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THE EMPLOYMENT LAW FIRM

Celebrating Diversity:
Managing legal risk and the costs involved

THE NEW ZEALAND WORKFORCE: THEN AND NOW

New Zealand has been on a journey of change during which the laws of our country have transformed to reflect diversity in our nation.

There are different expectations on the parties to an employment arrangement now than there were 50 years ago. As we have shifted in our expectations the law has also moved.

- ***Human Rights Act***
  - **Prohibits an employer from discriminating against job applicants or employees on certain prohibited grounds.**
  - **An employer cannot use the prohibited grounds to refuse to employ a person for work which is available, offer them less favourable terms of employment, terminate them where others would not be terminated, disadvantage them, or retire them.**
- ***Employment Relations Act***
  - **Imports the discrimination provisions of the Human Rights Act but only in respect of existing employees.**
  - **Employers and employees must deal with each other in good faith, this includes:**
    - **Not misleading or deceiving each other;**
    - **being active and constructive in establishing and maintaining a productive employment relationship; and**
    - **being responsive and communicative.**
- ***Health and Safety in Employment Act***
  - **Employers must take all practicable steps to ensure the safety of employees while at work, this includes:**
    - **Providing and maintaining a safe working environment;**
    - **ensuring that equipment is safe for use;**
    - **ensuring that employees are not exposed to hazards; and**
    - **developing procedures for dealing with emergencies.**

- ***Flexible Working Arrangements Act***
  - **Grants certain employees the right to request a variation of their working arrangements if they have the care of any person.**
  - **The employer must deal with requests under this Act within a certain timeframe.**
- ***Equal Pay Act***
  - **Employers cannot refuse to offer people the same terms and conditions of employment by reason of the sex of that person.**
- ***Parental Leave and Employment Protection Act***
  - **Sets minimum entitlements with respect to parental leave for male and female employees.**
  - **Protects the rights of employees during pregnancy and parental leave.**
  - **Entitles certain employees and self-employed persons to up to 14 weeks of paid parental leave.**
- ***Holidays Amendment Act***
  - **Provides employees with the right to request to transfer whole or part of a public holiday to another day; and**
  - **the employer and the employee must agree in writing and follow the procedural guidelines in the Act.**
- ***Volunteers Employment Protection Act***
  - **Employees on protected voluntary service or training are deemed to have been granted leave of absence for the period of service; and**
  - **employment is considered continuous.**

Discrimination Case Law

AGE: *McAlister v Air New Zealand Ltd*

In 2004 the International Civil Aviation Organisation introduced a standard which prohibited pilots from holding the position of pilot-in-command if they were 60 years of age or older. Air New Zealand adopted a policy reflecting this standard.

McAlister was a senior pilot and flight instructor for Air New Zealand. When he turned 60 he was demoted to first officer because of the "age 60" rule. He also lost his role as instructor because he needed to be fulfilling the duties of pilot in command to do this.

The law

Under the Human Rights Act employers can discriminate on the grounds of age where there is a genuine occupational qualification for that position or employment. However, employers cannot use the exception to discriminate against an employee if, with some adjustment of the activities of the employer (not unreasonably disruptive), some other employee could carry out those duties.

The Supreme Court found that it was unrealistic not to regard the age standard as a genuine occupational qualification. However, whether or not Air New Zealand could reasonably

readjust McAlister's activities to allow him to focus on other tasks to accommodate the restriction was sent back to the Employment Court for determination.

The lesson

There may be a genuine occupational reason why a person can be discriminated against in their employment. However, the employer still needs to consider whether a person can remain in their employment by reorganising their duties. If employers do not do this, they may be found to have unlawfully discriminated against an employee.

DISABILITY: *Hunter v Canpac International Ltd*

In 2008, Canpac updated its health and safety policy and required all employees in Jenny Hunter's area to wear hearing protection. Unfortunately the hearing protection caused feedback in Jenny's hearing aid. Jenny met with her employer to resolve the issue.

Canpac sought specialist medical advice which found hearing protection was necessary for Jenny. She insisted that none of the earmuffs made available were suitable. At this stage Jenny had not provided any documentation supporting her view so Canpac told her she was required to return to work and wear the protection. Otherwise, her "employment would be in jeopardy".

Jenny then sought advice and tried to meet with Canpac to resolve matters. But, before Canpac considered the specialist's advice Jenny was told unless she returned to work wearing the hearing protection, she would be summarily dismissed. Jenny then received advice from her specialist that with some adjustment earmuffs could be worn. The employer rejected this advice. As a result, Jenny resigned.

The law

The Court said it was understandable that the employer wished to ensure its policy was being adhered to in order to meet statutory health and safety obligations. However, the employer was too hasty in rejecting the recommendations of Jenny's audiologist. Coupled with the "non negotiable" stance it took at the end meant that Jenny was faced with a choice, to wear the hearing protection and compromise her workplace safety and efficacy, or face dismissal.

The lesson

Treating people equally doesn't always mean treating people in exactly the same way. Employers need to make a real effort to accommodate their employees' differences and needs. It is not "one size fits all".

INJURY: *Mitchell v Blue Star Print Group (NZ) Ltd*

Mitchell was a guillotine operator at Blue Star Print. He worked 12 hour shifts and often did not take breaks. He began complaining of having a sore chest and sore arms. However his employer failed to substantively follow up his complaints.

Eventually Mitchell wrote to his employer raising his workload and stress. He gave the employer 14 days to remedy the problem. When nothing was done Mitchell went on sick leave for 3 weeks and applied for ACC.

When Mitchell returned he blacked out and hit his head on a guillotine. On the way home he blacked out once more. As a result he took more time off work. Throughout this time the employer did nothing to investigate or respond to Mr Mitchell's concerns.

Soon afterwards the employer wrote to Mitchell advising him of changes to the workplace. Mitchell resigned his employment and in his resignation letter he outlined the history of his complaints and the employer's failures to adequately respond.

The law

The Employment Court said that it was beyond doubt that Mr Mitchell's physical problems were caused by his workplace. The employer had breached its obligations, including failing to act in good faith and failing to take all practicable steps to ensure a safe workplace.

These failures directly led to Mitchell resigning his position. Resignation was foreseeable due to Mitchell's clear communications to his employer.

The lesson

Employers need systems in place to ensure that complaints are investigated, appropriate action is taken and feedback is given to the employee concerned.

This case is another cautionary tale that employers must remain responsive and communicative with employees who have diverse needs in the employment relationship. Our law will step in to protect employees if employers fail to do so.

Conclusion

We are a diverse society and this naturally means a diverse workforce. A "one size fits all approach" does not often work and employers that are impatient and intolerant are likely to find themselves breaching their obligations before the courts and having an unhappy workforce.

On the other hand, enlightened employers who respect differences in the workplace and accommodate diverse needs will obtain the loyalty of their staff and their businesses should flourish as they cope with change.

We need to and are obligated to embrace diversity with patience and respect.

The information in this seminar is not intended to take the place of, or be, a substitute for specific legal advice.

Cullen — The Employment Law Firm
Level 8, Kirkcaldies North Tower, 45 Johnston Street, PO Box 10891, Wellington
PH 04 499 5534 FAX 04 499 7443
www.cullenlaw.co.nz