

NEWSLETTER - SEPTEMBER 2009

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

New Zealand
Law 2008 Awards

DIRECTORS AND HOLIDAY PAY / STAFF SUSPENSION

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THE FIFTH ANNUAL NEW ZEALAND LAW AWARDS 2009

The Lane Neave Employment Relations Team has again been nominated for the CCH Employment Law Awards in 2009.

As the past winner of this prestigious award for 2007 and 2008, we appreciated our clients support and look forward to competing again this year.

VOTING CLOSES – TUESDAY 6 OCTOBER 2009

STRICT RULES ON STAFF SUSPENSION

Whether to suspend an employee can be a very difficult decision for an employer to make. There are three key points for an employer to keep in mind:

- 1 Employment agreements should contain a suspension clause.
- 2 An employer should consult with an employee before making a decision to suspend.
- 3 Suspension is only necessary where there is an imminent risk.

Generally suspension is appropriate where:

- 1 There is a risk that the employee's presence in the workplace will hinder an investigation.
- 2 It is required to preserve or prevent intimidation of potential witnesses.
- 3 There are safety issues.
- 4 There is a reasonably held belief that the employee might react poorly to being investigated and compromise the company's security, damage company property or disclose confidential information.

The recent decision of *Cheng v Base Projects Limited* (Employment Relations Authority, Auckland, September 2009) involved a situation where the Employment Relations Authority (Authority) considered a suspension to be unlawful.

On 1 September 2008 an "email war" broke out between the employer and the employee, resulting in the employer telling the employee that she was endangering her employment and told her to "go home and think about your attitude".

The Authority held that the employee was suspended on 1 September 2008 and the actions of the employer were not justified.

The employee's employment agreement made no provision for suspension. However, the Authority pointed out that even without an express contractual provision, suspension may be justified in unusual cases where the employer has a good reason to believe the employees continued presence in the workplace will or may give rise to some other significant issue.

The Authority held that a fair and reasonable employer would have talked first with the employee about the prospect of suspension and the terms on which it was to incur. The employer did not properly identify at the time an issue of sufficient significance that would justify the employee being removed from the workplace while his concerns were being investigated.

Despite the above, the remedy of compensation for distress arising from that disadvantage was reduced by 100 percent because of the employees blame worthy conduct contributing to the situation giving rise to her grievance.

DIRECTORS ORDERED TO PICK UP TAB FOR HOLIDAY PAY

Under the Employment Relations Act 2000 (Act), the director of a company may be held personally liable for unpaid wages and holiday pay. Section 234 of the Act provides that there are some circumstances in which officers, directors or agents of a company can be found personally liable for minimum wages and holiday pay.

DIRECTORS ORDERED TO PICK UP TAB FOR HOLIDAY PAY

This section applies in any case where a labour inspector commences an action in the Employment Relations Authority against a company to recover any money payable by way of minimum wages or holiday pay to an employee of the company.

EMPLOYMENT LAW BRIEFS

DIRECTORS ORDERED TO PICK UP TAB FOR HOLIDAY PAY (Con't)

Circumstances where a director may have to pay for wages or holiday pay claimed by an employee include:

- 1 When the company is in receivership or liquidation; or
- 2 When there are reasonable grounds for believing that the company does not have assets to pay the amount in full.

In the recent decision of *Teremoana v Counties Milk Limited* (Employment Relations Authority, Auckland, February 2009), the Labour Inspector held that the employee was owed \$8,188.60 for holiday pay. Under section 234 of the Act the Labour Inspector sought authorisation from the Authority to bring an action for recovery from the director, Mr Fisher, for the holiday pay that the employer was ordered to pay the employee.

The Authority Member was satisfied that there were reasonable grounds for believing that the company did not have assets to pay the amount in full. The employer's milk delivery business was due to be taken over by the end of the month. Furthermore, there was evidence that the employer had outstanding debts to the supply company, Inland Revenue and a truck rental company.

SECOND EDITION OF WORKPLACE FIRST AID GUIDE PUBLISHED

The Department of Labour has released the revised version of its guide for employers on first aid in the workplace. The guide was last revised in 2001.

The 2009 version of the First Aid for Workplaces is a good practice guide, taking in to account changes in legislation, notably the repeal last year of the Factories and Commercial Premises (First Aid) Regulations 1985.

The 2009 version also outlines the law that applies to the provision of first aid at work, i.e. Regulation 4 of the Health and Safety in Employment Regulations 1995 and the Health and Safety in Employment Act 1992.

This guide can be found at:
www.osh.govt.nz/order/catalogue/pdf/first-aid-2009.pdf

MEAL AND REST BREAKS LAW TO BE AMENDED

The Labour Minister, Kate Wilkinson, has announced that last year's Amendment Bill, in relation to meal and rest breaks, will be clarified.

Previously, there were no statutory requirements for meal and rest breaks, although entitlements were in most individual and collective agreements.

Last year's law change states that from 1 April 2009, employers are to provide employees with paid rest breaks and unpaid meal breaks.

Currently employees are to be provided with the following paid rest and unpaid meal breaks:

- 1 One 10 minute paid rest break if their work period is between two and four hours.
- 2 One 10 minute paid rest break and one unpaid 30 minute meal break if the work period is from four to six hours.
- 3 Two 10 minute paid rest breaks and one 30 minute unpaid meal break if the work period is from six to eight hours.

If an employee works for periods longer than eight hours, these provisions automatically reapply to each succeeding work period.

Ms Wilkinson stated that the current laws are too prescriptive and needed clarifying. Ms Wilkinson will introduce an amendment to increase flexibility around breaks.

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.**