

Earthquake Update

After the devastation caused by Canterbury's latest earthquake and its subsequent aftershocks, many employers are now questioning what their rights and responsibilities are in relation to staff. This edition of "The Advocate" will outline the issues which employers need to give consideration to in this regard and provide information which is available at this time.

PRAGMATIC APPROACH

While the current situation raises a number of legal issues which have not been the subject of Court determinations (at this stage!) and may not be specifically provided for in your employment agreements, we would suggest that employers adopt a pragmatic approach to dealing with specific issues affecting their workplace and employment relationship with staff. In a large number of scenarios, employers, employees (and their representatives/union) will be able to reach an agreement on a viable solution to deal with the various scenarios facing the workplace as a result of the impact of the earthquake.

The current situation we are all facing makes it imperative that employers and employees maintain a continued dialogue; with employers providing advice as to whether work will be available and employees communicating their ability to employers to attend workplaces.

The best solution to any particular issue which you may currently be facing may be to attempt to reach an agreement with your employees and clearly ongoing communication will be most likely to facilitate this.

EMPLOYMENT AGREEMENTS

In the first instance however you need to review the terms of your employment agreements to determine whether there is express provision concerning the situation which you are facing. Some employment agreements have business interruption or *force majeure* clauses which provide that the employer may cease paying employees when the business is unable to operate (either temporarily or permanently) for reasons beyond the employer's control. A natural disaster, such as a major earthquake, will likely trigger such clauses.

In the circumstances where your employment agreement does not contain provisions which directly cover your situation the following options may be available to employers to deal with the situation:

1. Frustration of Contract

In circumstances where as a consequence of the earthquake, you are unable to provide work and/or have reached a decision to cease operating a business, it is arguable that the doctrine of frustration is applicable to the situation.

The doctrine of frustration releases a party from its contractual obligations when an unforeseen event, such as a devastating earthquake, renders the contract impossible to perform. Due to the doctrine being an exception to an otherwise absolute rule, it has a very high threshold and, once reached and enforced, means the employment agreement is at an end and wages are therefore no longer payable.

For employers whose premises has been totally destroyed or badly damaged to the extent that the employer will not be resuming business for a long period of time, if at all, the doctrine of frustration may be relied upon to terminate employment agreements and/or to cease paying employees for an interim period to allow for the repair of workplaces.

The doctrine of frustration will likely only be able to be relied upon in rare and extreme circumstances and we would urge you contact us to seek advice if you want to canvass your ability to rely upon 'frustration'.

2. Redundancy

In circumstances where you consider that some or all of your staff may be surplus to your ongoing operational requirements you may initiate a process to restructure your current staffing levels. The standard obligation to consult will apply.

The current circumstances in Christchurch would mean the consultation process could be undertaken relatively quickly, but it will of course be dependent upon on a business's individual circumstances, including factors such as whether the employer has business interruption insurance which may cover staff wages or business income. In any event, insurance companies will usually require employers to act prudently and mitigate losses which would likely include making staff redundant where necessary.

3. Business is not yet Operational

In circumstances where work cannot be undertaken temporarily because of damage to the workplace and/or it is unsafe for staff because your workplace is inside the red zone, the issue arises as to whether employees who are not required to attend work because of this reason are entitled to be paid.

As a general rule, if an employee is willing and able to work, the employer is obliged to provide the employee with work and to pay the employee accordingly, even though a business may not be operating. However there are a number of options to deal with this, these include:

- check your insurance policies you may have business interruption insurance which covers payment of wages for a period of time.
- employees may agree to take a portion of their annual leave or you could give 14 days' notice to take annual leave in circumstances where agreement cannot be reached.
- seeking employees' agreement to a reduced pay scheme until the business is fully operational.
- seeking employees' agreement to work part-time where such work is available, perhaps at a different location or from home and/or potentially carrying out alternative duties, for example, cleaning.

4. Work Available - Employees not Returning to work

If an employee is unable to come into work because he or she is sick or injured or needs to care for a spouse, child or other dependant who is sick or injured, the employee may be entitled to sick leave in accordance with the Holidays Act 2003 or any more beneficial provisions provided for in an employment agreement.

If the business is operational, and there are no safety issues, and the employee simply refuses to return to work then payment of wages will not be required to be made unless agreement can be reached to use annual/special and/or unpaid leave. Absence that is protracted may necessitate disciplinary action or possibly termination of employment due to abandonment.

HEALTH AND SAFETY ISSUES

Employers have a duty under the Health and Safety in Employment Act (HSE) to take all practicable steps to ensure the safety of their employees whilst at work. In many cases, employers may need to engage experts to assess whether the workplace buildings are safe.

Employees can refuse to work under the HSE if they have reasonable grounds to believe that the work that they are required to undertake is likely to cause them serious harm (e.g. working in a damaged building which has not been assessed by an engineer). However, employees with these types of concerns are obliged to discuss them with their employer, and in the absence of a clearance from an engineer the parties may reach an agreement on possible solutions, such as working outside of the building concerned, in another building they are comfortable with, or working from home.

GOVERNMENT SUPPORT PACKAGE AND OTHER ASSISTANCE

The Government has announced an Earthquake Employment Support Package which provides financial assistance to employers and employees in Canterbury affected by the 22 February 2011 earthquake and aftershocks. The scheme is run by Work and Income New Zealand and there are two options to choose from:

1. Earthquake Support Subsidy – a payment for employers who want to maintain the employer/employee relationship and needs to take time to consider the business viability.
2. Earthquake Job Loss Cover – a payment for employees where the employer has decided not to continue their business and employees are no longer able to work and/or receive a wage.

For questions and answers on the earthquake support package visit www.workandincome.govt.nz or call WINZ on 0800 559 009

As you will appreciate the options set out in this issue of "The Advocate" are generalised in nature and each workplace will need to address their unique situation impacting upon their workplace and their employees.

McPhail Gibson & Zwart Ltd is fully operational, and we are available to provide specific advice tailored to your business' individual needs at this time. Contact us on 03 3652345.