

NOVEMBER 2009

EMPLOYMENT NEWS >>UPDATE

In this issue:

Review of personal grievance procedure, Holidays Act, and rest and meal breaks

[Read more](#)

Employers can sue employees

[Read more](#)

A time of uncertainty—Super City employees

[Read more](#)

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A time of uncertainty—Super City employees

With the amalgamation of the eight Auckland local authorities into a unitary authority under way, it is a time of uncertainty for the 6000 local government employees in Auckland, who are yet to find out about the fate of their jobs.

How have overseas 'Super City' amalgamations tackled the issue of protecting employees' jobs, and what can we learn from these overseas models? This transitional process will cause potential disturbance to local authorities until the completion date in November 2010, principally affecting those employers with local authority relationships. It also implies a possible surplus of unemployed specialty staff after November 2010 especially at the senior level. The principal body responsible for this process is the Auckland Transition Agency ('ATA') and at this stage the ATA is receptive to feedback—something employers may wish to take advantage of.

Queensland

Recently, Queensland reduced the number of councils from 157 to 73. One of the main bottom-line considerations of the amalgamation was to provide certainty to employees of the former councils. During the Queensland transition, all council employees below the level of chief executive were guaranteed their jobs in the new councils for a period of three years. In order to formally guarantee this, a Code of Practice was drawn up, which was jointly agreed to by all parties, including workers and their representatives.

EMPLOYMENT NEWS >> UPDATE CONT...

To provide job security to employees affected by the restructure, the Code of Practice stated:

A new or adjusted local government must not, as a consequence of reform, retrench an employee (excluding a CEO) before 16 March 2011. Dismissals are not covered by this provision.

The Code of Practice also ensured that employees' terms and conditions of employment would not change as a result of the amalgamation. The Code provided that all employees of former councils, which were being amalgamated, would commence employment with a new or adjusted local authority under the same terms and conditions as existed prior to changeover day. The Code also provided that there was deemed to be no break in employment during the changeover. Further, all affected employees had their existing employee entitlements carried over to the new or adjusted local authority they would be working for. Another important feature the Code provided was that employees, who transmit to a new or adjusted local authority, were not required to serve a probationary period or qualifying period of employment.

The Queensland amalgamation also gave unions an opportunity to improve council members' employment conditions. For example, members of the Queensland Services Union received up to a 10% pay rise due to the equalisation of wages. Further, other conditions such as on-call allowances, paid maternity leave and travel arrangements were improved.

New South Wales

New South Wales also recently amalgamated a number of councils.

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The Local Government Amendment (Employment Protection) Act 2003 was passed to provide employment protection for certain staff members transferred from the employment of one council to another council due to the constitution, amalgamation or alteration of council areas. One section of the Act provided that there would be no forced redundancy of transferred non-senior staff members for three years after transfer. It also provided for lateral transfer of non-senior staff members.

Auckland's approach

Neither the Local Government (Tamaki Makaurau Reorganisation) Act 2009, nor the Local Government (Auckland Council) Act 2009 has specifically addressed the issue of staff transition. In order to provide certainty to the 6000 local government workers, it is suggested that a similar approach to that taken in New South Wales and Queensland be followed. For example, council employees could be provided with a guarantee that they will retain their jobs for a minimum period. This would provide them with the assurances of fairness and certainty they are lacking at present.

On 2 November 2009, the ATA released a discussion document detailing the organisational structure, the scope of workforce change and the staff transition protocols and processes anticipated for the new Auckland Council, which will become definitive in January 2010 after submissions and further clarification by the ATA.

The ATA expresses intention to maintain the security and nature of employment for staff members who fall into one of three categories: those whose work relates to specific community facilities, jobs that are specific to operational work in community services, and staff who deal with customers directly. In contrast, staff, whose roles relate to strategy, policy or planning are not afforded the same assurance. Redundancies are expected in roles where there is a duplication of responsibility, particularly relevant at supervisory, management and support levels.

In terms of forced redundancy, the anticipated transition is expecting to proceed in a similar way to Queensland and New South Wales. However, no guarantees or obligatory standards have been set. In terms of transfer, probationary period, terms of contract and other matters relating to a continued employment, no standards have been set.

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Review of personal grievance procedure, Holidays Act, and rest and meal breaks

These reviews may offer employers simpler, more straightforward approaches to the personal grievance procedure, the Holidays Act, and rest and meal breaks.

Personal grievance procedure

There may be some light at the end of the tunnel for those employers struggling with the strict rules of procedure. In his speech to the Council of Trade Unions, John Key announced that the Government is reviewing the personal grievance claims procedures in order to make them less onerous for employers

Currently, if an employer dismisses an employee for a substantively justified reason, but fails to follow the correct process, the dismissal will nevertheless be an unjustified dismissal. Therefore, many employers—particularly small employers—have been hauled over the coals because they did not dot their 'i's and cross their 't's. While an employee may have done something that clearly amounts to misconduct, the employer is penalised by the Employment Relations Authority owing to a procedural error in the way they went about dismissing the employee.

Current figures show that employees won almost 70% of cases heard by the Authority or Court in 2008. This demonstrates the difficulty employers have in getting the process correct. Interestingly, 49% of those grievances were brought by employees in their first year of employment.

EMPLOYMENT NEWS >> UPDATE CONT...

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The Prime Minister has not given any indication of what a review is likely to encompass. However, the Minister of Labour is reported to be reviewing the current law, and is expected to make recommendations to Cabinet.

We will be paying close attention to this review, and will keep you updated when further information comes to light.

Holidays Act 2003 review

In other legislative news, the review of the Holidays Act 2003 is reported to be running on time, with a report still expected in December. This review is being undertaken by a working group of five, with two employee representatives, two employer representatives, and an employment lawyer acting as Chair. The review is limited to specific aspects of the Act, including the calculation of 'relevant daily pay', the ability to transfer public holidays and trading annual holidays for cash. Many employers are awaiting the report with bated breath, hoping that a simpler, more straightforward approach to calculations will be included, and that compliance costs will be reduced.

New rest breaks and meal breaks bill

Finally, hot off the press is the introduction of a new Bill, which aims to amend the current rest and meals breaks legislation. If the legislation is passed, it is intended to provide 'greater flexibility' and give employers and employees the opportunity to take breaks when suitable to individual requirements.

The law currently makes it difficult for employers and employees in a number of

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industries because it prescribes rigid specific breaks and times depending on the length of a work day. The new Bill intends to introduce flexibility to workplaces, by permitting rest and meal breaks to suit service or production continuity, as far as it is reasonable. For example, under the current law, employers in the restaurant industry have to send employees on mandatory breaks, even if this interrupts service in busy patches. However, if Parliament passes the new Bill, the employer and employee will be able to determine break arrangements between themselves, rather than interrupting continuity of service. The Bill also allows for employers and employees to agree that, instead of a break, there will be compensatory measures, such as later starts, earlier finish times, or time off in lieu. Thus, this Bill will potentially benefit the interests of both employers and employees.

We will keep a close eye on the development of the Bill and will keep you informed if there are any new progressions.



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If the employer breaches the employment agreement, the employee's damages are generally clear: the employee may recover an amount for lost remuneration (minus any amount mitigated), compensation, and a contribution towards costs. However, when the roles are reversed and it is the employee who breaches the agreement, it is considerably more difficult for the employer to prove damages and many employers would rather dismiss the employee summarily. Therefore, it is not surprising that there are few cases to be found where the employer has sued the employee for damages.

Section 162 of the Employment Relations Act 2000, allows the Employment Relations Authority, in any matter related to an employment agreement, to make any order that the Civil Courts are entitled to make under any enactment or rule of law. This includes an award of damages. The Authority can award damages against an employee for breaches of the implied term of fidelity, of duty to act with good faith and their contractual duty of care, where the employer suffers loss; *Recon Professional Services Ltd v Andrews* (WA77/05, 15 May 2005).

In a recent Employment Relations Authority determination *Auckland Regional Council v Tilialo* (Member Monaghan, AA 368/09), the employer, Auckland Regional Council ('ARC'), sued an employee, Mr Tilialo, who had breached his employment agreement by knowingly and dishonestly authorising payments of two false invoices, and misusing the funds for his benefit. ARC was successful in all respects against Mr Tilialo.

EMPLOYMENT NEWS >> UPDATE CONT...

Interestingly, the Authority ordered Mr Tilialo to pay damages in respect of the value of the invoices, costs of ARC's investigation into the matter, and general damages for inconvenience and interruption to business. Additionally, the Authority ordered penalties against Mr Tilialo—to be paid to ARC. As a result of his misappropriation and deceptive conduct, the employee ended up being \$40,000 out of pocket.

In this case, Mr Tilialo had authority to authorise expenditure for ARC of up to \$50,000 on any single contract or transaction. Mr Tilialo abused his delegated authority by authorising payments of two false invoices, which were created by his 'girlfriend'. Mr Tilialo subsequently used the money from the false invoices to pay for his girlfriend and himself to go to New York on holiday.

Because Mr Tilialo was not forthcoming with information during the investigation, ARC incurred significant legal costs prior to the Authority proceedings as a result of investigating the false invoices. The Authority found that it was reasonably foreseeable that legal advice would be sought in these circumstances. The Authority treated the costs of the investigation as special damages. In *Binnie v Pacific Health Ltd* [2002] 1 ERNZ 438, the Court of Appeal held that legal expenses, prior to the issue of proceedings (e.g. for investigations into employee conduct) could be treated as special damages rather than as party and party costs. The effect of treating these costs as special damages, rather than as

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costs, is that 'as special damages the costs in question would be recoverable in full as opposed to being recoverable only to the extent of a reasonable contribution'.

ARC also suffered general inconvenience as a result of the investigation. For example, there was loss of executive time and interruption of ARC's business while they investigated Mr Tilialo's breaches. The Authority also thought it appropriate to award general damages against Mr Tilialo for this inconvenience. According to *The Laws of New Zealand*¹; 'General damages ... are recoverable for those losses that cannot be objectively quantified in monetary terms'. In *Medic Corporation Ltd v Barrett* [1992] 3 ERNZ 977, the Employment Court held that loss of executive time that was attributable to time spent pursuing the employer's investigation into misconduct was recoverable as general damages.

Finally, because Mr Tilialo's breaches of his employment agreement were not technical and

¹ Laws of New Zealand, Damages, (4) Types of Damages, General Damages, para 35 ('introduction')

EMPLOYMENT NEWS >> UPDATE CONT...

inadvertent, the Authority also considered a penalty against Mr Tilialo to be appropriate. Because ARC suffered harm as a result, the Authority awarded the penalty to ARC.

This case serves as a warning to employees that the Authority can and will grant substantial orders when there is an appropriate case of misconduct by an employee.

In another recent employment case, *Masonry Design Solutions Ltd v Bettany* (AC30/09, 21 August 2009), an employee, Mr Bettany, attempted to bring an unjustifiable dismissal claim against his employer, Masonry Design Solutions Ltd ('Masonry'). However, his employer 'struck back' and was not only successful in upholding the dismissal, but also in its counter-claim for loss from poor workmanship.

Masonry dismissed Mr Bettany for his timekeeping and unreasonable use of the email and internet system. In relation to timekeeping, Mr Bettany was late to work and absent on a number of occasions. He was reminded of his timekeeping obligations on a number of occasions throughout his employment. However, Mr Bettany continued to wilfully fail and refuse to be present and available at work. The Employment Court held that, Mr Bettany's serious or repeated failure to follow reasonable instructions to begin work on time, amounted to serious misconduct. In relation to his email and internet use, Mr Bettany admitted that his use had been unreasonable.

After his dismissal, Masonry also became aware that some of Mr Bettany's work had been of such poor quality that it had to be redone. Masonry incurred a

significant cost as a result of having to redo Mr Bettany's work. As a result of Mr Bettany pursuing an unjustified dismissal claim, Masonry decided to 'bite back', and pursue Mr Bettany for the costs they incurred in fixing up his work, which was mistake-ridden.

The Employment Court held that it was foreseeable that if an employee produced such poor work quality, it would need to be rectified and at a cost to the employer. Therefore, both causation and foreseeability of the cost of rectifying the poor work were established in this case. The cost of rectifying the work was \$12,000, which was awarded against Mr Bettany in the form of special damages.

Like everyone else, employers can get angry and demand justice. These cases emphasize that employees need to be aware that even if they initiate legal proceedings, their employer still has the possibility of successfully striking back against them with hefty claims.