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THE ADVOCATE

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a regular newsletter for clients of
mcphail gibson & zwart ltd

Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

(Mental) Health and Safety

Mental wellbeing has come to the forefront over the past two years that we (as a country) have been managing through COVID-19, and we expect this will continue to be a prevalent issue for many employers and employees over the coming months.

We usually report on cases where employers have gotten things wrong, so thought it may be useful to highlight one case where the employer got things right in relation to an employee's mental wellbeing: ***Baxter v Damarell Group Property Management Limited***. Of course, every case will turn on its own individual facts. However, this case highlights some key considerations for employers when dealing with employees' mental health and wellbeing.

Ms Baxter raised a claim for unjustifiable disadvantage for DGPM's failure to provide a safe workplace.

The underlying considerations in the context of mental health in employment are found under the Health and Safety at Work Act 2015. This provides that an employer has a duty to maintain a safe workplace for employees, and requires them to take all reasonably practicable steps to eliminate, or where this is not possible, to mitigate risks to their safety. An important consideration is also whether the Employer could have reasonably foreseen the risk of any harm found to have been caused to the Employee, taking account of "*what was known at the relevant times during their employment rather than with the benefit of hindsight*".

The Authority found that Ms Baxter was not disadvantaged in her employment. They found, "*overall the evidence established DGPM had taken reasonable steps, based on which it knew at the time, to assist Ms Baxter manage her workload and to take appropriate steps to make the workplace healthy and safe for her*".

In particular, the Authority observed that DGPM had:

- had regular catchup meetings with Ms Baxter to check in with one another;
- offered for Ms Baxter to take leave and for her to work from home where she was feeling overwhelmed;
- ensured when she was on leave, she took uninterrupted time to rest and did not work;
- hired additional staff to help with Ms Baxter's workload;
- made accommodations for Ms Baxter to reduce her workload; and
- offered her an alternative role.

Further, the Authority highlighted the employee's own responsibility to take practicable steps to ensure their own safety.

What we can take from this case is, an employer who listens and proactively supports their employees with mental health and wellbeing, is more likely to have taken steps a fair and reasonable employer could take in the circumstances. Further, that an Employer must be adequately and actively informed regarding an employee's mental health.

FINAL ER Seminar for 2022

Our last 2 Day ER Seminar will be held on 1 and 2 November 2022. Details can be found on our website www.mgz.co.nz/training/

BREAKING NEWS: E TŪ INC and ors v Carter Holt Harvey LVL Ltd [2022] NZEmpC 141

Relatively few cases (relative to the impact of COVID-19 on the country) have made it through the Employment Court ("*the Court*") since the start of the pandemic. However, on 15 August 2022, the Full Court issued its judgment as to whether an employer could require employees to take annual leave during the March and April 2020 Alert Level 4 lockdown, under the Holidays Act 2003 ("*the Act*").

At 1:30pm on 23 March 2020, the Prime Minister announced New Zealand would enter Alert Level 4 lockdown from 25 March 2020. All non-essential businesses were required to close, and people required to stay home to stop the spread of COVID-19. We will all remember that day.

Carter Holt Harvey LVL Ltd ("*CHH*") was under enormous pressure to prepare their business for closing down, as well as ensuring employees had clarity and certainty about whether and how they would be paid during the Alert Level 4 lockdown.

On 23 March 2020, CHH advised employees that they would be paid in accordance with their employment agreement from 26 March 2020 to 8 April 2020, and from 9 April 2020 to 22 April 2020, they would be required to take leave. This leave in the first instance would be taken from their annual holiday entitlement. This decision was communicated directly to employees via email and text message. Approximately half of CHH's workforce were members of E Tū, however the Union did not receive any direct communication from CHH at the time.

The Court noted that the relevant provisions of the law are:

- Purpose: The purpose of annual holidays is to provide an employee an opportunity for rest and recreation. This must also be balanced with the purpose of enabling employers to manage their business.
- Good faith: Employers and employees must deal with each other in good faith, meaning they should be active and constructive in establishing and maintaining a positive employment relationship, and to be responsive and communicative with one another. This duty also extends to the relationship between an employer and union.
- Section 18 of the Act: An employee may apply to take annual holidays, and when an employee is to take annual holidays *"is to be agreed*". An employer must not unreasonably withhold consent to an employee's request to take annual holidays.
- Section 19(1)(a) of the Act: Where an employer and employee are unable to reach agreement, an employer may require an employee to take annual holidays.
- Section 19(2) of the Act: An employer must give not less than 14 days' notice of the requirement to take annual holidays.

In summary, the Court found:

- CHH had not actively and constructively engaged with employees or the Union, and did not respond to the Union's communications regarding the direction to take annual leave.
- The requirement for "*agreement*" under s 18 of the Act places a higher burden on an employer. An employer cannot require an employee to take annual leave unless they have attempted and failed to reach agreement with them.
- CHH was not entitled to rely on s 19, as they had not established they were "*unable to reach agreement*". Therefore, CHH was not entitled to require employees to take annual holidays as they did.

Some further interesting issues considered included:

- An employer cannot require an employee to take annual leave under section 19 of the Act where the employee has no annual leave entitlement.
- Section 19(2) does not require any particular form for notice requiring an employee to take annual holidays. In this case, the email notifying employees was sufficient.
- An employer does not have an obligation to ascertain whether a period of annual holidays will be used for the purpose of rest and recreation.
- There was no obligation on CHH to revoke the notice to take annual holidays, once it was in receipt of the COVID-19 Wage Subsidy.

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