ISSUE 16 | DECEMBER 2012

sbm

EMPLOYMENT ▪ HEALTH ▪ EDUCATION ▪ SPORTS

Merry Christmas to all our clients, colleagues and friends.

A very Merry Christmas from the team at SBM. It's been another rather manic year in the world of employment law, and like you, we are all looking forward to the Christmas break and hopefully a few weeks of sun, surf and relaxation.

In our final newsletter for 2012, we update you on some of the proposed changes to the Employment Relations Act recently announced by the Government and we summarise a rather remarkable case in which an employee received substantial damages in spite of suggesting to her manager where she could stick her job.

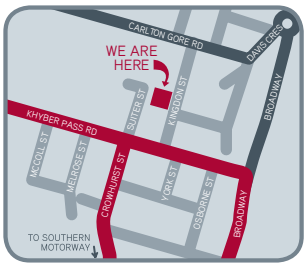
Firstly, though, we'd like to celebrate some recent great success for our firm.

More recognition for SBM

The Asia Pacific Legal 500 is regarded by many as the leading guide on law firm rankings in our region. The Legal 500 attempts to identify the leading firms and lawyers in their specialist fields through detailed research and interviews. Remarkably, of the ten leading employment lawyers the Guide recently named for New Zealand, three are from SBM. Don, Kathryn and Penny were all named, while Bridget Smith also received an honourable mention as our newest partner. No other firm had more than one partner selected.

We also took part in the recent New Zealand Law Awards, and were runner up in Employment Law Firm and Boutique Law Firm of the Year. We have now been in the top three each of the last three years.

While it's wonderful to get this recognition, our thanks go to all those clients and staff who may have been asked to vote or be interviewed. We thank you for your ongoing amazing support.



IN THIS ISSUE:

SwarbrickBeckMackinnon SOLICITORS

L&E GLOBAL

Swearing at your boss...$10,000 Following your disciplinary process ...priceless

At some stage of our working life most of us will have dreamed of telling a manager what we really thought of them. Most of us also will have resisted that urge, fully aware that abusing our boss can be "career limiting"!

However this temptation got the better of one employee who, after firstly cursing her manager, then told her to stick her job up her ... well, you can imagine the rest. But what happened next was less predictable.... the employee was awarded $10,000 in damages for unjustified dismissal.

In a recent case of *Waaka v City Line (N.Z.) Limited trading as Valley Flyer*, the Employment Relations Authority awarded a Hutt Valley bus driver a total of $10,000 compensation for unjustified dismissal and unjustifiable disadvantage. Ms Waaka worked as a driver on the Valley Flyer buses. One day Ms Waaka unexpectedly needed to take time off to attend a tangi for a relative. As she was unable to arrange childcare, Ms Waaka took her two young children to work while she made leave arrangements. The depot manager asked why the children were at the bus depot and Ms Waaka was instructed to take her children home.

The conversation quickly went downhill. After cursing her manager, Ms Waaka was warned to mind her language if she wanted to remain employed. Ms Waaka then said "you can stick your job up your f****** arse" and walked out of the premises.

Valley Flyer, perhaps unsurprisingly, took the view that Ms Waaka's statement was a clear indication that she didn't intended to perform her role any more. As far as the company was concerned, she had resigned.

Ms Waaka brought a personal grievance for unjustified dismissal and unjustified disadvantage .

The Authority determined that as Ms Waaka had made this statement in the heat of the moment, it could not be considered an unequivocal statement that she had repudiated her employment agreement. The effect of this was that Valley Flyer had actually dismissed Ms Waaka.

The Authority stated that the bus company had an obligation as a fair and reasonable employer to seek an explanation from Ms Waaka as to the meaning of her statement before reaching any conclusion that she had resigned from her employment.

Another problem for the employer was that Ms Waaka's manager informed Ms Waaka's union soon after she left that they would not be conducting any investigation, there would be no meeting to discuss the matter and Ms Waaka had been dismissed without any further process. This was inconsistent with its argument that Ms Waaka had resigned.

The employment agreement provided for a set procedure for a disciplinary process. As Valley Flyer did not make any inquiries into Ms Waaka's conduct and did not follow that process, the Authority determined that Ms Waaka had been unfairly disadvantaged.

Ms Waaka was awarded $8,000 as compensation for her unjustified dismissal which was reduced by half in recognition of her contribution, and a further $6,000 as compensation for being unjustifiably disadvantaged.

While many employers may shake their head at this type of outcome, the lessons here are clear:

- A resignation must be unambiguous and unequivocal for it to be valid. If words such as 'resignation' or 'quit' are not used, then check what the employee means by what he/she has said;
- If an employee resigns in the heat of the moment, allow for a cooling off period and then make further inquiries to make sure that he/she has in fact resigned; and
- If your disciplinary policy provides for a process, stick to it.

Proposed changes to Employment Relations Act – December 2012

Back to the future – proposed changes to employment law

WHEN THE CURRENT NATIONAL LED GOVERNMENT WAS FIRST ELECTED IN 2008, MANY PEOPLE ANTICIPATED THE QUICK REPEAL OF LARGE PARTS OF THE LEGISLATION IN RELATION TO BARGAINING AND UNIONS. THAT DIDN'T HAPPEN. HOWEVER, FOUR YEARS ON, THE GOVERNMENT HAS ANNOUNCED ITS FIRST MAJOR SET OF CHANGES TO OUR CURRENT EMPLOYMENT LAWS, WITH A RAFT OF PROPOSED AMENDMENTS TO COLLECTIVE BARGAINING AND TO PART 6A OF THE EMPLOYMENT RELATIONS ACT.

While we haven't seen the draft legislation yet, if they do what they have indicated, we think the proposed changes will be significant.

Changes to Collective Bargaining

Under the current law, the parties involved in collective bargaining negotiations are required to keep bargaining and conclude a collective agreement unless there is a "genuine reason based on reasonable grounds, not to". This obligation means employers and unions have to continue to bargain, sometimes for prolonged periods, in order to try to reach an agreement even after they hit impasse.

The Government now plans to repeal this requirement – instead it will be enough to bargain in good faith. However, if that does not lead to an agreement, so be it. This may well shorten what can be a very protracted process in some circumstances.

Another important change being proposed is the revoking of the "30 day rule". At present, when a new employee is hired to do work that falls within the coverage clause of an existing collective agreement, that employee must be employed on the same terms as the collective for the first 30 days of employment. This requirement is particularly frustrating for those employers who only have a small number of union members covered by a collective agreement, but who must employ all new staff on the same terms as that collective, for at least the first 30 days. Some of those employers will be pleased to see the removal of this requirement.

However, employers will need to approach this new found freedom with caution. If they offer lesser terms than under a collective to new employees they could end up providing recruitment opportunities for the union.

Other planned changes include:

- Employers may opt out of multi-employer collective bargaining; and
- Employers can impose partial pay reductions in cases of partial strike action. Currently if staff strike by way of a go slow or by refusing to do some limited aspects of their job, the employer cannot dock their pay by a corresponding amount. The law will be amended to allow this to occur.

Part 6A

Part 6A provides legal protection to certain categories of workers (cleaners, catering and laundry staff) who are considered "vulnerable" to changes to contracting arrangements. These employees have a statutory right to elect to transfer to a new employer when a business is contracted out, or the contract changes hands or the business is sold.

»

Cabinet has proposed that Part 6A will be amended by including:

- A requirement for the outgoing employer to forward employees' information to the incoming employer, including employment agreements, PAYE or wage and time records.
- A process where the incoming and outgoing employers would agree about how to apportion liabilities for accrued service-related entitlements of the employees who will transfer.
- A requirement that employees must decide whether to transfer to the new employer within five working days (or a longer timeframe if that is agreed between the incoming and outgoing employer).

It is proposed that businesses with fewer than 20 employees will be exempt from these provisions if they are the incoming employer.

Other Proposed Amendments of Interest

Changes will be made to the flexible working arrangements provisions to allow all employees (not just those with caring responsibilities) to request flexible working arrangements. The changes will also remove the strict time limits that apply to when an employee can request changes to their working arrangements.

Finally, our August 2012 newsletter dealt with the somewhat surprising findings of the Employment Court in the *Wrigley v Massey University* case, in which redundant staff appeared to be given rights of access to a very broad range of personal information. The Government has indicated that it will introduce legislation to change the way personal information is disclosed following this case. There are few indications about what those changes might be, but it is probable that the changes will restrict the scope of the information that must be disclosed.

FINALLY, WE'D LIKE TO ANNOUNCE the arrival of Matt McGoldrick as a new Associate in our team. Matt previously worked as a solicitor in the Wellington employment law practice of a national law firm, and the Wellington Crown Solicitor's office, as well as spending time as an employment lawyer in the UK.

We're delighted to have someone with Matt's experience and skill set join us. Sadly though, Aimee Credin has decided to focus her career on commercial litigation and has joined a specialist commercial litigation firm. We wish Aimee all the very best.

SwarbrickBeckMackinnon SOLICITORS

Level 6, 5–7 Kingdon Street, Newmarket, Auckland 1023, New Zealand
PO Box 7120, Wellesley Street, Auckland 1141, New Zealand
Phone: 09 520 8700 Fax: 09 520 8701 www.sbmlegal.co.nz