the employee alleged he was disadvantaged by the unjustifiable action of his employer in respect to his application for the internally advertised vacancy for the role of Quality Assurance Manager within the organisation.

The employee said he applied for the position within the required deadline of 26 September 2007. Further, the employee said he was telephoned on 5 October 2007 by his employer's internal recruitment consultant, who conducted a telephone interview with him.

In the course of the interview the consultant asked the employee if he would make himself available for a formal interview and psychometric testing the following week. Later that day the consultant again contacted the employee and advised those nominated days were unsuitable and she would contact him on the rescheduled interviewing and testing.

On 17 October 2007 the employee emailed the consultant to ask for an update but received an auto reply advising that the consultant was in Christchurch for two days.

On 19 October 2007 the consultant advised the employee she had been in Christchurch conducting the interviews for the Quality Assurance Manager and that the employee had been unsuccessful. The employee promptly advised the consultant of his intention to instigate personal grievance proceedings over his employer's treatment of his application. The employer firmly resisted the claim stating the consultant had attempted to contact the employee on 15 October 2007. Records properly obtained by the employee clearly indicated this was not the case. The ERA held:

- 1 The employer failed in its obligation under paragraph 8 of the Employment Agreement which outlined the procedures for responding to applicants and dealing with short listed applicants.
- 2 The employee had been unjustifiably disadvantaged by the employer's treatment of him in respect of his application.
- 3 The employee did not contribute to the circumstance giving rise to the grievance.
- 4 The employee was entitled to remedies.

The employee was awarded \$2,500.00 under section 123(1)(c)(i) of the Employment Relations Act 2000. Furthermore, he was awarded the sum of \$2,000.00 as a contribution to his legal costs.

EMPLOYMENT RELATIONS TEAM

If you have any queries in respect of the above, or any other employment law issues, please contact a member of Lane Neave's Employment Relations Team: Glenn Jones, Andrew Shaw, David Caldwell, Amy Shakespeare and Fiona McMillan.