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Employment update

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Abandonment of Employment

An employment relationship can come to an end when an employee abandons his/her employment.

Contractual provisions

An *'abandonment clause'* is a clause in an employment agreement which states that the employer may terminate the employment relationship where an employee has been absent from work, without good reason, for a specified period of time (usually 3 days).

The employers' right to terminate an employment relationship through operation of an abandonment clause has been upheld by the Courts.

Abandonment is not the default position

It is important to note that an employee will not be deemed to have abandoned his/her employment simply because they have not reported to work for the period specified in the *'abandonment clause'*. The default position is that the employee is still employed at the expiry of the specified period.

Employers must approach abandonment situations with caution. If not approached correctly, invoking the abandonment clause could amount to a dismissal. This could expose the employer to a personal grievance claim.

Has the absence been consented to?

Employers cannot rely on an abandonment clause if they know the reason for the employee's absence, and they have consented to the absence.

The employer's obligation to make enquiries

In *EN Ramsbottom Ltd v Chambers [2000] 2 ERNZ 97* (CA) the Court of Appeal stated that an employer has an obligation to make enquiries of an employee where he/she has not expressed a *"clear intention"* to end his/her employment.

Before considering invoking an abandonment clause, employers must comply with their good faith obligations pursuant to section 4 of the Employment Relations Act 2000. Employers have an overriding duty to be responsive and communicative, even where an employee has been absent from work without notice for the period specified in the abandonment clause.

In the context of abandonment, the good faith obligations require employers to exhaust all possible avenues of contacting an employee who has not reported to work before invoking the abandonment clause. Practically, this means that an employer must attempt to call, email, text message, and send a letter to the employee before they can terminate the employment relationship through operation of an abandonment clause. Employers should keep a paper-trail of all attempted communications, which can then be referred to if the employee should raise a personal grievance claim.

Heat of the moment resignations

Employers should not accept resignations made by employees in the *'heat of the moment'*. Such resignations often occur when employees are in the midst of a disciplinary process or an argument with Company management.

Intention to resign?

If an employee resigns in the *'heat of the moment'* the pertinent question for the employer to consider is whether the employee intended to resign.

The Courts have held that it is unfair and unreasonable for employers to infer from a '*heat of the moment'* resignation that an employee genuinely **intended** to resign: *Boobyer v Good Health Wanganui Ltd EmpC Wellington WEC3/94, 24 February 1994.*

The Courts have held that words of resignation, which are made as part of an emotional reaction or outburst, should not be taken literally. The Courts consider that employees can be so overcome by an emotional state that it is unreasonable for their employers to conclude that the employee intended to resign.

What are the risks of accepting a *"heat of the moment"* resignation?

The Courts have held that, where an employer accepts a *'heat of the moment'* resignation without making enquiries as to the employee's intention or offering a *'cooling off period'*, the employer could be held to have dismissed the employee.

Employers have an obligation to comply with the test of justification under section 103A of the *Employment Relations Act 2000* and act as a fair and reasonable employer could in all of the circumstances. The Courts consider that a fair and reasonable employer could not rely on a *'heat of the moment resignation'* without undertaking further investigation as to the employee's actual intentions.

Employers could face a personal grievance claim for constructive dismissal if they accept and act upon *'heat of the moment'* resignations without offering a *'cooling off period'* or making enquiries, and the employee subsequently changes his/her mind about resigning.

What should you do when faced with a *'heat of the moment'* resignation?

Where it is clear that an employee's resignation formed part of an emotional outburst, employers must make enquiries as to the employee's actual intentions.

Employers should offer the employee a ***'cooling off period'*** of at least one (1) working day to reconsider their resignation.

At the expiry of the cooling off period the employer should ask the employee whether he/she genuinely intended to resign. If the employee maintains that he/she intended to resign then the employer can rely on the resignation. In these circumstances the employer's risk of facing a personal grievance claim will have reduced significantly.

Christmas Hours

We close from midday on 23 December and reopen on Monday 16 January 2017. Call 021 228 2414 with any urgent enquiries.

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