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Spring Issue

Nicole Ironside advises on an employer's obligations when an employee is injured or sick and has exhausted their sick leave entitlement.

Sally Cantrell discusses the importance of terms of trade for business.

Nicole discusses flexible working arrangements and the implications for employers under the new Employment Relations (Flexible Working Arrangements) Amendment Act 2007.

Dean Russ sheds some light on the new Client Care rules for Solicitors.

Medical Incapacity – An Employer's Obligations



Nicole Ironside
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Scenario; An employee is injured or sick, and has exhausted their sick leave entitlement and it is not certain whether the employee is able to return to the workplace.

What are the employer's obligations in these circumstances? Is the employer required to continue to employ the employee or can the employer dismiss the employee

for incapacity? The answer is not always straightforward.

While an employer is not required to hold open the job of a sick or injured employee indefinitely, there are a number of steps to follow before an employer dismisses a sick or injured employee.

Step 1 – The employer must first consider the terms of any employment agreement with the employee. Injury management programmes or policies concerning the management of employees health, including medical retirement and rehabilitation policies, may be incorporated into the employee's employment contract. These should be strictly followed to avoid an allegation that the dismissal was unjustified.

Step 2 - The employer must wait a reasonable time for the employee to recover. What is

a reasonable time will depend on the facts of each individual case. We can assist in providing advice in such cases.

Step 3 - The employer must make sure that it has precise and reliable medical evidence which indicates that the employee is unlikely to be able to return to the workplace or unlikely to be able to do so within a reasonable period of time. This will require the employer to have information on:

- (a) The nature of the illness/injury.
- (b) The likely period before the employee will be able to return to work.
- (c) The likely period before the employee will be able to work at peak performance.
- (d) Any risks to the employee's health associated with a resumption of work duties.

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The employment agreement should contain a provision to allow for the collection of this medical information in the event that the employee is ill or injured.

The medical information obtained should enable the employer to reach an informed view on the medical state of the employee, the employee's ability to return to his or her job, the likely timeframe for that return and whether it is reasonable to continue to hold open the employee's job any longer.

It is important that an employer does not reach any independent conclusions about the medical state of the employee, without first consulting with the medical specialist who has treated and provided medical information on the employee.

Further, any doubts or concerns that the employer has about the medical information should be clarified with the medical specialist before a decision to dismiss is made.

This process should allow any misunderstandings on the medical state of the employee to be cleared up at an early stage.

Gradual return to work

A gradual return to full time work after an illness or accident is common practice and it is not unusual for a medical specialist to suggest a 12 week time frame for this to take place. Most employment agreements provide for modified hours or duties while an employee is returning to their full time work capacity.

If the employer has a real concern about accommodating an employee's return to work on a gradual basis because, for example, the employee occupies a key position and it would be

impracticable for that employee to return to their position gradually, then the employer should raise this concern at a very early stage with both the employee and the medical specialist and seek their input on this concern.

Step 4 - The employer must clearly communicate to the employee its views on the employee's medical state and its view that the employee's employment may need to be brought to an end because of the employee's ongoing inability to return to the workplace. The employer must allow the employee to have input into the decision to dismiss to allow the employee a real opportunity to persuade the employer that he or she is able to return to the workplace and perform his or her duties.

Assignment of the employee's work while the employee is sick or injured

The employer may need to temporarily assign the sick or injured employee's work duties either to an existing employee or to a new employee. This temporary assignment may need to continue until such time as the sick or injured employee returns to work or is dismissed and the 12 week time limit for raising a personal grievance has expired.

If the employer permanently fills the employee's position immediately after dismissal and after a personal grievance has been raised, then the employer may be taken to have assumed the risk of permanently filling the position, prior to the resolution of the employee's personal grievances. The employer may have to reinstate the dismissed employee and find another comparable job

for the second employee. Therefore, any placement must be described as temporary.

Summary

1. If an employer wishes to dismiss an employee for incapacity, it should first wait a reasonable time for the employee to recover.
2. The employer should have precise and reliable medical evidence that the employee is unable to return to the workplace and that there is no firm date stipulated for a return.
3. The employer should communicate and consult with the employee and the medical specialist on the employer's views about the employee's medical state. Dialogue should include the reasons for those views and the possible risk to the employee's employment because of an ongoing inability to return to the workplace.
4. There should be no misunderstandings on the medical state of the employee.
5. The employee must be given an opportunity to have input on the decision to dismiss and have representation in any dismissal meeting.
6. The employer should avoid permanently appointing another employee to the sick or injured employee's position until the employee has been dismissed and until at least the 12 week time period for raising a personal grievance has expired.

For specialist assistance and advice, contact Nicole Ironside, Senior Solicitor. (03) 548 1469 Nelson ▲▲

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Terms and Conditions of Trade



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Any arrangement dealing with the supply of goods and services requires terms and conditions of trade. Further, terms and conditions also need to be regularly reviewed to ensure that they address the issues most likely to arise in your supply context.

We set out below the crucial elements of effective terms and conditions of trade.

Broadly speaking, terms and conditions need to clearly outline each parties' rights and obligations under the supply contract, and resolve any ambiguities that may otherwise generate uncertainty. Uncertainty and ambiguity do not help a supplier in the event of a dispute.

Key aspects of most supply agreements include:

- the procedure for placing orders,
- delivery of the goods,
- the nature and extent of any warranties and limitation of liability,
- Clarification of when ownership and risk in the goods will pass to the customer,

- price of the goods and how payment is to be made,
- payment related issues such as responsibility for GST (and other taxes or duties),
- whether and when a deposit is payable,
- whether prices are subject to change,
- how this price change is to be determined,
- consequences, costs and interest on overdue payments.

If terms and conditions allow for deferred payment, it is important to state that the contract for supply creates a security interest in the goods for the purposes of the Personal Property Securities Act 1999. (PPSA) Further, you must obtain the customer's agreement to this in writing. Compliance with the PPSA is required to ensure you benefit from your security interest. The registration of a financing statement over the goods on the Personal Property Securities Register, PPSR, will be required as soon as practicable. Further, where payment is deferred, you need to specify that the customer shall not be entitled to withhold any payment for the purposes of any set-off or counter claim.

If your terms and conditions set out a right to repossess goods, it is also wise to ensure that they confer a right to enter onto the relevant premises occupied by the customer for that purpose. The rights of entry onto premises to repossess goods given by the

Hire Purchase Act 1971 to a supplier no longer exist. The Credit (Repossession) Act 1997 applies when a (creditor) supplier has a right to take possession of consumer goods, but does not confer a right to repossess or a right to enter premises for the purposes of repossession.

Terms and conditions need to be tailored to your business and to your particular trading situation. They also need to be drafted broadly enough to govern a wide variety of potential issues. Generic factors include what amounts to a default for the purposes of the contract, and the consequences, which country's laws apply if orders are accepted from overseas, the circumstances in which you are entitled to refuse or cancel orders and to what extent optional statutory and/or implied warranties are excluded from your supply agreement.

The other critical aspect is that terms and conditions must be brought to a customer's attention prior to formation of a contract. Therefore it makes sense, to have the customer sign a declaration stating that he or she has read and agrees to be bound by terms and conditions, and to retain a copy of that declaration for your records.

If you would like to discuss this article please feel free to contact:

Sally Cantrell at our Richmond office. ▲▲

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Flexible Working Arrangements

The new Employment Relations (Flexible Working Arrangements) Amendment Act 2007 came into force on 1 July 2008



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The amendment

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 came into force on 1 July 2008. It is now Part 6AA of the Employment Relations Act 2000. The Act gives employees who have worked for their employer for at least six months, the right to request a change to their working arrangements because they provide care for any person.

Working arrangements include days, hours and place of work so that any conceivable work pattern could be covered.

The request

The employee's request must be made under part 6AA of the Employment Relations Act 2000, be in writing and state (amongst other things) the changes the employer may need to make to the employee's working arrangement and whether the changes in working arrangement are permanent or temporary.

The employer's decision

The employer must notify the employee of its decision within 3 months of receiving the request. The grounds for refusal

are wide ranging and include;

- an inability to reorganise work among existing staff;
- an inability to recruit additional staff;
- detrimental impact on quality or performance;
- an inability to meet customer demand; and
- additional cost.

Challenge

An employee cannot challenge the merits of the employer's decision to refuse the request but can challenge the employer's refusal of a request where the



employer has not complied with the requisite process. If the employee is successful, the Employment Relations Authority may impose a penalty (payable to the employee) not exceeding \$2,000.00.

Flexible working policy

A flexible working policy, which forms part of the employee's employment agreement, may be of benefit to some employers. The policy could set out the process to be followed when the employee makes a flexible working arrangement request. A policy could include a useful standardised request form which would ensure that the employer is provided with all of

the information required under Part 6AA of the Employment Relations Act. A flexible working policy could also include a trial period or regular review intervals to ensure that the arrangement is a workable one for both employee and employer.

While there is no requirement to meet with the employee when a request is made, the employer may find that a meeting is a useful opportunity to discuss the employee's request and negotiate an arrangement that accommodates both parties' needs.

The employer should always keep an accurate record of the request, the process followed, the factors considered and the decision. If the employer grants the request, then the arrangement should be properly documented including the date the arrangement is to commence, when it will expire, when the arrangement will be reviewed, and the effect of the arrangement (if any) on the employee's remuneration and benefits.

Rest Breaks

In April 2008, the Government introduced a Bill providing for minimum rest breaks and breastfeeding arrangements. The Employment Relations (Breaks and Infant Feeding) Amendment Bill, provides for the following paid rest breaks and unpaid meal breaks:

- One 10-minute rest break for up to 4 hours' work.
- One 10-minute rest break and one 30-minute meal

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break for between 4 and 6 hours' work.

- Two 10-minute rest breaks and one 30-minute meal break for between 6 and 8 hours' work.

For more than 8 hours' work, the requirements apply as if the work period had started again at the end of the 8th hour.

Employers can stagger the breaks but will need to agree on timing with employees.

The Bill provides for a penalty for employers who do not comply: i.e. up to \$5,000.00 for individuals or \$10,000.00 for a company or corporation.

Breastfeeding

The Bill also requires employers to facilitate breastfeeding in the workplace by providing facilities and breaks "so far as is reasonable and practicable

in the circumstances". This will be supported by a code of employment practice that will be issued after the Bill becomes law.

Breastfeeding breaks will be unpaid and exist in addition to rest and meal breaks (unless the employer and employee otherwise agree).

Employers, when deciding what is "reasonable and practicable" can have regard to their "resources" and "operational environment". This would allow an employer, who has limited space or resources, to provide limited or no facilities or breaks for breastfeeding.

If employers do not comply, the Bill provides for the same penalties as apply for rest and meal breaks.

The Bill is likely to become law in New Zealand. Therefore, it is important for employers

to now begin considering its implications. Many employers are already providing breastfeeding facilities in the workplace so that women are able to return to work earlier following child birth, if they choose to do so.

Paid rest breaks, breastfeeding facilities and flexible working schemes are designed to offer benefits to both employers and employees, namely the ability to recruit and retain skilled employees, reduce training and recruitment costs and increase loyalty and morale amongst employees.

If you have any questions regarding this article, please contact Nicole Ironside of our Nelson Office. Nicole is a senior solicitor specialising in Employment and Relationship Property Law ▲▲

New Rules for Lawyers – Client Care

Confused about the amount of information sent out by your Solicitor?



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From 1 August 2008 the new Lawyers and Conveyancers Act 2008 became law in New Zealand and introduced a significant change in the way lawyers are regulated and how lawyers practise in New Zealand.

Controversial parts of the law which have received media attention include removal of conveyancing from the sole responsibility of lawyers through to the abolition of District Law Societies across the country.

At a day to day level the most significant change for our clients is the change in the way in which a lawyer's conduct is regulated.

From 1 August 2008 new rules of conduct and client

care come into force. These rules replace the rules of professional conduct for barristers and solicitors.

The Act places four fundamental obligations on lawyers set out in the Act which can be summarised as follows:

1. To uphold the rule of law and facilitate the administration of justice in New Zealand;
2. To be independent in providing services to his or her clients;
3. To act in accordance with all fiduciary duties

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and duties of care owed by him or her to their clients;

4. To protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

An important new area under the new rules are a new set of requirements described as client care requirements. These client care requirements now place an obligation on lawyers to provide certain information to a client when first taking instructions and undertaking work for that client.

The idea of this information is to give the clients information about who is dealing with their file, points of contact, complaints procedures and a general overview of the lawyer's obligations in carrying out work on the client's behalf.

Many of our clients will by now have received letters of engagement which include these new client care information terms. Others will receive a copy of these terms when new work is undertaken on their behalf.

As a firm we strive to provide the highest level of services to our clients. We endorse and embrace any formal requirements which assist

in meeting those objectives. As clients of our firm we encourage open discussion about all aspects of our handling of your work and in particular any concerns or complaints you may have about how your work is handled.

As this will be the first time that many of our clients have received information of this type, we are always happy to discuss any concerns or questions that you might have about how these new client care requirements affect you and the way in which your files are handled.

If you have any questions regarding this article, please contact Dean Russ of our Nelson Office ▲▲

Employment Seminar Information

Nicole Ironside will be holding seminars on Employment issues for the Employer in Nelson, Richmond and Motueka covering the following key issues:

- **Trial Periods**
- **Long term sick leave / incapacity**
- **Dismissal for misconduct vs poor performance**
- **Redundancy**
- **Employee vs independent sub-contractor**
- **Fixed term agreements**

Please advise by email to admin@fvm.co.nz should you wish to attend.



Would you prefer to receive our newsletter via e-mail?

If so, please contact Sue Gardener, Partnership Secretary, Nelson Office

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