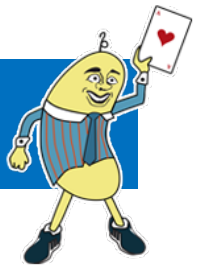
Perriam & Partners

Chartered Accountants & Business Advisors



EMPLOYER NEWS 2020

PERRIAM & PARTNERS ISSUE 23 September 2020

EMPLOYERS WARNED AGAINST ILLEGAL PAY CUTS

The Labour Inspectorate reminds employers of the need to follow legal procedures when making changes to workers' pay or other agreed terms and conditions.

The reminder follows a determination by the Employment Relations Authority (ERA), in which an Auckland employer, Eastern Bays Hospice Trust operating as Dove Hospice, was ordered to repay money owed to six workers. Dove Hospice unilaterally reduced workers' salary to 80 per cent before making them redundant.

The ERA determined the pay deductions were not agreed to by the workers and were therefore not legal.

Employment New Zealand National Manager George Mason says employment law continues to apply to all employment relationships. This includes anything that has been agreed to in an employment agreement.

"We understand that many workplaces will need to make changes to adapt to and recover from the impacts of COVID-19. These changes can include different ways of working, varying hours or days of work, and in some cases, changes to the rates of pay.

What employers need to remember, however, is that all changes need to be recorded in writing and employees need to be consulted in good faith and given the opportunity to consider and agree to these changes. In any situation, pay cannot be reduced below the minimum wage of $18.90 per hour. Failure to follow these rules may lead to legal action and penalties.

Likewise, employees need to discuss and raise any issues, concerns or changes to their circumstances with their employer as soon as they can.

In these challenging times, it is more important than ever for employers and employees to work together," Mr Mason says.

Information on legally making changes to employment agreements can be found on the Employment New Zealand website.

Source: www.employment.govt.nz

IN THIS ISSUE

CONTRACTOR OR EMPLOYEE – COURIER INDUSTRY

The Employment Court recently ruled an Independent Contractor to be an Employee, despite having signed an agreement to be a Contractor. This long disputed issue, could serve to be another nail in the coffin for the industry.

This is the case of Parcel Express and a courier who worked for them for the best part of a year until the relationship fell apart. Although the Court commented this is not precedent setting and only applies to this case it does and should send alarm bells across the industry as a whole.

This case once again demonstrates that the Courts will look at the true nature of an employment relationship and not just what is written on paper. As outlined by the Judge, 'standard industry practice' also doesn't make it right.

We have known for a long time there are tests to determine whether someone should be considered a Contractor or an employee and just because it suits the company isn't one of them.

A major test in a relationship determination is the degree of control the principal may have over the Contractor, and some major red flags prevail here.

The principal company mandates the type of vehicle to be used for the work, colour scheme of the vehicle, branding to be used, foot all costs thereof, audit the mileage, limiting the amount of leave Contractors can take, insisting on exclusivity to them, restraint of trade of 100 kms of Auckland and non-solicitation of clients after the relationship.

While all these costs and restrictions fall at the feet of the Contractor, it's often the case they struggle to achieve any more than the minimum wage and aren't afforded any benefits or protections from being an employee.

While this is currently industry standard, and the Court decision only pertains to this particular case, it's likely that things will need to change before we see many more of these cases being tested.

If you wish to engage a contractor, we strongly recommend to review our guide on Independent Contractors which covers the list of tests to consider plus appropriate agreements.

Source: www.employers.co.nz

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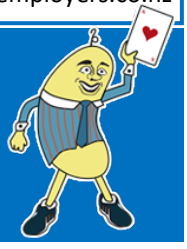

COVID-19 AND STAFF REDUNDANCIES – IT'S IN YOUR INTEREST TO FOLLOW A PROPER PROCESS

The COVID-19 situation continues to challenge businesses. Many employers tell us they are feeling the pressure to adapt quickly. Some are considering staff redundancies. If you are restructuring or planning redundancies you have legal responsibilities to follow proper processes.

WHAT DOES RESTRUCTURING AND REDUNDANCY MEAN?

Employers restructure their business so that they have the right set-up and roles in place to respond to economic changes.

Restructuring means changing the operational set-up to improve the way the business runs. Businesses need a genuine business reason to restructure. Examples include a change in market demands, financial constraints, realigning your brand, changes in customer behaviour, wanting to outsource some business functions, or a merger.

Redundancy usually means reducing or changing the makeup of a business workforce because a job or jobs are no longer needed or there is the need for a different skill set. Section 4 of the Employment Relations Act 2000 requires employers to act in good faith when making employees redundant. Employers cannot for example make an employee redundant and then replace them with someone else in a substantially similar position but with a different job title.

BEFORE YOU CONSIDER ANY REDUNDANCIES

If you think a new structure could improve the way your business operates, you might want to investigate restructuring. This doesn't necessarily mean making employees redundant, although that can happen, but it might mean employees' roles change.

Restructuring cannot be used as a way to manage individual employee performance issues. Employment laws also protect some groups of employees including cleaning, catering and laundry staff, in certain restructuring situations.

ONCE YOU HAVE DECIDED TO LOOK AT RESTRUCTURING OR REDUNDANCIES

You need genuine business reasons to restructure your business. You'll need to state these reasons clearly as you proceed. You must follow the proper redundancy process. If you don't follow the proper process, your employees can apply to the Employment Relations Authority for re-employment, loss of salary and/or compensation for acting illegally. You can also receive hefty fines. Employment New Zealand has resources and guidance for both restructuring and redundancy. A good starting point is to go to **employment.govt.nz/workplace-policies/workplace-change/workplace-change-process-outline**.

Source: Inland Revenue August 2020 Business Tax Update

THINGS TO CONSIDER WHEN WORKING REMOTELY

Employers and employees should consider aspects related to employment law, health and safety, as well as costs, privacy and data security issues.

CHANGES TO EMPLOYMENT AGREEMENTS

Employers should consider whether they need to update the employment agreement to reflect the variations made to working arrangements. If the variation to the agreed hours of work or place of work is permanent, then the employment agreement should be updated.

HEALTH AND SAFETY

Under the Health and Safety at Work Act 2015 and related regulations, employers must provide employees with the highest level of protection from workplace health and safety risks, so far as is reasonably practicable. This includes risks to both physical and mental health.

If employees regularly work from home, employers should consider whether this would be a 'home-workplace' that needs a health and safety risk assessment. This could include things like ergonomics of the workstation setup, fire safety equipment, and first aid kits. If an employee lives alone and works at home regularly, there may also be risk of social isolation. Employers should make sure that employees have plenty of opportunities to stay connected with colleagues – either alternating days working at home and in the office, or having regular 'virtual catchups'.

EQUIPMENT AND EXPENSES

Employers should consider whether they need to purchase or provide allowances to cover additional office equipment and related costs to enable employees to work effectively from home. These include computers, screens, video and audio devices, and electricity or telecommunication costs. There is no specific legal entitlement to allowances. The payment of and level of allowances, over and above salary or wages, can be agreed to by the employer and employee.

MONITORING AND PRIVACY

Employers should only consider setting up cameras and software to monitor employees if it's reasonable, for example, to ensure their safety. Monitoring staff can affect their morale and productivity because they may feel that they are not trusted by their employer. Employers need to be mindful of the different privacy concerns that arise when monitoring or filming occurs in the employee's home environment.

INFORMATION AND DATA SECURITY

The company's information and data may not be as safe at an employee's home as at the business' premises. This is because employers can control better the security of their information and data at their premises. Whereas, at home, employees may be using different devices and work from a different network and system which are outside the control of the employer.

Source: www.employment.govt.nz

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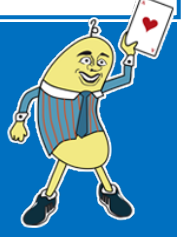

MODIFYING EMPLOYMENT AGREEMENTS DURING COVID-19 RESPONSE AND RECOVERY

Employers and employees need to work together to slow the spread of COVID-19, protect New Zealand and keep each other safe. This means that normal obligations to keep in regular contact and to act in good faith are more important than ever. Regular employment law still applies to all employment relationships – regardless of the circumstances that we find ourselves in. This includes anything that has been agreed to in an employment agreement.

DEAL WITH EACH OTHER IN GOOD FAITH

Employers and employees, and their representatives must discuss in good faith the implications of the COVID-19 response and recovery on their working arrangements. Where changes to current working arrangements are proposed by an employer, there are specific good faith requirements that must be followed. Any changes made need to be consulted on and agreed to by both parties. Any agreed change to the employment agreement should be recorded in writing. Having the agreed terms and conditions in writing is a legal requirement, whether the change is temporary or permanent.

Employers and employees may be considering changes that involve workplaces closing temporarily or reductions in hours. These changes require additional good faith or other process arrangements, including consulting with employees and their representatives, providing time to respond to proposals and considering their comments.

CHANGES TO JOB DESCRIPTION

Example: Agreeing that the employee will undertake alternative work where the employee is unable to do their existing job

An employer can't change the job description of an employee without the employee's agreement. In some situations, where an employee is unable to do their existing job, an employer may propose that the employee does a different job. This could be a temporary change until the employee can resume their existing job. In these situations the employer must follow the usual process for workplace change which includes giving the employee a fair opportunity to consider and respond to the proposed change. Any agreed changes must be recorded in writing and signed by both parties, and the employee must be given reasonable time to consider the proposal.

CHANGES TO THE RATE OF PAY

Example: Agreeing to a lower rate of pay for each hour that the employee works

An employer can't change an employee's rate of pay without discussing it in good faith and the employee's agreement. In some situations, reducing an employee's rate of pay may be put forward as an alternative to redundancy. The length of time for this change must be stated in writing in the employment agreement variation. In these situations the employer must follow the usual process for workplace change, which includes giving the employee a fair opportunity to consider and respond to the proposed change.

During all Alert Levels, businesses are legally required to pay workers for any work they do and must continue to meet all contractual obligations. This means employees – regardless of whether they are working from home, or from their workplace – must be paid at least the minimum wage, or more if the rate in their employment agreement is higher.

If an employee is working (either from home, or at a workplace), then they must be paid for each and every hour that they work at their agreed wage rate. This rate cannot be below the minimum wage rate. Any agreed changes must be recorded in writing and signed by both parties, and the employee must be given reasonable time to consider the proposal.

Source: www.employment.govt.nz

CHANGING THE HOURS OF WORK

Example: Agreeing to a temporary reduction in hours.

Generally, if an employment agreement sets the employee's hours of work, then an employer can't change them with the employee's agreement. This should be recorded in writing. If the employment agreement says that an employer can change the hours of work, the employer still has to act fairly and reasonably before they do.

In some situations (such as genuine financial, commercial or economic problems, or genuine restructuring of the business), reducing and employee's hours may be put forward as an alternative to redundancy.

Alternatively, employers may propose changes to work times or moving to shift work arrangements to manage physical distancing requirements. In these situations the employer must follow the usual process for workplace change, which includes giving the employee a fair opportunity to consider and respond to the proposed change. Any agreed changes to the hours of work should be recorded in writing.

Source: www.employment.govt.nz

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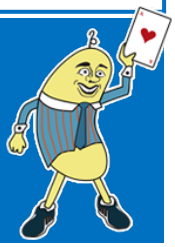

VALIDITY OF MEDICAL CERTIFICATES

As per the Business NZ Workplace Wellness Report 2019, New Zealand lost around 7.4 million working days due to absences in 2018. Time lost to absence averaged 4.7 days per employee, and it's estimated to cost the economy $NZD 1.79 billion. These figures are growing each year and has a direct effect on productivity of New Zealand businesses.

While companies need to allow and ensure sick staff stay at home to recover properly, there is also a need to question absence and not just tolerate abuse of sick leave. While unused sick leave entitlements are generally not paid out, we do have a widespread trend of workers who view sick leave entitlement as free days off, to be used regardless of any ailment. It is therefore vital to ensure that abuse of sick leave is minimised in your business. Legislation provides assistance in this manner by allowing Employers to request medical information/certificates. Simply receiving the information alone is not sufficient, it is important to understand the validity of the information received from your staff as it relates to their sick leave entitlement.

Investigating the information supplied needs to be used to identify abuse of sick leave, incapacity concerns and even Health and Safety risks in your workplace.

WHO CAN COMPLETE A MEDICAL CERTIFICATE

- A doctor, that is registered to practice in New Zealand and has a current Annual Practicing Certificate.
- A nurse practitioner – within their scope of practice.
- A dentist, where the employee's absence is dental-related.
- A midwife, where the employee's absence relates to pregnancy.

CONTENT OF A MEDICAL CERTIFICATE

As stated by the Medical Council of New Zealand, all medical certificates are legal documents and any statement a health practitioner certifies must be honest and made in good faith. If you are concerned that a doctor has not complied with the requirements of the Council's statement, you can lodge a complaint with the Medical Council or the Office of the Health and Disability Commissioner. All medical certificates need to:

- be written legibly, minimising the use of medical terms for easy comprehension;
- disclose only information that is accurate and based upon clinical observation, any patient comment should be clearly distinguished from clinical observation;
- clearly identify the examination date and the expected period of treatment or recovery;
- retrospective certificates should be clearly identified as such and not exceed more than 5 days;
- contain useful and specific information on what duties/tasks an employee can and can't do – as well as what capacity he/she has for alternative duties.

INVESTIGATION GUIDELINES

Lodging an investigation into the validity of information supplied must only be done if there is a reasonable suspicion that the information is incorrect and/or justified by an internal process such as incapacity. Acting in good faith must remain consistently and throughout the process. Investigations can include:

- Referring to the employee's sick leave history and pre-existing factors;
- Direct communication with the employee, unless authorised by the employee to deal directly with the health care provider;
- Requesting more detail from the employee;
- Getting authorisation from the employee to contact the health care provider for more detail;
- Requesting subsequent medical opinions, at the company's cost.

When requesting and/or investigating a medical certificate, the employment agreement and/or your company policy and procedures are the first point of reference.

Source: www.employers.co.nz