

## NEWSLETTER - DECEMBER 2009

Winners of the New Zealand Employment Law Award  
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## EMPLOYMENT OVER THE CHRISTMAS PERIOD

During the Christmas and New Year period many businesses close down or employees use their annual leave. Accordingly, there is no better time than now to look at the law in regards to closedown periods and annual leave.

## HOLIDAY CLOSURE

Many workplaces close over the Christmas period each year. An employer may implement a closure once a year and can require employees to take annual leave during this period, even if this means an employee may not be fully remunerated.

An employer must give at least 14 days notice of such a close down.

An employer may nominate a date that the close down begins and the date it is to end however, there is no limit as to the length of the closure. Nevertheless the closedown must be “customary” thus employers should avoid extending their closure dates to what it has been in the past without their employees’ agreement.

An employer may also have more than one closure a year however, only with the agreement of its employees.

During this close down period an employee who holds sufficient annual leave to cover for the period should be paid in that respect however, if an employee does not have sufficient annual leave then they can either agree to take their annual leave in advance or the employer can require them to be on annual leave without pay.

If a public holiday falls within this period then the public holiday should not be deducted from an employee’s annual leave, similarly if the employee becomes ill their sick leave should be used rather than their annual leave.

## ANNUAL LEAVE

If a close down period does not occur then normally annual leave is agreed between an employee and employer. Employees are entitled to a minimum 4 weeks paid annual leave a year.

An employer may require an employee to take annual leave on alternative dates to those provided by the employee if they both cannot agree on the timing of annual leave. But it must be noted that there is an inherent obligation on both parties to act in good faith and the employer must give the employee at least 14 days notice.

Likewise if employees fall ill during their annual leave or if there is a public holiday, these days should not be deducted from their annual leave.

## PROPOSAL TO CHANGE DEFINITION OF “SERIOUS HARM”

The Government proposes to change the definition of “*serious harm*” in the Health and Safety in Employment Act 1992. The new definition is to provide clarity and to ensure that employers do not spend an inappropriate amount of time dealing with trivial issues. The change should also assist enforcement agencies and the Department of Labour to focus on the investigation of injuries and the prevention of them in the workplace.

The new definition is to include physical injuries leading to an employee being unable to perform their normal duties for 10 or more calendar days, any permanent injuries, specified events such as electrocution or loss of consciousness, and diagnosed occupational illnesses.

Minister of Labour, Kate Wilkinson, has said that she will introduce the legislation to Parliament in the new year to amend the Health and Safety in Employment Act 1992. Other proposed changes will include providing a levy mechanism so that the Department of Labour can recover costs of enforcing the Hazardous Substances and New Organisms Act 1996 in the workplace; requiring businesses who share a workplace to collaborate to meet their duties under the Health and Safety in Employment Act; and aligning the rules of self incrimination in the Health and Safety in Employment Act 1992 with those in the Evidence Act 2006.

## EMPLOYERS CAN SUE INCOMPETENT EMPLOYEES

A recent decision of the Employment Court has confirmed that employers can seek damages from incompetent employees.

*Masonry Design Solutions Limited v Bettany* involved an employee, Mr. Bettany, who had been employed on a fixed 3 month term as a computer-aided design draughtsperson with a possibility of permanent employment in the future.

# EMPLOYMENT LAW BRIEFS

## EMPLOYERS CAN SUE INCOMPETENT EMPLOYEES

(Con't)

Unfortunately Mr. Bettany did not meet his employer's standards as he arrived to work late on several occasions and was found to use the company's email and internet services for his own personal use. Mr Bettany was summarily dismissed the week before his fixed term agreement was to expire.

Mr. Bettany was found to be wrongfully dismissed by the Employment Relations Authority yet was only awarded a small amount in compensation.

On appeal the Employment Court held that there had been a fair and reasonable dismissal as Mr. Bettany breached his contractual obligations in that he did not devote his time, attention and abilities to his duties as he was much too concerned with what he was doing outside of his employment.

Furthermore, the employer had discovered that the work Mr. Bettany had completed was of such poor quality that it had to be redone. Accordingly, the employer counterclaimed for \$18,000 worth of damages to correct Mr. Bettany's errors. The Employment Court found in the employer's favour finding that the majority of these mistakes were caused by his *"carelessness, inattention to detail and otherwise for reasons that amounted to breaches by Mr. Bettany of his contractual requirements."*

It was concluded that Mr. Bettany's work was so inaccurate that it was reasonable and foreseeable for Mr. Bettany to realize that his work would have to be redone and at the cost of the employer. Therefore the Employment Court ordered Mr. Bettany to reimburse his employer \$12,000 (the equivalent to 100 hours work at \$120 an hour.)

The case of *Auckland Regional Council v Tilialo* reached a similar conclusion, finding that an employee had failed to use proper skill and diligence in the management and use of funds, abused delegated authority, failing to follow understood procedures and failing to disclose a material conflict of interest. Once again the employee was ordered to pay his employer damages for investigation and legal fees, general damages for loss of executive time, inconvenience and interruption to business and further costs for punishment and deterrence.

These cases show that not only can employees seek awards against their employers but so to can employers against their employees. Therefore when an employee fails to perform their duties with competence, this can be held to be a breach of their employment agreement.

Our aim is to assist our clients to be proactive in ensuring statutory compliance and best risk management in the area of employment law. This publication is, however, necessarily brief and general in nature. You should therefore seek professional advice before taking any action in relation to the matters dealt with in this publication.

## EMPLOYMENT LAW REVIEW

Labour Minister Kate Wilkinson has announced that there will be a review of employment laws in relation to the continuity of employment provisions. As provided by the Employment Relations Act 2000, these laws must be reviewed every three years. They were last amended in 2006.

This review will be a chance for employers and employees to offer their feedback on the laws and their operation.

The laws in question, called the continuity of employment provisions, affect industries where work is often contracted such as cleaning, food and laundry services, and changes to these employment agreements can create restructuring and redundancy situations.

The review will also look at situations when a business is restructuring and employee protection provisions are required to be added to employment agreements.

A discussion document of the review is expected to be released in February 2010 with submissions closing at the end of March.

## 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.**