sbm

ISSUE 19

NEWS

SEPTEMBER 2014

EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

A new name and new premises too

Welcome to the first newsletter under our new name, SBM Legal.

Why a new name? Well partly because Swarbrick Beck Mackinnon was something of a "mouthful" for our clients and partly because we wanted to emphasise that as a firm, we are far more than just Penny Swarbrick, Kathryn Beck and Don Mackinnon.

With four specialist employment law partners, a growing staff of outstanding employment lawyers and administrators and an ever expanding client base, we are in a real growth phase.

And to reflect that growth (and our need for more space), we've also decided to move to new premises at 52 Broadway, Newmarket. Our new home is easy to find (see the map opposite), there's plenty of parking and excellent coffee! We look forward to seeing you at 52 Broadway some time soon.

IN THIS ISSUE:

Redundancies continue to be closely scrutinised

IN OUR NEWSLETTER EARLIER THIS YEAR, WE REFERRED TO TWO IMPORTANT DECISIONS BY THE EMPLOYMENT COURT (BRAKE AND TOTARA FARMS) AND INDICATED AN EMPLOYER'S DECISION TO MAKE A ROLE REDUNDANT WAS LIKELY TO BE EXAMINED FAR MORE CLOSELY BY THE COURTS THAN IN THE PAST. WE RECOMMENDED EMPLOYERS MAKE SURE THAT ANY BUSINESS/FINANCIAL REASONS PUT FORWARD FOR A RESTRUCTURE WERE CAREFULLY RESEARCHED, ACCURATE AND COULD SURVIVE CLOSE SCRUTINY.

Since then, the courts have reinforced not just the importance of having clear and accurate information available to support a redundancy decision but also the importance of sharing that information with affected employees.

In Ngatai v Ward Demolition Limited[1] the employer had decided it needed to close its Christchurch office. As a result, Ms Ngatai and another employee were potentially redundant.

An initial consultation meeting occurred at which Ms Ngatai attempted to negotiate an "exit package" for her and the other at risk employee. When that was unsuccessful, Ms Ngatai instructed counsel who alleged that a significant amount of information had not been supplied. He demanded copies of a large amount of information pursuant to section 4(1A) of the Employment Relations Act.

The information requested included details of the company's operations, its work levels, its overall staffing, and the previous three full years' financial accounts. The employer provided some of the information requested but not all. Personal grievances for unjustified disadvantage (as a result of the failures to provide the information) and unjustified dismissal were raised.

In its determination, the Authority examined the motivation for the redundancy and concluded it was based on a genuine view about the Christchurch market. As such, the employer was substantively justified in making Ms Ngatai's position redundant.

However, in terms of the withheld information, it found it was all ultimately "relevant" to the "continuation of Ms Ngatai's employment" and that a reasonable employer would not have refused to provide the information.

The employer claimed the demand for information was just a tactic and that it was unreasonable for an employee to seek such a wide array of information. The Authority acknowledged "that some representatives play a tactical game when representing prospectively redundant employees, seeking a wide range of information to both delay the decision and to pressurise an employer to cut a deal". Nevertheless, the Authority found that the employee was entitled to relevant information beyond just what the employer thought was relevant when developing its proposal. As a result, the Authority held the failure to provide the requested information caused Ms Ngatai to suffer humiliation, loss of dignity and injury to her feelings and awarded her $5,000 under section 123(1)(c)(i).

More recently, in Whaanga v Sharp Services Limited, the Employment Court determined that Mrs Whaanga was not given sufficient information relevant to the decision to restructure her role. In particular, while the employer emphasised the need for staff to consider possible efficiencies, it did not make it clear that redundancies might arise as a result of a restructuring of the business. The employer stated it needed to become "more efficient" but the proposal to restructure and the possible implications for Mrs Whaanga, were not clearly set out to her. Further, she had no adequate opportunity to comment on the proposal before the decision to terminate her employment was made. She was awarded lost wages and damages under section 123(1)(c)(i).

The message for employers is simple; make sure any restructure is supported by a strong business case, share that information (and supporting evidence) with affected employees during the consultation process and make your communications clear and unambiguous.

[1] [2014] NZERA Christchurch 11.

IN GEENTY V GR & TL BURNETT LTD, THE EMPLOYMENT RELATIONS AUTHORITY ALLOWED AN EMPLOYER TO DEDUCT AN EMPLOYEE'S DEBT FROM WAGES OWED WITHOUT HIS CONSENT.

Under sections 4 and 5 of the Wages Protection Act 1983, a debt can only be deducted from an employee's wages if the employee has agreed in writing, (such as in a clear deductions clause in an employment agreement). This allows the employee to repay any debts in his or her own time at a rate he or she can afford. This statute is the current incarnation of legislation that has been in place for over a century aimed at protecting workers from unfair practices, such as requiring the employee to spend his or her wages in the company store.

If there is no agreement to deduct, the employer has to pay the wages; then pursue any employee debt through the Employment Relations Authority and/or the civil courts.

I OWE MY SOUL TO THE COMPANY STORE

However, a recent Employment Relations Authority decision, Geenty v GR & TL Burnett Ltd [2014] NZERA Auckland 171 (Member Robinson) has cast doubt on the long established law in this area.

Mr Geenty was owed $1,263.36 in unpaid wages and holiday pay by his employer. But he had been charged and convicted of theft as an employee and ordered to pay $23,682 in reparation to the same employer (he had been summarily dismissed at the time of his arrest).

The employer argued that it had the right to set off Mr Geenty's debt under cl. 13 of the Set Off Act 1729 and cl. 5 of the Set Off Act 1735 ("the Set Off Statutes"). These clauses provide that, where a defendant to a claim can prove it is owed money by the plaintiff, judgment should only be entered for any amount outstanding after the debt has been set off.

Section 15 of the Wages Protection Act 1983 provides that the Act "shall be read subject to the provisions of any other Act" and the employer argued that a valid set off must be allowed, as the Set Off Statutes overrode s. 4. The employee argued that s. 15 was only intended to apply to statutes that allowed a deduction from wages (for example, tax legislation).

The Authority Member noted the many cases that prohibited a set off against wages, but found that s.15 was clear and meant the Set Off Statutes overrode s. 4. If said that if Parliament had intended s. 15 to be restricted to statutes permitting deductions from wages, it would have said so.

The legal position in this area is now unclear. None of the previous existing cases on the Wages Protection Act appear to have considered the Set Off Statutes. But if employers are allowed to "set off", it undermines a fundamental protection of the Wages Protection Act 1983. It would be useful to have this issue considered at a higher level, but in the interim, the door is open for an employer with an appetite for risk to argue it can withhold wages if it has a set off.

Living at work: where to draw the line

A recent decision of the Employment Relations Authority demonstrates that an employer must be very conscious of whether an employee is "working" overnight (and therefore entitled to be paid) when the employee works and lives on site. This issue arises out of "sleepover" cases over the last 2 to 3 years in which employees have been found to be "working" when "sleeping".

In Hill v Shand an employee of the Murchison camping ground was paid an annual salary of $30,000 and was also entitled to free accommodation in a house on site.

In the summer months, when the camping ground was particularly busy, Mr Hill worked 15 hours a day, seven days a week, generally starting at 7am and finishing at 11pm. After 11pm, Mr Hill stayed in his accommodation, but still had significant responsibilities, including ensuring the security of the camp ground and everyone in it, and also to be available to check in guests, and be alert to any incidents occurring in the camp overnight. »

» In the off-season, he worked eight hours a day and his responsibilities were much less than in the summer months.

Despite these constraints on his freedom overnight and his responsibilities, the Authority concluded that Mr Hill was not "working" after 11pm. However, it was a close run thing and the Authority made it clear if the situation had been slightly different, it may well have determined that he was in fact working during that time.

The decision serves as a reminder that there are significant issues for an employer to consider where employees are provided with accommodation, and live on the same site where they perform their work.

The factors that the Authority or Court will consider in a claim by an employee to be paid wages while sleeping will be (1) the constraints placed on employee during the sleepover period, (2) the responsibilities of the employee during the period, and (3) the benefit to the employer of having the employee sleeping over. Where there is an increase in the degree and extent of each factor it is more likely that the sleepover period will be regarded as "work".

While the employer in this particular case was fortunate that the Authority didn't determine that the employee was "working" during periods of sleep over, the case does demonstrate the obligation of an employer to pay minimum wages in those periods in some circumstances.

In this case, ultimately, the Authority determined that Mr Hill had been underpaid because his salary did not provide him with at least the minimum wage for each hour that he worked. Again, this is a reminder to employers that employees' salaries – especially those with long hours – must be at least as much as the minimum wage legislation for each period of work.

CAUTION – DRUG TESTING IN PROGRESS

THE PARAMETERS OF DRUG AND ALCOHOL TESTING CONTINUE TO BE TESTED IN THE COURTS. THE RECENT CASE OF SIM V CARTER HOLT HARVEY HIGHLIGHTS THE NEED FOR EMPLOYERS TO HAVE A DRUG AND ALCOHOL POLICY THAT IS THOROUGH, ROBUST AND CLEAR.

Two cannabis plants were found growing in the grounds of the Eves Valley Sawmill, Carter Holt Harvey's Nelson mill. The site manager decided that only staff could access the mill, not members of the public, and ordered approximately 190 employees including managers be subject to urine testing. CHH's policies allowed drug testing of employees but only where there was "reasonable cause" and when an employee's "actions, appearance, behaviour or conduct suggest that they may be under the influence of drugs and/or alcohol." One employee, Mr Sim, was found to have a non-negative drug test but there was no suggestion that he had planted the marijuana plants.

76 members of the EPMU, including Mr Sim, brought claims in the Employment Relations Authority for unjustified disadvantage on the basis that they had been "compelled…to submit to drug testing in breach of CHH's drug and alcohol policy." CHH argued that the testing was justified in that it was intended to deter drug use and ensure the health and safety of its employees.

The Authority disagreed with CHH, and found that there was no "reasonable cause" as per the policies and that there needed to have been suspicion that an individual employee is affected by drugs or alcohol, as opposed to the entire workforce, before testing could be ordered. The Authority found that CHH's intention to "send a strong message" to its staff did not enable it to override its own policies and did not justify the testing. The Authority also commented on the testing process used by the NZ Drug Detection Agency where male employees were watched by the NZDDA collector whilst giving the sample and female employees were left alone in the van with door closed. The male employees were seen to have been more disadvantaged than the female employees.

The Authority referred the parties to mediation to attempt to reach agreement on the level of compensation that each employee should receive.

sbm

SBM Legal **Barristers & Solicitors**

52 Broadway, Newmarket, Auckland 1023
PO Box 7120, Wellesley St, Auckland 1141
New Zealand | **www.sbmlegal.co.nz**

P: 09 520 8700
F: 09 520 8701

L&E GLOBAL