



ISSUE

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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
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An employee's resignation is not always a straightforward issue and could in some circumstances place some additional obligations on an employer to ensure the resignation is, in fact, a resignation.

The Employment Court, in **Urban Décor Ltd v Yu** [2022] NZEmpC 56, has recently re-examined the issue of resignations made in the "heat of the moment" and whether an employer is under an obligation to allow an employee a "cooling off" period before accepting the resignation. Although each case will be different and will turn on its own facts, this case serves as a useful reminder of where an employee's resignation may not be so simple.

The case involved that of two employees who were engaged in a heated argument with their employer. At the end of the argument, the employees told their employer that 'they quit', before packing their belongings and leaving the premises. The following day, the employer sent letters to the employees outlining that their employment was terminated effective immediately.

In assessing whether or not the employees had resigned, the Court referred to **Mikes Transport Warehouse Ltd v Vermuelen** [2021] NZEmpC 197, which set out four considerations for whether an employer should allow an employee to "cool off" before accepting their resignation:

1. *Resignation is a unilateral act. It does not involve the employer's agreement or disagreement.*
2. *While an employer's decision to dismiss must be justified and meet the standard of what a fair and reasonable employer could do in all the circumstances, an employee does not need to justify their decision to resign; nor does the decision need to be demonstrably sensible or well thought through.*

3. *Much of this will depend on the surrounding circumstances. The key issue is whether, on an objective assessment, the employee resigned. If it was a resignation, there was no legal obligation to hold off on recognising that resignation, and failure to do so could not turn into a dismissal.*
4. *Any concerns about whether a resignation arose from an employer's misconduct or breach could then be addressed via the developed case law relating to constructive dismissals.*

In considering this, the Court in *Urban Décor* summarised that:

*"whether or not an employee has resigned is an objective test as to whether a reasonable employer, with knowledge of the surrounding circumstances, would have reasonably considered the employee to have resigned. Clear words of resignation are likely to clear that bar unless a different understanding can be informed by the surrounding circumstances..."*

The Court analysed and weighed the evidence of the employees and their employer, and found that on an objective basis, the employees had in fact resigned from their positions. The Court noted that the employees had also not made contact with the employer following this until after hours, and that when they did, they did not indicate any intention to return.

The Court found that there was no obligation in this case to allow the employees a period to "cool off" as the resignation was unequivocal. Further that, the employer's dismissal letters did not and could not turn those resignations into dismissals. The Court did note, however, that the employees may have been able to later resile from the resignation, had they done so promptly and within a reasonable time.

# When an employee is on ACC, who pays for public holidays?

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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The question has recently arisen as to whether an employer is liable to pay for public holidays that fall within a period where an employee is receiving weekly compensation entitlement from ACC.

As a consequence, MBIE is reviewing its guidance to ensure it is consistent on the issue, and this has also been sent to the Holidays Act Taskforce to consider as part of their review of the Holidays Act 2003 (*"the Act"*).

The starting point is, a person is entitled to receive weekly compensation for loss of earnings for incapacity caused by a covered injury, and who was an earner immediately before his/her incapacity commenced. Where an employee is receiving weekly compensation, the employer is not required to pay the employee, and they cannot require an employee to use their sick leave or annual leave over this time. This effectively places the employee on *"unpaid leave"* while they are still employed.

If the employee receives any *"earnings"* while they are receiving weekly compensation, the Corporation must abate (or reduce) the person's weekly compensation accordingly. This situation can apply where an employee gradually returns to work.

The Act is silent on whether an employee should be entitled to be paid for public holidays by their employer where they are receiving weekly compensation. However, it is clear that when an employee is on annual leave or sick leave, and a public holiday falls on a day that the employee would otherwise have worked, the employee is entitled to be paid for the public holiday. This obligation is expressly provided for under the Act.

Generally, the question that must be asked as to whether any employee is entitled to be paid for a public holiday is whether the public holiday would otherwise be a working day for the employee.

Section 12(3) of the Act sets out factors that must be taken into account where the situation is not clear. These are:

- (a) the employee's employment agreement:
- (b) the employee's work patterns:
- (c) any other relevant factors, including—
  - (i) whether the employee works for the employer only when work is available:
  - (ii) the employer's rosters or other similar systems:
  - (iii) the reasonable expectations of the employer and the employee that the employee would work on the day concerned.
- (d) whether, but for the day being a public holiday, the employee would have worked on the day concerned.

If the employee should be entitled to be paid for the public holiday, ultimately it may come down to an assessment of whether the public holiday is a day the employee would otherwise have worked. Arguably the longer the employee has been off work on unpaid leave, the less arguable it is that the public holiday would be a day that they would have otherwise worked. We have found some limited case law that has agreed with this assessment, and found that while the employee was on unpaid leave, and receiving weekly compensation, the public holiday was not a day they would have otherwise worked.

However, we expect further guidance may make the position clearer and may change how public holidays are dealt with while an employee is receiving weekly compensation. We also note the ability under s 13 of the Act for the Labour Inspector to determine the question of whether a public holiday falls on an otherwise working day. We will be awaiting the updated guidance with great anticipation...



## Matariki

### New Public Holiday to Celebrate Matariki

In April, Te Ture mō te Hararei Tūmatanui o Te Kāhui o Matariki/Te Kāhui o Matariki Public Holiday Act 2022 was passed by Parliament, creating the new public holiday to celebrate Matariki, which will fall in June or July each year on a Friday.

Matariki is marked by the appearance of the constellation of stars each winter known as Matariki (or the Pleiades), celebrating a new year. It is a time for remembrance, celebrating the present, and looking to the future.

The first public holiday for Matariki will be this year on **Friday 24 June 2022.**



Jane Jarman has recently joined our team at MGZ Employment Law.

Jane joined us from her previous role acting for clients across a range of areas of law, as well as specialising in employment law and its associated areas, including: ACC, health and safety, and privacy law. Jane has acted for a number of clients in employment and other matters from the initial stages of providing advice through to appearances at Review and Alternative Dispute Resolution, such as conciliation and mediation. Jane has a calm, pragmatic, and straightforward manner in assisting clients to reach a resolution in any disputes that arise.

Outside of work, Jane enjoys spending time with family and friends, as well as spending time in her garden with her cat, Jim, and dog, Ted.