EMPLOYMENT, HEALTH,
EDUCATION & SPORTS LAW

# Employment at work

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# Wishing You A Very Merry Christmas

## It's hard to believe that this tumultuous and rather manic year is drawing to a close.

For the team at Swarbrick Beck Mackinnon, 2009 has been an extremely busy and ultimately very successful year. We've built on the successes of our 2008 merger and we've well and truly established ourselves as a leading market force in employment law.

We received independent recognition by being named as one of the top 3 employment law firms in the New Zealand Law Awards and we've once again been ranked among the top employment law firms in the country in a variety of international publications including Chambers Global and the Asia-Pacific Legal 500.

We're very aware that 2009 has been a tough year for many of our clients. Our goal has been to support you by providing quick, pragmatic, cost effective advice. We hope we've delivered.

We continue to work with a great group of clients and we'd like to thank you all for your support throughout 2009. We hope you have a wonderful Christmas with your family and friends and look forward to working with you again in 2010.

# What's The Government

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The Minister of Labour, Kate Wilkinson, recently addressed the Auckland Employment Law Committee on the approach the Government was taking to employment law.

The Minister stated that flexibility in employment law was crucial. The focus of the Government was to create a flexible employment framework that was fair to both parties. The Minister said she was open to lobbying about the changes required to employment laws, but she needed to know specifically what was not working and suggestions on how it could be fixed. The Minister was keen to avoid over-regulation as this was not conducive to creating a flexible framework.

More specifically, she discussed:

## Health and Safety

Health and Safety in employment is a key focus for the Government over the next year with over one person a week dying as a result of a work place accident. The Minister noted that it was not only a personal tragedy for those involved but had huge cost implications for business and also the wider society. That cost has been approximated at $16 billion.

The Minister had recently met with senior executives from the country's largest companies, the CEO of the Department of Labour and the CEO of ACC to discuss the formation of a Chief Executives' Forum on Health and Safety. The purpose of the proposed forum was to see business and Government work together to reduce injuries and illnesses at work. The Minister was keen to utilise the knowledge of the senior executives as she believed they are perfectly placed to help the Government identify where the health and safety risks are within various industries.

## 90 Day Trial Period

The Minister noted that the 90 day trial period introduced in March appeared to be working successfully. She had received no indication that it was being abused by employers. However, she was keen to receive feedback from employers and employees as to whether the trial period was working.

The Minister was asked whether the trial period would be extended to organisation with more than 20 employees. She indicated that while this move was not yet on the radar she would be open to lobbying on this point.

## Holidays Act Amendments

As many of you will be aware, submissions for amendments to the Holidays Act 2003 closed some time ago. The Minister advised that a total of 240 submissions had been received by the Review Committee and a clear theme had emerged that the Holidays Act needed to be simplified to enable people to readily understand it, particularly the calculation of "relevant daily pay".

The Minister confirmed the amendments would include a provision enabling employees to cash in their fourth week of holiday by agreement and the intention is to word this provision to enable it to be flexible enough to accommodate both employer and employee wishes.

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## Statutory Redundancy

A Bill was introduced in Parliament on 5 August 2009 by Sue Bradford, which provides a statutory right to compensation for redundancy based on a minimum of 4 weeks' remuneration for the first full year of an employee's continuous employment with

# Up To?

the employer and 2 weeks' remuneration for each subsequent full or partial year, up to a maximum entitlement of 26 weeks' remuneration.

Ms Wilkinson stated that 22 submissions had been received in relation to the issue of statutory redundancy and the Minister advised that only four of those submissions were not in favour of a right to statutory redundancy pay. However, the Minister also said she was very conscious of adding unnecessary cost to New Zealand businesses at this difficult economic time.

## Collective Bargaining

Currently groups of employees are required to register as a union in order for them to bargain on a collective basis. Prior to the election, National expressed a strong view that it wanted to amend the law to enable employees to enter a collective agreement without having to belong to a union. This right last existed under the Employment Contracts Act and if introduced, would meet strong union resistance. Ms Wilkinson simply indicated this option was still being "examined".

## Draft Code of Employment Practice on Infant Feeding

The Draft Code of Employment Practice on Infant Feeding had gone out for consultation and submissions have been received. A final Code is due out shortly.

The purpose of the Code is to provide employers with guidance on how to fulfil their obligations concerning the provision of breastfeeding breaks and facilities under the Employment Relations Act 2000.

## Employment Relations Authority

Finally, the Minister stated she had concerns about the length of time some Authority Members were taking to issue determinations. The extensive delay in some cases meant that parties were not getting the "fast and cost effective" solution which the Authority was supposed to provide. The Minister stated that the delay in issuing determinations would be a consideration in the reappointment process of each Authority Member. National has also previously stated it believes all Authority Members should be legally qualified.

# Running Your Business During A Strike

When the Employment Relations Act was first introduced in 2000, one of the most controversial provisions was the so called "anti scab" section (section 97).

Section 97 places extensive restrictions on the ability of employers to call in replacement labour to do the work of the strikers. Essentially, employers can not employ or engage people principally to "perform the work of a striking or locked out employee". However existing employees can voluntarily agree to do this work.

Section 97 has the potential to give a strike real "teeth" because if an employer cannot replace striking staff, then even if large numbers of employees are not on strike, the business may be unable to operate if the strikers are in key roles.

The Court of Appeal has recently issued an important judgment on section 97 which may increase its impact even further. In Finau v Southward Engineering Ltd, a strike in the workplace resulted in a coil slitter machine not being operated. The employer then instructed two non striking employees to operate the coil slitter. The two non striking employees were employed as "tube mill operators" but they occasionally worked on the coil slitter.

The non striking employees didn't want to undertake the work performed by their striking colleagues and so refused to operate the coil slitter. The employer then suspended them saying they were now parties to the strike.

The issue in the Employment Court was whether the employees could be made to work on the coil slitter as part of their normal duties or whether their agreement was essential. The employees' union argued that the issue should be decided on the basis that the replacement employees must have been scheduled to do "the particular task that, but for the strike, would have been done by a worker on strike at the time in question".

The Employment Court found that this approach would "tilt [the] balance very much in favour of employees and unions engaged in a strike". It held that the non striking worker could be instructed to undertake the work if it was "the type of work" which comes within the normal duties of the non striking employee.

However, the Court of Appeal disagreed with the Employment Court's conclusion. The Court held that the work of a striking or locked out employee meant "the work a striking or locked out employee would probably have been performing had he or she not been striking or locked out".

The Court of Appeal felt that both the employer and the non striking employee needed a test that provided clarity to them both and so posed the following question – "the parties faced with a strike, need to imagine what the strike affected part of the workplace would probably have looked like were the strike not taking place… This mental picture is not to be constructed on a snapshot basis or in painstaking details; the mental picture is more broad brush than that".

The Court stated that what the parties need to focus on is what the striking employee would have been doing over the period of the strike. If the employer wants another employee to undertake that work and if that other employee would not have been asked to do such work but for the strike, then section 97 will apply. That will mean that other employee can lawfully refuse to do that work.

Contingency plans may need to be re-examined in light of this decision, as it may no longer be safe to assume you have the resources to cover striking staff.

# Call Me Loyal:

## What Level Of Loyalty Can Employers Reasonably Expect From Staff?


All employees owe obligations of loyalty and fidelity to their employer. But in reality, what does that mean if an employee wants to leave and set up in competition?

A recent case in the Employment Court, Rooney Earthmoving Limited and McTague 24/8/09, provides some useful guidance.

In this case, the company sought damages against three of its ex-employees for: taking its clients and key personnel; undermining its business; and removing confidential information. The hearing dealt with liability only, reserving damages for future consideration.

The employees all had significant experience in the earth moving industry and were all in positions of trust and confidence. The three staff planned to set up a competing business and to exit the company separately in a manner that would both undermine the company and give their own new business the best advantage. They took with them confidential information about the company's clients as well as financial and pricing information in a deliberate attempt to undercut the company for their own benefit.

The company argued in the Employment Court that, as part of the duty of fidelity, the employees actually had a positive obligation to disclose to their employer their intention to leave and join a competitor or set up in competition. The Court considered New Zealand and UK cases for guidance. The UK cases support an obligation on employees, in certain circumstances, to disclose an intention to compete.

However, the New Zealand Courts are not so convinced. The Court relied on an earlier statement by Goddard CJ:

"We live in the era of management buyout. Employees can surely be at liberty to discuss their future plans with each other without facing the risk being reported as disloyal employees".

The Court in Rooney ultimately found that law had not yet reached the point where the duty of fidelity includes having to disclose an intention to simply leave and compete, as that would undermine the freedom of movement of employees. Interestingly, it noted the position of employees who were also directors "may well be different".

However, on the facts, the Court had little difficulty finding the employees had breached their duties of loyalty and fidelity in numerous respects. This included : soliciting staff to join their competing business; clearing the company's whiteboard of confidential information; obtaining the company's client lists; using quotations unlawfully obtained from the company to undercut it; and failing to disclose knowledge of client solicitation.

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The company can now pursue a damages claim for any losses suffered.

The point for employers to note is that your employees cannot undermine your business while still working for you. However, that duty does not prevent staff discussing their own plans to join a competitor or set up in competition nor does it require them to disclose those plans. The possible exception is for employees who are also directors.

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