sbm

ISSUE 30

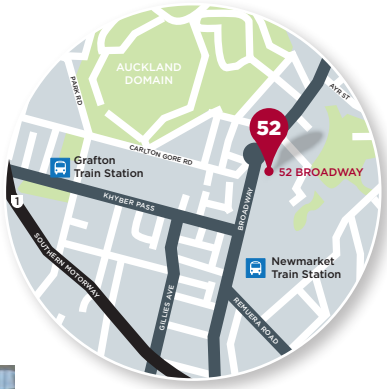
NEWS

DECEMBER 2018

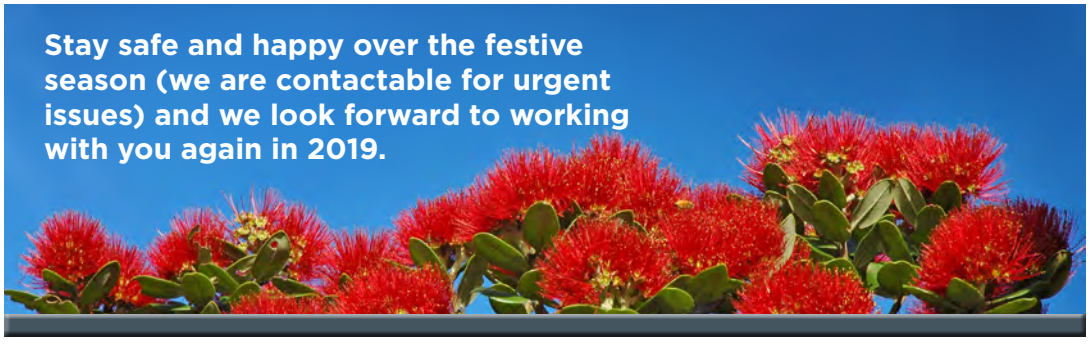
EMPLOYMENT ◆ HEALTH ◆ EDUCATION ◆ SPORTS

How is it December already? Once again it seems like the year has flown by. Our good news since the last newsletter includes:

- Don has been appointed Chairperson, Vetting Panel of the International Athletic Associations Federation (IAAF) *Ed – great news for those of you who were concerned we might lose our "presidential status" when Kathryn's term as NZLS President ends in April 2019;
- Kathryn has been appointed Chair of the NZLS Cultural Change Taskforce;
- Kathryn was invited to Korea by none other than the United Nations to speak at the Expert Group Meeting on Gender-Related Judicial Integrity Issues;
- We have retained our Band 1 status in the annual Chambers and Partners worldwide rankings. Penny, Kathryn and Don are ranked in Band 2 as Leading Individuals while Bridget is "Up and Coming". Quotes to describe the partners are included throughout the newsletter.



And last, but by no means least, we are delighted to have been named Employment Law Specialist Firm of the Year for 2018 at the NZ Law Awards. Thank you to any of you who nominated us and a big thanks to our team here, for their commitment to getting the job done on a daily basis, but being thoroughly good and decent people while doing it.



IN THIS ISSUE:

THE TRICKY ISSUE OF REDEPLOYMENT IN A RESTRUCTURING PROCESS

ONE OF THE MORE COMPLICATED ISSUES THAT ARISES IN A RESTRUCTURING PROCESS IS "REDEPLOYMENT". THIS IS ESSENTIALLY THE OBLIGATION TO CONSIDER WHETHER AN EMPLOYEE SHOULD STILL BE EMPLOYED (BUT IN A DIFFERENT JOB) INSTEAD OF BEING MADE REDUNDANT AND LOSING THEIR EMPLOYMENT ENTIRELY.

In our experience, it is often overlooked. Further, many of the challenges that follow a restructuring process now focus on redeployment. Many challenges boil down to how "similar" another role is to the role an employee previously performed, and whether an employee should be "appointed" rather than having to be "interviewed".

When does the obligation arise?

An employer conducting a restructuring process may go through a reasonably comprehensive process of: preparing a restructuring proposal; consulting with affected employees about the proposal; considering what employees have to say (and potentially amending the proposal); and making a decision on the proposal.

However, redeployment can often be overlooked. It isn't the case that a decision on a restructuring proposal automatically means a person gets their notice of redundancy. It is at the point an employer decides that a person's role is going to be disestablished that redeployment needs to be considered – before notice is given.

Does redeployment mean you have to create a role?

If there are no vacant roles in a business it doesn't mean that an employer has to create one so the employee can stay on. But even then an employer still needs to engage with an employee about this fact. This is because an employer has to consider whether there are redeployment opportunities. If it has done that, and engaged with an employee about that, then this will cover off the obligation.

So what if there are vacant roles?

Sometimes there will be roles in a business that are vacant because someone has left and not yet been replaced. Other times, new roles will have been created out of the restructuring process itself.

How an employer deals with redeployment in this scenario will often come down to how "similar" those new or vacant roles are to what the employee previously did. It will also come down to the skills an employee has, and whether those skills are transferrable to a new or vacant role. If the employee has the skills to perform the new role then he/she is entitled to be offered it, not just the opportunity to apply for it.

This does not mean that an Accounts Administrator whose job has been disestablished should be redeployed into a General Manager's job. But it may mean that such a person should be redeployed into (or at the very least considered for) a newly created Administration Assistant job. It will largely depend on the employee's skills and experience and whether they could perform the new role, either now or with reasonable training.

There might also be scenarios where two or more positions have been disestablished, and there is now only one role available. In that scenario it would generally be expected that an employer would run a "selection process" to select who gets the job. That process should be exactly the same for all candidates, so that everyone gets a fair go. It would also be normal for that to be "closed" to those whose roles have been disestablished and were similar to the new job.

Can you "go to the market"?

For some state sector employers, there are specific legal obligations which require advertising of vacant roles, and the appointment of "suitably qualified candidates". However, for all other employers there are no such obligations, and the legal principles generally require internal candidates to be preferred.

In the same way, asking an existing employee to be interviewed, while at the same time inviting applications from the market can be risky. If a new person gets the job – and the existing employee gets made redundant – it can provide fertile ground for a personal grievance claim. But there may be justified situations where going to the market is OK.

All in all, redeployment is a complicated beast, and can sometimes lead to a really good process falling down at the final hurdle, so it is important to deal with the obligation carefully in every case.

Employment court adopts bands for compensation

For many centuries, courts could not grant remedies for damage caused to intangible "feelings". This is still a part of the ordinary civil law. However, employment law is relatively unusual because it allows an employee who has been treated unfairly to obtain a remedy if they have suffered "humiliation, loss of dignity, and injury to feelings". When awarding compensation to address such damage, the courts provide monetary remedies.

What can immediately be seen is a difficulty in setting a remedy which fairly represents any damage that has been done. After all, how can you compensate in monetary terms something which cannot easily be shown to have given rise to a monetary loss?

The Employment Court has recently provided substantial guidance in addressing these issues. In two recent cases, the Chief Judge of the Employment Court has set monetary "bands" that will guide the setting of remedies for compensation for "humiliation, loss of dignity, and injury to feelings".

These bands are:

- Band 1 (low level damage or injury): awards up to $10,000;
- Band 2 (mid-level damage or injury): awards between $10,000 and $40,000; and
- Band 3 (high level damage or injury): awards above $40,000.

In *Richora Group Limited v Cheng*, the employee was found to have been constructively dismissed. She had been locked out of the workplace by the employer changing the locks and without her being told why. This had come after it appeared the employer thought the employee had contacted IRD to complain about the employer; the employee had not. She was dismissed, as the Court described it, in "no uncertain terms", and without the employer hearing from the employee, who was unwell at the time.

The Court described the effects on the employee of the employer's actions. The employee attempted suicide and her physical and mental health declined. She required medical intervention. She also experienced depression, acute stress and anxiety.

The Court found that these effects were all as a result of the plaintiff's unjustified actions. It found that the damage was within Band 3. This would have meant that an award of over $40,000 would have been made, however, the employee had only sought $20,000 compensation and so that was the maximum the court could award.

In *Archibald v Waikato DHB*, the employee was made redundant. The Court found that the substantive redundancy was justified, but the process was not. The employee had been offered a redeployment opportunity but that would have involved her travelling two hours 45 minutes per day for a period of up to 9 months. She described that travel as "filling her with dread", that she physically could not do it, and it would "destroy her". The employer did not engage with the employee, and simply presented her with the option of the redeployment role or being made redundant.

The Court again described the effect on the employee. This was described as being "a deep sense of hurt" that she had not been listened to, that her concerns had been unceremoniously brushed to one side, that she felt cornered by the actions of the employer, and became very upset and anxious. She also experienced stress and worry.

While the Court put aside any possible damage that might have occurred due to the loss of the job (because it found the redundancy was justified), the Court found that damage had been suffered by the employee due to the employer's unfair treatment. It found that the damage was around the middle of Band 2, and awarded $20,000.

Over recent years, there has been a noticeable increase in these sorts of awards being made. However, any claim of damage still has to be supported by evidence. And it goes without saying that an employee needs to have established that they have been unjustifiably dismissed or disadvantaged in the first place.

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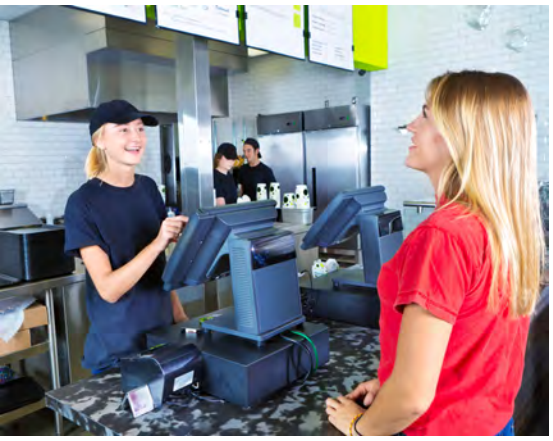

Changes to employment law – an update on the state of play

IN OUR OCTOBER NEWSLETTER, WE REPORTED ON THE PROGRESS OF THE EMPLOYMENT RELATIONS AMENDMENT BILL. WE CAN NOW REPORT THAT THE BILL WAS PASSED IN PARLIAMENT ON 5 DECEMBER 2018. YOU CAN READ OUR EARLIER REPORTS ON THE PROGRESS OF THE BILL HERE: https://www.sbmlegal.co.nz/Publications/Newsletters.aspx

Since the Select Committee's report was released, there have been a few amendments to the Bill, but otherwise what we reported earlier is what has basically been passed. The particular changes of note in the most recent Parliamentary wrangling are:

- At a practical level, employers will effectively be able to opt out of a multi-employer collective agreement (a "MECA"). While employers still need to bargain in good faith, they can oppose concluding a MECA if they have "reasonable grounds" to do so.
- Consent to access a workplace by union officials is still required. However, there is no requirement to seek consent if:
  - » a collective agreement is in force that covers the work done by employees at the workplace; or
  - » bargaining has been initiated for a collective and the intended coverage of that collective covers the work done by employees at the workplace.
- There are additional exemptions from the requirement to provide rest and meal breaks for those engaged in an "essential service" or "national security", where such employers can provide "compensatory measures" instead of breaks themselves. These number of employers this will apply to will likely be quite limited.

The provisions of the Bill will come into force on 6 May 2019.

The Bill has a number of "back to the future" changes that repeal amendments to the Employment Relations Act 2000 made by the previous National Government. These include:

- Removing the Employment Relations Authority's power to determine collective bargaining is at an end;
- Giving unions a head start when initiating collective bargaining again;
- Reintroducing the requirement to conclude a collective agreement unless there are genuine reasons, based on reasonable grounds, not to;
- Requiring parties to keep bargaining about other matters even if they've reached a deadlock about one matter in the bargaining.

These changes won't have much impact on run-of-the-mill bargaining, but they may have an impact on out-of-the-ordinary bargaining where the parties can't agree and the bargaining becomes protracted.

Unions may also push for more multi-employer collective bargaining, but MECAs remain rare and were rare even before the National Government allowed employers to opt out of MECA bargaining.

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Changes to employment law
– an update on the state of play *continued*

Of more interest is the new requirement to include wage and salary rates in a collective agreement. Employers won't be able to resist entering into a collective agreement on the grounds they object in principle to including wage and salary rates in a collective agreement. Most collective agreements do in fact have wage and salary rates in them, but this change could impact new union-employer relationships and existing union-employer relationships where wage and salary rates are not set out in a collective agreement. Unions are likely to test this law and push for a broad application because of the importance of wage bargaining to them and their members.

There are also some changes afoot to the law relating to industrial action. The law allowing employers to make partial pay deductions during partial strikes will go. This means an employer won't be able to reduce an employee's wages if they go on a partial strike, such as a go slow or paperwork ban. The employer will either need to suspend the employee or keep paying them even though they're only performing part of their duties when they're on strike.

Also, a minor or technical error in a strike notice in a non-essential service will no longer invalidate the strike. This shouldn't have a huge impact because it's pretty difficult to get injunctions restraining strikes in non-essential services.

There haven't been too many cases from the Employment Court on the collective bargaining front, but a couple of interesting decisions relating to industrial action have come out.

In *Secretary for Justice v PSA* [2018] NZEmpC 129, the Employment Court refused an application for an interim injunction to restrain a strike in a non-essential service. Court Security Officers ('CSOs') were going on strike in court rooms, which created inconvenience and potential health and safety risks when the courts were closed.

The parties agreed the justice sector was not an essential service, so no particular number of days' notice needed to be given. However, the employer argued it was still entitled to "reasonable notice" of a strike. The union was giving 30 minutes' notice of strikes and the employer said this was unfair. The Employment Court found there was no requirement to give reasonable notice because there was no minimum period of notice set out in the Employment Relations Act 2000 for non-essential services. The case may proceed to a full hearing, but in the meantime employers in non-essential services can continue to expect pretty short notice of strikes and this will continue to be lawful in most circumstances.

In *Wendco (NZ) Ltd v Unite Inc.* [2018] NZEmpC 67 the employer obtained an interim injunction restraining picketing related to a strike. In that case, the union went on strike and then picketed on the employer's premises and drive thrus. The employer showed there was evidence of the strikes committing the tort of trespass and the court held that because of the health and safety risk arising out of picketing in drive thrus the picketing should be restrained. The union's argument that the Employment Court could not grant an injunction to restrain picketing where it related to a lawful strike was rejected. This means that even if a union lawfully goes on strike, if its picketing is unlawful it can be restrained. It also confirms that a union can't picket on an employer's property.

Stay tuned for more developments when the new laws come into force, and no doubt there will be litigation about these new laws.

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Strategies for surviving the silly season...

Christmas comes but once a year. If you are the sort of person who looks on it as an opportunity for receiving gifts, once a year may seem like a long time to wait. If, on the other hand, Christmas represents a potential mine field of office Christmas parties, choosing appropriate staff gifts, moderating secret Santa pranks, balancing annual leave requests and trying to achieve output and business efficiency when the minds of some have already moved to sun, sand and surf, then Christmas can be a little less appealing... So, to make life easier and in the spirit of giving, we've set out below some tips for managing potential employment issues this festive season.

To be clear from the outset, it isn't about eliminating fun, nor are we advocating giving Christmas a 'miss' – indeed, becoming the Grinch who stole Christmas may just raise its own set of new issues. Instead, like most things employment law related, it is about taking a realistic and common sense approach to any issues that arise.

Not everyone celebrates Christmas

As a starting point, not everyone celebrates Christmas. If there are people of different nationalities and/or religious beliefs in your workplace, it is worth bearing in mind that they may not be celebrating Christmas. This could be an ideal time for them to educate their colleagues on the festivities they observe but be mindful, not everyone is interesting in or comfortable talking about their beliefs or their personal life.

It is also important to bear in mind other people's beliefs/cultures/traditions when organising social functions as they may impact on what people can eat and/or prevent the consumption of alcohol. In a large organisation, not every social function will be to everyone's liking, but human nature is that people like to feel included and as though their preferences were taken into account.

Social media and social occasions

It is true, no matter what strategies and safeguards you put in place, there will often be one employee who surprises or shocks – and commonly not in a good way. But for most people and organisations, the biggest issues we see could often have been avoided if expectations were clear at the outset.

Take the office Christmas party for example. Consider issuing a memo or an email (depending on the size of your organisation) to employees which covers: location (specifying whether the event is on your premises or offsite), timing (is there a particular finish time), what drinks will be served (and expectations about consumption), what food will be served, entertainment (and the tone of the evening/event) standards of dress expected, whether guests are invited, what arrangements (if any) are available for transport home. The memo should also clearly outline an expectation that while it is a social occasion and people are expected to enjoy themselves, they are also expected to behave appropriately and that anyone who is intoxicated will not be served alcohol.

As a responsible host, it is important to make sure that you serve an appropriate amount of food if people are drinking. Issues around food and alcohol consumption can be removed by holding the function off-site where the venue has responsibility for the service and consumption of alcohol and any related issues. If you are serving alcohol on your premises, as well as making sure your employees know what you expect of them – make sure you know what you are obliged to do as a responsible host. Hiring outside staff to serve alcohol is often a good idea as it ensures that no staff have to 'work' during the work function but it also means that it is a third party that is dealing with any issues arising from the service

or consumption of alcohol. That said, as a responsible employer it pays to have someone (or some people) designated as being in charge and having responsibility for the function, who will deal with any issues if they arise.

Social media is also becoming a growing issue. For this reason you can avoid potential issues if you make it clear what your position on it is. For example, make it clear to employees if you don't want pictures from the staff Christmas function appearing on social media sites and remind them of any restrictions that you may have in place regarding communicating about employment with your organisation.

Secret Santa, and work gifts

They say 'tis better to give than to receive (although most of us do like to receive as well). Again, common sense needs to prevail in gift giving. If your office is going to do secret Santa (or the like) make sure an appropriate spending limit is set, so that employees aren't excluded unnecessarily due to financial constraints. While levity and light hearted fun is fine, remind employees that not everyone may share their sense of humour and if they are not sure about a potential joke or the reaction of the intended recipient, perhaps they should consider checking it with a colleague (or a manager) first.

When giving gifts to employees (which isn't compulsory but is common) make sure employees aren't left out. Particularly in a small environment, employees are likely to discuss what they received. Potential issues can be avoided by being transparent about the gift giving process and giving the entire office the same gift. If a more personal approach is preferred, care should be taken to ensure employees don't draw negative conclusions about the employer's view of them based on their Christmas gift compared with that of a colleague. Christmas gifts aren't an entitlement so one would hope that an employee would receive a gift in the spirit in which it was given, but equally, a comparatively small Christmas gift will often be described on a list of alleged transgressions by an employer as evidence of unfair treatment giving rise to a disadvantage or worse, constructive dismissal.

'Tis the season to be jolly – but still work hard

Long lunches, client functions, ducking out to get the last minute shopping done... Sometimes it may feel that employees already have one foot out the work door and are taking advantage of the holidays early. It may depend on your industry or your workflows as to whether you are dealing with a Christmas rush. Retail is of course expected to be busy and professionals are often busy as clients want to tie up loose ends before the year end so that they can start afresh in the New Year.

If you feel employees are taking advantage, the first step should generally be a quiet word to reinforce expectations about working hours. Consider whether some flexibility may work in your organisation, in the circumstances. For example, provided employees are making up the time during the day either before or after normal work hours, that may resolve the issue. However, if that is not the case, remind employees (either the particular employee or a general reminder to all employees) about what is expected. It is important if you are going to allege a breach of an obligation that you can establish that the employee was aware of the obligation/expectations.

If you do have issues that your organisation wants to deal with before the end of the year, consider whether strategically it is the best time. For example, employees are often already under stress at this time of the year, with family and/or financial pressures. So, if an organisation proposed a restructuring that may result in the disestablishment of the employee's role, the employee could react more negatively and may be more likely to challenge it. While the business's commercial needs will be paramount, it is worth bearing in mind the broader context. Equally, there is an argument to be made that in good faith, a fair and reasonable employer would let an employee know as soon as possible, so that for example the employee doesn't extend themselves over the Christmas season, only to be faced with possible redundancy in the New Year. Again, it will depend on the facts and the circumstances but the point is – consider the facts and the circumstances in assessing what your organisation wants to achieve and the best way to go about it.

With all that in mind, enjoy the festive season. Take the opportunity to celebrate your successes to date and take a break before starting again, hopefully refreshed, in the New Year. The strategies above aren't intended to take the fun out of the festive season, but rather, to ensure that the festive season doesn't take the fun out of your organisation's New Year. Putting in place simple strategies to avoid and/or deal with issues is a better option than crossing your fingers and saying ho, ho, ho I hope we don't get a personal grievance!

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