MACKINNON & ASSOCIATES

Employment@Work

ISSUE NO. 6 | JUNE 07

Preparing for a longer holiday?

We start with a quick update on annual leave.

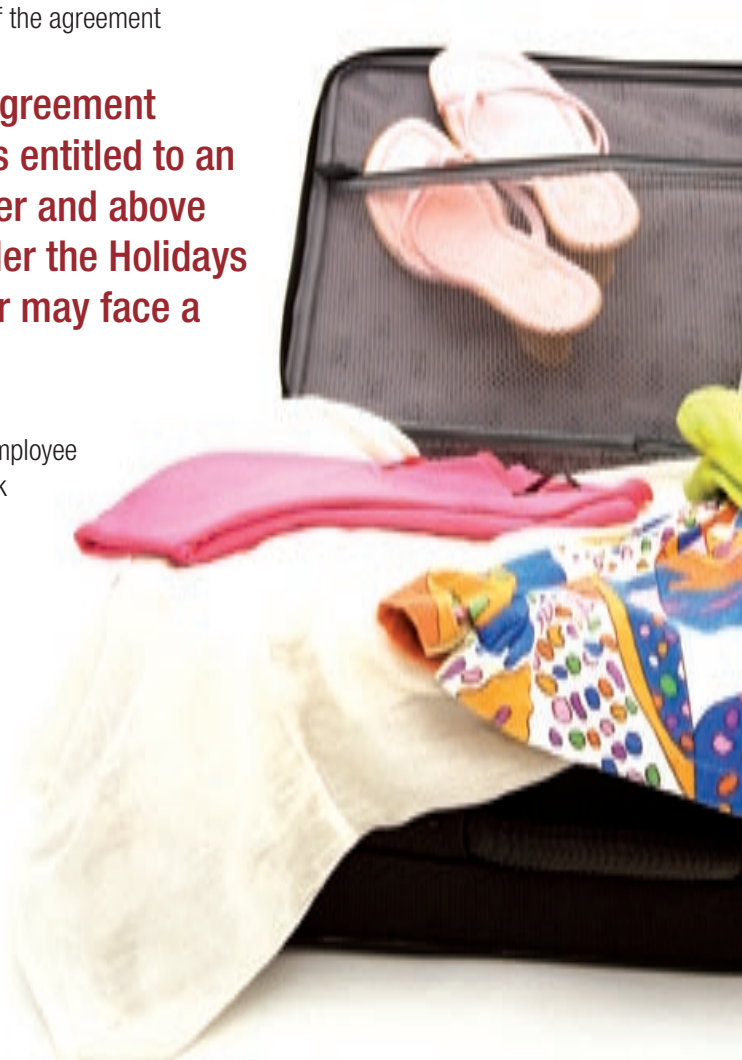
The introduction of a compulsory fourth week of annual leave took effect from 1 April 2007. However, employers should remember, there is no requirement to automatically introduce the fourth week of leave to current staff from 1 April. Rather, current employees qualify for the fourth week on the next anniversary of their employment **after** 1 April 2007.

So, for example, if Sally commenced work on 12 July 2003, she will receive her fourth week of leave from 12 July 2007.

For all staff who commence employment after 1 April 2007, they are entitled to annual leave accruals at 8% of gross earnings. Their actual entitlement to take the fourth week of leave will then apply from their first anniversary date.

As for employees who already were receiving a fourth week of leave, do they now qualify for a fifth week? The answer depends entirely on the wording of their employment agreement. If the agreement simply provides that an employee is entitled to a fourth week of leave, or words to that effect, then the fact that 4 weeks is now the statutory obligation will not lift the employees' entitlement to five weeks. However, if the employment agreement states the employee is entitled to an "extra week", over and above their entitlements under the Holidays Act, then the employer may face a five week liability. If in doubt about your obligations, we suggest you get advice.

...if the employment agreement states the employee is entitled to an "additional week", over and above their entitlements under the Holidays Act, then the employer may face a five week liability.



IN THIS ISSUE...

But are you really sick?

Employers occasionally complain that they have an employee who they are sure is suffering from "Mondayitis" but "it's too hard to prove it". As a recent case in the Employment Court shows, conducting a closer investigation into "sickies" may be worthwhile.

The case in question involved a Mr Griffith, who had been employed by Sunbeam Corporation for many years. Sunbeam was aware that Mr Griffith was working on a private building project in his own time. This posed no problem until one *"beautifully fine [Palmerston North] day"* Mr Griffith phoned in sick, leaving a message saying that he *"would not be any use to anyone"*. Normally that would be the end of the matter.

However, a colleague of Mr Griffith told his managers that he'd been told by Mr Griffith that he needed *"three good days to get the building roof closed in"*.

Two senior managers then decided to pay Mr Griffith's building site a visit. When they did so, Mr Griffith was found on site, dressed in work clothes, including a tool belt. He was observed banging in pieces of metal, marking boards and providing instructions to those on site. In short, he seemed anything but sick!!

Not surprisingly, Sunbeam commenced a disciplinary process and sought Mr Griffith's explanation.

Mr Griffith claimed that he'd been sick when he phoned in but, with the help of medication, his migraine had gone.

As a result, he'd popped over to the building site for a short while to help out and was then planning on returning home to rest. Sunbeam didn't accept those explanations and Mr Griffith was ultimately dismissed for serious misconduct.

When considering Mr Griffith's claim, the Employment Court held that:

> *"…in most instances the employer must trust the employee to exercise the right to take sick leave honestly because it is impractical to do otherwise. It may also be said that, in general, abuse of the right to paid sick leave will be serious because it involves obtaining payment by a false pretence or, at least, attempting to do so."*

In this case, the Court held that Mr Griffith had breached the trust and confidence associated with taking sick leave. It held that there was also an aggravating factor in that Mr Griffith had engaged in other work from which he would *"logically benefit"*. As a result, the Court upheld the dismissal.

It also didn't help Mr Griffith's case that during the disciplinary process, he claimed he'd been to the doctor first thing. He produced a medical certificate to Sunbeam, which he claimed related to his morning appointment. However, after further investigation, it emerged that Mr Griffith had phoned his doctor as soon as Sunbeam had found him working and had visited him in the afternoon. His earlier explanation was entirely false!

This decision should provide some comfort to employers. The Court made it clear that abuse of sick leave will be viewed very seriously and that employees engaging in such conduct are unlikely to receive much sympathy from the courts. However, in reality, getting the evidence is not easy and employers have to be willing to go to some lengths to prove wrongdoing.

Mr Griffith claimed that he'd been sick when he phoned in but, with the help of medication, his migraine had gone.

Go home, stay home!

"Go Home, Stay Home" is one of those enduring games kids have played for decades. The idea of the game is refreshingly simple; tag your opponents, and send them to home base where they stay until they are rescued.

"Go Home, Stay Home" has long had an equivalent in an employment relationship. Employers who suspect an employee of wrong doing often want to suspend that employee by sending them home, until the employer can complete its investigation and the employee can explain their actions.

While suspending an employee in circumstances such as this sounds like common sense, it is, in fact, an act fraught with legal complications.

The right to suspend

Generally speaking, an employee should not be suspended in the absence of a contractual right to do so. Accordingly, individual and collective employment agreements should always be drafted with an express right to suspend. If that right is not included, a suspension may be unjustified.

Having said that, there are circumstances where suspension may be appropriate, even in the absence of a contractual right. For example, if an employee remaining at work might pose an unnecessary risk to the health and safety of other employees, the right to suspend that employee would almost certainly be implied into the employment agreement.

However, employers should not restrict themselves to these extreme circumstances. It is far wiser to have a contractual ability to suspend.

To pay or not to pay...

Suspension generally occurs when an employer strongly suspects that the particular employee may have engaged in serious wrongdoing. Common examples include allegations of theft, assault, fraud or internet/email abuse. In these circumstances, it often leaves a sour taste in the employer's mouth to continue having to pay the employee while they investigate further. However, a suspension should normally be on full pay. At this stage in the process, misconduct has not been established, and an open mind must be maintained.

Again, however, a well drafted suspension clause can provide an employer with important additional protection. Such a clause should allow for some suspensions to eventually move on to a *"without pay"* basis. This should usually arise in circumstances where the suspension has become prolonged through no fault of the employer.

This might be where the employee is unavailable (perhaps because they face criminal charges or perhaps for reasons of alleged stress) in which case the employer would not want to have the suspension continue on pay during this time.

If the contract allows it, can I send the "suspect" employee straight home?

An employer cannot simply wave a suspension clause in an employee's face with one hand, while holding the door open with the other. Recent case law has emphasised that an employer should give the employee the opportunity to comment on the "proposal" to suspend before it is implemented. The employer must then consider any views put forward by the employee before a final decision is made.

In our experience, this step is often overlooked by employers. Many assume, (perhaps not surprisingly), that if they have a contractual right to suspend, and if they genuinely suspect serious wrong doing, the last thing they should need to do is ask an employee for their opinion as to whether a suspension is necessary. However, suspension is a significant decision and the Courts expect consultation to occur wherever possible.

Any alarm bells ringing?

Suspending an employee is not as simple as "go home, stay home". Rather, it is an area which requires careful drafting in the employment agreement and where a fair and well planned process is vital.

The ability to communicate during collective bargaining

We all know the old adage that 'the pen is mightier than the sword'. Good communication can sway opinion, influence emotion, drive change and end disputes.

For these reasons, the issue of communication during bargaining is often contentious as parties jostle to maintain influence. Employers and unions alike want to ensure that their own message is conveyed to staff without any "spin".

The need to communicate without "spin" is precisely what motivated the employer's actions in Christchurch City Council v Southern Local Government Officers Union. The Council sent a series of messages to union members which attempted to justify its approach to bargaining. The Union argued this was unlawful under Section 32 of the Employment Relations Act. The result of that case was that the Employment Court effectively imposed a blanket ban on the ability of employers to communicate with any union members during bargaining (and potentially beforehand). The Court concluded:

> *"…that neither party may, without agreement otherwise, correspond or communicate about the bargaining with persons for whom an authorised representative is acting".*

Court of Appeal judgment

Not surprisingly, the case was appealed to the Court of Appeal. Although the Court of Appeal found the communications breached the Act, it held that the Employment Relations Act does not impose a complete ban on communications relating to bargaining. It held that the parties to collective bargaining are able to:

> *"…communicate statements of fact or opinion, reasonably held, about an employer's business or a union's affairs (including in relation to the bargaining) to persons for whom an authorized representative is acting…"*

The Court said what employers could not do is "negotiate" with union members, nor could its communications undermine the bargaining or the authority of the union itself.

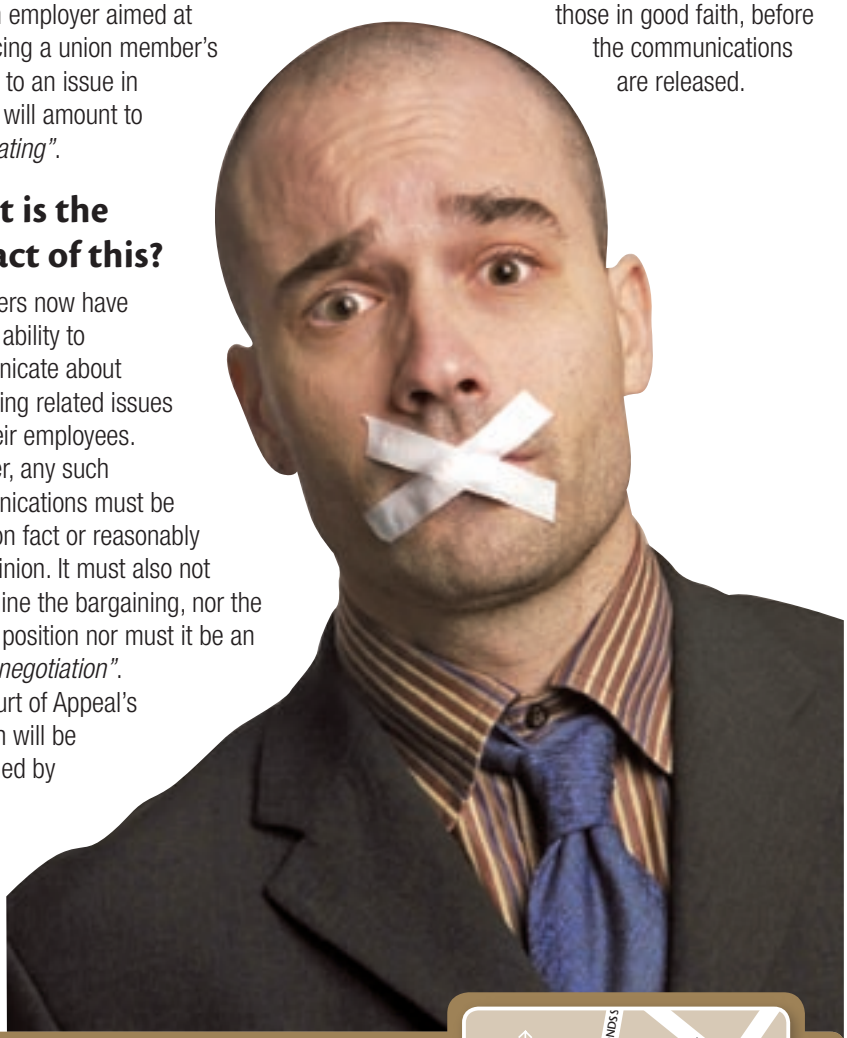
Unfortunately though, little guidance was provided as to when a communication from an employer aimed at influencing a union member's attitude to an issue in dispute will amount to *"negotiating"*.

What is the impact of this?

Employers now have greater ability to communicate about bargaining related issues with their employees. However, any such communications must be based on fact or reasonably held opinion. It must also not undermine the bargaining, nor the union's position nor must it be an act of *"negotiation"*.

The Court of Appeal's decision will be welcomed by many employers. However, it still leaves a lot of uncertainty and more disputes about the lawfulness of communications seems inevitable.

The best practice is to seek agreement about how and when communications will occur. Ideally that agreement should be included in the bargaining protocols, agreed before the bargaining occurs. If no such arrangement exists, employers will reduce their risks significantly by obtaining comments from the union on any proposed communications, and considering those in good faith, before the communications are released.



Mackinnon & Associates
Employment Law & Human Resource Specialists

For all initial enquiries contact us at:
Mackinnon & Associates PO Box 8729, Symonds St, Auckland
T | 64 (9) 638 5820 F | 64 (9) 638-5825