sbm

ISSUE 24

NEWS

MARCH 2017

EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

We hope 2017 has started well for you, your families, your businesses and your employees.

How is it March already? Technically it's the end of summer and those holidays are becoming a distant memory. This year we aim to improve and increase our communication with clients. This newsletter, now in email form only, is one way of doing that. We are also going to trial an online blog for three months. The aim is to cover topical employment issues and cases of interest on a weekly basis. Take a read – www.sbmlegal.blog We welcome your feedback.

PROMOTION

We're pleased to announce that Sarah Ongley will become a Senior Associate from 1 April 2017.

Sarah joined us from Haigh Lyon last year and has quickly proven herself to be an invaluable member of the team. She acts for both employer and employee clients and has experience in mediations, disciplinary investigations and all aspects of litigation.

ANOTHER EXCITING ANNOUNCEMENT

Don Mackinnon has been appointed one of three members of the Inaugural IAAF Vetting Panel.

The International Association of Athletics Federations (IAAF) has appointed an independent panel of experts to oversee and assess the eligibility of new and existing officials being put forward for, or continuing to serve in, IAAF roles.

Commenting on the appointments, IAAF President Lord Sebastian Coe said: "This panel of independent experts is central to the increased focus of our organisation on matters of good governance and reflects our commitment to ensuring that all IAAF Officials are persons of the highest standards of conduct and integrity. I am delighted with the calibre of applications and the depth of discussion we have had and welcome the panel on board for what will be an extremely important function for the future of our sport.

Although disappointed that none of the female candidates kept themselves in for the final round, I am encouraged by the conversations we have had with some of the initial applicants and we will look to expand the panel in the future."

IN THIS ISSUE:

Sleeping on the job – is it acceptable?

CASES ABOUT SLEEPING ON THE JOB COME BEFORE THE EMPLOYMENT RELATIONS AUTHORITY AND EMPLOYMENT COURT ON A REGULAR BASIS. SNOOZING ON THE CLOCK IS AN AGE OLD PHENOMENON.

Most of us would agree that sleeping on the job is good cause for dismissal, but many employers have fallen into the trap of acting too quickly when they catch a sleeping beauty at work. It's important to inquire into whether the employee was in fact sleeping on the job and to test whether there are any genuine excuses for the employee's doziness.

A recent example involved an Auckland welder who was dismissed for allegedly sleeping on the job, among other things.[1] A co-worker took video of him allegedly sleeping. The Employment Relations Authority found his dismissal was unjustified, saying, *"I have viewed the video footage of Mr Williams on the morning of 9 June 2016 and it shows Mr Williams sitting back with his eyes closed. It is not clear to me from the video that Mr Williams was asleep".*

In *Taylor v Tennent Hotels Ltd* 11 April 2016 [2016] NZERA Wellington 43, the Employment Relations Authority found an employee's dismissal was unjustified, even though that employee acknowledged sleeping on the job. She was employed as a night porter in a hotel. The dismissal was unjustified because the employer did not follow a fair procedure and invite the employee to obtain representation, nor did it allow the employee to explain herself before making its decision.

Similarly, in *Graham v Turners and Growers Ltd* [2012] NZERA Christchurch 287 a dismissal was found to be unjustified because the Authority determined the employer should have looked more closely at whether there was a medical condition which caused the employee to fall asleep.

These cases demonstrate the importance of following a fair investigation process. Was the employee actually asleep or were they *"resting their eyes"*? Was there any medical reason for the employee falling asleep? Was there some other extenuating circumstance, such as having to deal with a sick toddler in the middle of the night?

It will be important to look at context. An office worker who falls asleep for 5 minutes at his/her desk is in a different category to a pilot or truck driver who falls asleep on the job, in that the latter places themselves and others at significantly greater risk. Case law shows the importance of investigating the matter properly and not jumping to conclusions if an employee is suspected to be sleeping. The circumstances and consequences (including possible as opposed to just actual consequences) will also be relevant.

Of course, some employees may quite legitimately be asleep in the course of their employment. Some employees work sleepover shifts. Caregivers to the disabled and school matrons are employees who have recently won the right to be paid the minimum wage for sleepovers because they were required to sleep on the premises and attend to any incidents that occurred during the night. These cases were heard by the Employment Court and Court of Appeal, and the Sleepover Wages Settlement Act 2011 was passed as a response to this litigation. The Court of Appeal case involved caregivers for the disabled: *Idea Services Limited v Phillip William Dickson* [2011] NZCA 14. Whether or not an employee on a sleepover is entitled to the minimum wage depends on the circumstances, including the restrictions imposed on the employee and how often they are called upon to work.

As a final note, while in New Zealand we generally frown upon sleeping on the job, in Japan it can be socially acceptable. The Japanese call sleeping on the job "inemuri" and it can be a sign of dedication to the job, demonstrating that the sleeper spends so much time at the office that he or she can't sleep at home. Apparently one has to remain upright while sleeping to avoid appearing slovenly.

PERSONAL INFORMATION – WHAT IS IT?

You may not be aware that the Privacy Commissioner now has the ability to publish an "advisory opinion" and has done so for the first time on what does and doesn't constitute "personal information" (information about an identifiable individual).

An advisory opinion was sought by the Fire Service, which was considering publishing the addresses of fire incidents on its website with information about the dates and times of the calls and whether it was a false alarm or genuine emergency. Why, you might ask, did the Fire Service want to do that? The answer was because the information was frequently sought from insurers and they thought by publishing it on their website it would save time and resources answering those requests.

As a starting point, the Fire Service sought legal advice about whether their intended approach would comply with their obligations pursuant to

1 *Williams v Custom Motor Bodies (1998) Ltd* [2017] NZERA Auckland 15

Money, money, money, money...

The above is a line from the theme song from now US President Donald Trump's TV series, The Apprentice, making it possibly less acceptable for use these days than it once was. On a similarly divisive note, the minimum wage is a political hot potato.

Workers and unions want the minimum wage increased, arguing the current rate is not enough to live on. Employers generally argue against increases, saying job losses will occur if the cost of labour grows too high.

Finding the balance is not easy, and pretty much every increase to the minimum wage is met with arguments that it is either too much or not enough.

By way of brief history, the minimum wage is a longstanding feature of our employment landscape. The Minimum Wage Act in New Zealand was enacted in 1945. At the time, MPs said the minimum wage should be sufficient to allow a man to provide for his wife and three kids. Times have certainly changed since then.

The first minimum wage came into force from 1 April 1946. In general, minimum wage increases take effect from that date, and the next increase to the general minimum wage is scheduled for 1 April 2017, when it moves from $15.25 to $15.75. Is that enough, in this day and age, for a man to provide for his wife and three kids? And either way, is that still an appropriate measure?

The Minister of Labour must review the minimum wage each year. Changes to the minimum wage do not require changes to legislation. Rather, the minimum wage is fixed by the Governor General by an Order in Council on the recommendation of the Minister of Labour.

The minimum wage is really the only form of wage-fixing the Government undertakes. Employers, unions and employees are free to agree on whatever remuneration they think fit, so long as it meets or exceeds the minimum wage. The days of the Arbitration Court fixing wages are long gone.

The current union position is that the minimum wage should be fixed at 66% of the average wage, which would take it to around $19.60. That is also close to what unions say a living wage is.

The Unite Union correctly reports the current minimum wage is 52% of the average wage. The union says it was lifted to that level by the Clark Labour Government. The union says the Key/English National Government has maintained it at around that level.

Internationally, there have been several campaigns aimed at lifting the minimum wage and the concept of a living wage is gaining some traction. The United Kingdom recently introduced a National Living Wage of £7.20 for workers aged over 25. The United Kingdom's Office for Budget Responsibility warned it could result in up to 60,000 job losses.

In the USA, where the minimum wage is lower than New Zealand, unions have campaigned for a $15 per hour minimum wage in the Fight for 15 campaign. This campaign has met with some success, with cities including New York, Los Angeles and Seattle pledging to phase in a $15 minimum wage.

Opponents of Fight for 15 argue minimum wage increases will wipe out jobs and opportunities for young people. The argument is that if the cost of labour increases, it does not become worthwhile for employers to provide entry-level jobs or provide opportunities for inexperienced workers. There are also arguments that increased automation will occur as the cost of labour increases, resulting in further job losses.

Employers' organisations point out that New Zealand's minimum wage is actually quite high compared to other countries. Our minimum wage is the 7th highest in the world. Australia has the highest minimum wage in the world.

While Australia's minimum wage is higher than New Zealand's, it represents a lower percentage of the average wage than the minimum wage does in New Zealand. New Zealand's minimum wage is actually the highest percentage of the average wage in the OECD, although statistics can be difficult to compare because the situation changes if the median wage is considered.

The minimum wage will continue to be an important and contentious aspect of employment law and important arguments about the cost of living versus the potential for job losses will continue to be expressed. From an employer's perspective, compliance with the minimum wage requirements is mandatory and beyond that, wages will likely influence things like recruitment, retention, morale, training etc.

Workplace investigations

In 2016 the spotlight was on workplace investigations and the level of scrutiny required when conducting those investigations. In 2015 and early 2016, it appeared that the courts were becoming more pedantic and willing to scrutinise every aspect of a workplace investigation. However, employers will be somewhat relieved to know that by the end of 2016, this was changing.

In September 2016, the Court of Appeal (*A Ltd v H* [2016] NZCA 419) overturned an Employment Court decision which had been very critical of an investigation. The Employment Court had found an investigation to be unfair because the witnesses were not as thoroughly questioned as the employee who was being investigated and some interviews were conducted in person, while others were conducted by phone. Further, some interviews were recorded and transcribed, while others were not.

The Court of Appeal had to determine whether the Employment Court's approach in determining whether the employer had sufficiently investigated the allegations was correct. The Court of Appeal found that witnesses did not need to be questioned in the same way and with the same level of detail. The Court of Appeal overturned the Employment Court's decision and found that an employer's investigation should not be subject to "minute and pedantic scrutiny".

In another case, the Court reiterated that while it was important for the decision maker in an investigation to be able to approach the decision without any bias, the employer did not have to be independent in the same way as a judge would (*Bhikoo v Stephen Matt Hair Design Newmarket Ltd* [2016] NZEmpC 75).

Despite the above, what is considered procedurally fair, will still depend on the circumstances of each case and an assessment of what a fair and reasonable employer could do. What is considered fair and reasonable will depend on the nature of the matter being investigated, the employer's own disciplinary policies and procedures and any terms of the employee's employment agreement. As a minimum, the following should be put in place:

- Ensure the investigation starts reasonably promptly after receiving the complaint;
- Inform the employee of the detail of the allegations against them as well as the seriousness of the allegations and the possible consequences;
- Advise the employee of their right to representation;
- Interview all the employees or other witnesses who were involved in the complaint or incident or who may have relevant information;
- After those interviews, the information gained from those interviews must be provided to the employee being investigated for their response;
- Provide the employee with a reasonable opportunity to be heard and to explain their conduct;
- Carefully consider the employee's responses and make further enquiries if necessary;
- Ensure that the decision maker is able to approach the decision without any bias or predetermination.

PERSONAL INFORMATION – WHAT IS IT?

continued

the Privacy Act 1993. That is an important starting point as the Privacy Commissioner won't publish an advisory opinion as a substitute for legal advice. That is, employers can't go to the Privacy Commissioner to avoid the time and cost associated with instructing lawyers. (Phew!)

The legal advice given was that the addresses weren't personal information, but that if that was incorrect and they were personal information, putting them on the website would amount to a breach of the Act as none of the disclosure exceptions would apply.

Considering also the general public interest in the answer and the fact that it has broader application than the Fire Service's specific request, the Privacy Commissioner determined that it was appropriate to issue an advisory opinion.

The Commissioner's view was that address information is personal information about the house owner or residents, other than where a property is owned by a company. Therefore, publishing it on the website would breach the Act. The reasons for the Commissioner's view include:

- Personal information is information about identifiable human beings but the person doesn't have to be named or otherwise identified in the information;
- The term "information" is very broad and includes anything that tells you something about an individual; and
- There is existing case law that address information can be personal information including geotechnical information, insurance information and meter information.

As technology develops and information becomes more readily available and accessible, and businesses look to streamline their processes and procedures, it is even more important to ensure that your business is complying with its privacy obligations. The risks of penalties and reputational damage are too significant to ignore.

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