

## NEWSLETTER - MARCH 2010

Winners of the New Zealand Employment Law Award in 2007 and 2008 and 2009



### IN THIS ISSUE:

- Introducing Polly Leeming
- Lane Neave Workshops – “The Big 6”
- Employment Law Review
- Two Bills Introduced into Parliament
- Costs Awards in Employment Disputes

### INTRODUCING POLLY LEEMING

Lane Neave welcomes Polly Leeming to its Employment Law Team. Polly comes into the team as a Senior Solicitor to assist in all areas of employment law including ACC.

### LANE NEAVE WORKSHOPS – “THE BIG 6”

Once again, Lane Neave is hosting practical based employment law workshops for employers, this year discussing the Government’s just released “Big 6”. These workshops will be held on:

- 1 Wednesday 5 May 2010;
- 2 Wednesday 12 May 2010;
- 3 Thursday 20 May 2010; and
- 4 Thursday 27 May 2010.

These workshops will be held in Lane Neave’s Boardroom and will commence at 5.30 pm.

The “Big 6” topics include:

- 1 Health and Safety;
- 2 Recruiting;
- 3 Pay;
- 4 Holidays and leave;
- 5 Performance management; and
- 6 Ending employment relationships.

Invites for these workshops will be sent by email soon.

### EMPLOYMENT LAW REVIEW

As many of you will be aware, the National Government are taking 2010 to review our current personal grievance laws.

The objectives of the Review are to consider whether the personal grievance system:

- 1 Strikes a fair balance between employer flexibility and employee protection;
- 2 Does not impose unnecessary costs or obligations for employers or employees;
- 3 Supports improvements in workplace productivity;
- 4 Is efficient and effective;
- 5 Has met its objectives (as set out in the Employment Relations Act 2000);

6 Where improvements are required, the nature and extent of the issues involved; and

7 The steps that might be taken to address these (including, potentially whether any amendments to the legislation are necessary or desirable).

The discussion document, terms of reference for the Review and Review response form can be found at [www.dol.govt.nz/consultation/personal-grievance/](http://www.dol.govt.nz/consultation/personal-grievance/).

### TWO BILLS INTRODUCED INTO PARLIAMENT

February 2010 saw the introduction of two Bills into Parliament that relate to employment law.

The first Bill, the Minimum Wage (Mitigation of Youth Unemployment) Amendment Bill is intended to restore the capacity for the Governor-General to institute differing levels of minimum wages for youth and other workers in order to deal with the growing problem of unemployment.

It is reported that from the date of the abolition of youth rates up to the December 2009 quarter, almost 20,000 young people have lost their jobs. At this point, the unemployment rate amongst minority groups is particularly high, including a rate of 38.7% amongst Maori youth.

The Employment Relations (Workers Secret Ballot For Strikes) Amendment Bill is intended to amend the Employment Relations Act 2000 to require unions to hold a secret ballot vote of their members to approve a strike before undertaking any strike action. This Bill is to promote union members actively deciding whether a strike is to go ahead.

### COSTS AWARDS IN EMPLOYMENT DISPUTES

It is no secret that the cost of taking or defending employment proceedings in either the Employment Relations Authority or the Employment Court can be an expensive process. It is therefore important that a successful party can recover at least some of the costs incurred as a result of the litigation. Both the Authority and the Court have wide discretionary powers under the Employment Relations Act 2000 to award costs to any party. The Act states “*such costs and expenses (including expenses of witnesses) as the Court [or Authority] thinks reasonable*”.

The question many clients ask is, how much is reasonable? This is a difficult question to answer. The Authority and the Employment Court both take different approaches when awarding costs.

In the Authority an award of costs is more modest than those awarded by the Court. The Authority’s starting point for costs is generally a notional daily tariff.

# EMPLOYMENT LAW BRIEFS

## **COSTS AWARDS IN EMPLOYMENT DISPUTES** (Con't)

However, what exactly that tariff equates to is not certain. The Court has upheld ranges for the notional daily tariff starting at \$2,000.00 per day to \$3,000.00 per day.

For example, \$3,000.00 was an agreed starting point by the Court in *Johnson v Gilligan Business School Ltd (2009)* where the Court upheld an award made by the Authority of \$3,500.00 for a one day investigation meeting. The Court has also “*approved a range of up to \$3,000.00 per day*” (*Sefo v Sealord Shellfish Ltd (2008)*).

What is important here is that any notional tariff is simply a starting point. The rate will be adjusted either up or down depending on the circumstances of each case. For example, costs may be adjusted upwards to reflect the complexity of the matter, preparation required, degree of success, manner in which the case was conducted and the remedies sought. Costs may also be adjusted downwards to reflect the means of a party, conduct of a party, degree of success and breaches of process.

An award of costs in the Employment Court is not only what the Court thinks is reasonable as equity and good conscience may also be considered. The guideline emerging from cases through the Court is that an award of costs should equate to a reasonable proportion of costs actually and reasonably incurred by the successful party. The Courts will assess firstly whether the costs were actually and reasonably incurred and, secondly, what a reasonable level of contribution is.

Generally, two-thirds of reasonable costs is a starting point. The Court must then consider whether there are any factors which would justify this starting point being departed from. A general rule of thumb is that, for each day of hearing, two days preparation can be considered reasonable, with three being reasonable in complex cases. A Full Court Hearing will also require more preparation time. If both parties have had an element of success, then costs may simply lie where they fall. If one party withdraws proceedings, costs may also be awarded to compensate for the work the other party has already done.

As costs are discretionary, a successful outcome is not an automatic right to an award of costs. Evidence of time and effort spent is required, which is usually provided to the Court by way of a memorandum. The memorandum will provide the Court with relevant matters such as the work undertaken, the actual time charged, expert and disbursement costs (although office disbursements such as tolls and postage are unlikely to be recovered), any write-offs, travel and accommodation expenses for witnesses and complexity. A successful party must also be aware that preparation of the memorandum will also incur legal fees for the client, which is unlikely to be recoverable.

It is possible for a successful party to be awarded full solicitor/client

costs. This again relates to costs that are reasonably incurred rather than the amount payable by the successful party. Such awards may be awarded where there was no chance of the unsuccessful party being successful, and frivolous or vexatious claims. Conduct is relevant when assessing these costs.

A “without prejudice” offer is where an offer of settlement is made to one party on the basis that evidence of the offer is not to be given. Adding “save as to costs” or “except as to costs” after the “without prejudice” heading means that, if later on the parties settle for an equivalent or lesser settlement, then that evidence may be used with respect to cost issues. Such an offer is usually referred to as a “*Calderbank offer*”.

Where a party has turned down an offer that is clearly signaled as a Calderbank offer and that party later receives an award less than that tabled in the previous offer, that successful party may not be awarded costs. In fact, in this situation the successful party could be ordered to pay costs to the unsuccessful party as it could be considered that the unsuccessful party has incurred costs unnecessarily because the previous offer should have been accepted.

In conclusion, an award of costs can never be guaranteed nor can the amount awarded. So many subjective elements come into the equation. There is always a risk that the unsuccessful party will have an award of costs made against them, with the risk becoming more certain in frivolous or vexatious claims.

## **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, Fiona McMillan and Polly Leeming.**