

NEWSLETTER - MAY 2010

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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”. There are two workshops yet to be held:

- 1 Thursday 20 May 2010; and
- 2 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.

If you wish to attend one of the above workshops please contact Lynn Hawkey at lynn.hawkey@laneneave.co.nz.

PROPOSED CHANGES TO MEAL AND REST BREAK PROVISIONS

Introduced in October 2009, the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill 2009 proposes to amend the current legislative requirement for two 10-minute rest breaks and one 30 minute meal break during an average working day. The Amendment proposes to relax rest and meal break provisions for employees shifting the focus from prescriptive times to flexible arrangements to encourage employers and employees to negotiate in good faith regarding how employees shall take rest breaks and meal breaks.

In general, the Amendment will require an employer to provide an employee with rest breaks and meal breaks that provide the employee with a reasonable opportunity for rest and refreshment and to attend to personal matters during the employee’s work period. The duration of the employee’s work period must be considered. Any restrictions on

rest and meal breaks must be reasonable and necessary having regard to the nature of the employee’s work and certain matters.

The Amendment provides for either meal and rest breaks or compensatory measures. This provides flexibility for workplaces to time rest breaks and meal breaks around service or production continuity as far as *reasonable* with the employer being able to determine the arrangement if agreement cannot be reached between the employer and employee. The Amendment also covers situations where it is necessary for rest and meal breaks to have some restrictions on them because of the nature of the work being undertaken.

Compensatory measures in lieu of meal and rest breaks are possible. For example, the employer and employee may negotiate later start/earlier finishing times or time off in lieu. Compensatory measures will be defined as a measure that is designed to compensate an employee for a failure to provide rest breaks/meal breaks.

If the employee is provided with compensatory measures, then the employer will not be required to provide rest and meal breaks. However, the employer will need to have regard to the nature of the work performed by the employee and whether the employer can reasonably provide the employee with rest breaks and meal breaks.

If agreement cannot be reached between the employee and employer as to when meal and rest breaks should be taken, or the duration of those breaks, the employee may specify reasonable times and durations that enable the employer to maintain continuity of service or production.

With one person killed each week and 6,000 injured each year in the workplace, the Amendment will not come without complications and potential dangers for employers, especially working environments where proper rest and meal breaks are essential. With the Amendment enabling employers to decide whether the employee may have a rest and meal break, how long it will be and when, an element of uncertainty is created, especially around the test of reasonableness as nobody knows what this will mean. Employers will need to be careful the Amendment does not create further health and safety risks.

PRIVACY LAW GETTING IN THE WAY OF EMPLOYMENT LAW?

A recent case note by the Privacy Commission has cast a cloud on how employers investigate bullying and harassment claims.

An employee informed the Privacy Commission that she had been the victim of bullying by colleagues. Her employer had held a meeting with her to discuss her allegations of bullying. The meeting was recorded, and a verbatim transcript produced. The employer subsequently

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PRIVACY LAW GETTING IN THE WAY OF EMPLOYMENT LAW? (Con't)

provided a full copy of the transcript to the alleged bully. The employee considered this to be an interference with her privacy.

The employer acknowledged that it had given the full transcript to the alleged bully, but believed it had a proper basis to do so.

The Commission held that the employer had a proper basis to provide the allegations and associated details about the bullying to the alleged bully in order to meet the requirements of natural justice. However, there was a considerable amount of other personal information about the woman in the transcript which did not directly relate to those allegations. There was, for example, information about how the alleged bullying had affected the woman's mental and physical health.

The Commission was satisfied that the employee had been aware that the meeting was being recorded, and that her allegations of bullying would subsequently be put to the alleged bully for comment. However, the Commission held that she had not authorised the release of the full transcript.

The Commission held that there was a difference between telling the woman that the allegations she was making would be put to the alleged bully for comment, and subsequently giving the alleged bully a verbatim transcript of the meeting. The Commission considered the employer needed to get an explicit authorisation from the woman to the disclosure of the transcript.

This matter was resolved by the employer amending its policies in relation to the release of transcripts.

The above decision does have practical implications for employers when investigating a bullying or harassment claim. As explained above, one of the requirements of natural justice is for an allegation to be put to the accused.

We would suggest that in future employers obtain authorization from the victim to provide the full transcript of a meeting. If not possible, you do not provide a verbatim transcript to an accused. Rather, a summary of the allegations is drafted and submitted to the accused once the victim has approved the contents.

DRUGS AND ALCOHOL IN THE WORKPLACE

Employers wishing to insert drug and alcohol testing clauses in employment agreements must be cautious when including such clauses as there is fine balance between workplace obligations and an employee's own rights under the Privacy and Human Rights legislation.

Health and safety is an important consideration, especially given that

employers have statutory obligations. However, not all workplaces are considered "safety sensitive" environments which can also create complications for the employer.

An employer cannot dismiss every person who has an alcohol or drug problem. An employer therefore has to manage the situation in such a way that the rights of the employee with a drug or alcohol problem and the rights of other employees are weighed fairly and reasonably.

This is not always easy to do and, as a result, there is good reason for the employer to implement a drug and alcohol policy to assist the employee and in employer to act fairly and reasonably. Support with an employees rehabilitation will also be seen as important. Below is an article by Drugscene who provide drug and alcohol courses for employers.

DRUGSCENE

Drugscene offers a training course to help employers understand the risks posed by drugs and alcohol in the workplace. Training is provided by a former Detective Sergeant with more than 20 years experience in the drug field and is a recognised expert in this area.

Drug Scene holds one-day courses which feature an in-depth look at how drug dealers operate in a workplace as well as comprehensive coverage of Methamphetamine (P), signs of drug use, approaching a worker under the influence and information about the legal requirements of drug testing and OSH legislation in relation to drugs and alcohol.

The goal is to help to understand the risks associated with drugs and alcohol in a workplace and provide the employer with the knowledge and skills to effectively reduce those risks. Should you be interested in attending this course please contact Cam Stokes on 021 351 486 or email cam@drugscene.co.nz.

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, Fiona McMillan and Polly Leeming.**