

Employment Update

Winter 2017

Mental health in the modern workplace

The Health and Safety at Work Act 2015 has now been in force for just over a year. Reflecting upon the changes, it is evident that one facet of the statutory framework has not received as much media coverage as perhaps was warranted; namely, the obligation to ensure the mental, as well as physical, health of workers in the workplace.

Obligations concerning workers' mental health are not a new concept. The Health and Safety in Employment Act 1992 provided for the prevention of physical and mental harm caused by work-related stress. However, the Health and Safety at Work Act 2015 is not only concerned with the *prevention* of physical and mental harm, but with *securing* the physical and mental health and safety of workers. This shift from preventing harm to securing health aligns with the new emphasis on being proactive about health and safety through awareness, engagement and collaboration.

The challenges of modern working conditions

The mental health and wellbeing of workers is becoming increasingly important given the unique challenges of modern working conditions. Poor mental health in the workplace often involves stress and fatigue. WorkSafe New Zealand defines "*stress*" as the awareness of not being able to cope with the demands of one's environment, when this awareness is of concern to the individual. "*Fatigue*" is defined as the temporary inability, or decreased ability, to respond to a situation because of previous over-activity, whether mental, emotional or physical.

A certain level of stress is in fact healthy. However, under modern working conditions stress levels are rising to such an extent that they are having significant negative impacts on workers' mental health.

One of the key characteristics of modern working conditions is increasingly long hours. Recent surveys have found that almost half of workers worldwide work more than nine hours a day and ten percent of workers work over eleven hours a day. Daily commutes are also increasing. This is especially the case in Auckland where high property prices are forcing people to live further from the central business district, which means an increase in travel time to and from work for many. Furthermore, economic imperatives continue to drive these statistics upward.

Last August's amendments to French employment law were regarded by many as having sounded the death knell for France's 35-hour working week, reducing overtime rates for hours worked beyond the statutory limit of 35. In addition, the 2015 six-hour

working day pilot scheme in Sweden may have inspired some organisations to reduce workers' hours, but the pilot itself has been discontinued because it was not financially viable.

Technology is also blurring the lines between work and personal life making it increasingly difficult to achieve a healthy work/life balance. The prevalence of smartphones means that most people have access to their emails 24 hours a day and are therefore feeling increasingly pressured to respond when they are not at work.

The competitive job market has further led to anxieties about job insecurity as well as immense pressure to deliver and perform at the highest levels.

Health and Safety at Work Act 2015

The key purpose of the Act is to provide a framework to secure the health and safety of workers and workplaces. "*Health*" is defined to include both physical and mental health. This means that work-related stress, fatigue and other temporary impairments can cause harm and need to be managed the same as any other workplace risk or hazard.

Duty holders and corresponding duties

The duty holders under the Act are "*persons conducting a business or undertaking*" (PCBU), officers and workers. Each person with a duty under the Act is required to eliminate risks to health and safety, so far as is reasonably practicable, or where it is not reasonably practicable to do so, to minimise those risks, so far as is reasonably practicable. The extent of this requirement will depend on the level of influence and control the person has over the matter to which the risks relate.

The PCBU has the primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers. This duty applies to all employees, contractors and other people on the work site and is applicable anywhere the worker is working.

Officers, including directors of a company and partners, now have a positive duty under the Act to exercise due diligence to ensure that the PCBU complies with its obligations. This means that officers need to be proactive, actively engaged and informed about health and safety issues.

Finally, workers (including employees, trainees, students and volunteers) also have a duty to take reasonable care with respect to the health and safety of themselves and others in the workplace.

Penalties

The Act provides for significantly increased penalties for breaches of health and safety obligations. The most serious offence is for reckless conduct in respect of a duty, which carries a maximum penalty of \$600,000 and/or five years' imprisonment for officers; \$300,000 and/or five years' imprisonment for workers and \$3 million for a PCBU. As was the case under the old Act, it is unlawful to indemnify or insure against fines for breach of duties. The penalty for entering into such an arrangement is a fine of up to \$250,000.

Worker engagement and participation

The concept of worker engagement and participation is central to the new health and safety scheme. PCBUs now have a duty to engage with workers and to ensure that there are practices in place that provide workers with a reasonable opportunity to participate in health and safety matters. This follows from recognition that workers are often best placed in terms of expertise and workplace knowledge to maintain a safe workplace.

Providing a safe and healthy workplace

Organisations and employers need to be aware that the conditions of the modern workplace introduce new risks to the mental health and wellbeing of workers. Awareness and engagement are prerequisites for ensuring a healthy and safe workplace. Organisations should ensure that there are mechanisms in place for workers to communicate any potential concerns or issues related to mental health. A straightforward method might be to use questionnaires or surveys that may help identify where any potential issues are arising.

If the organisation receives any reports relating to stress in the workplace, it must take them very seriously. The organisation should take all practical steps to investigate the concerns raised and to discuss the issue with the worker. It is important that various solutions are discussed and communicated before agreement is reached on the implementation of the preferred solution.

The following are suggested strategies that can be adopted in an attempt to ensure the mental health and wellbeing of workers:

- Provide sufficient break periods during working time as well as adequate recovery time outside of work
- Ensure workers are provided with a variety of tasks as well as some means to take control, where appropriate, over the way they do their work
- Acknowledge success and contributions
- Encourage workers to pursue interests outside of work
- Implement flexible working arrangements where appropriate

A mentally healthy workplace is good for business. Organisations with low morale and high levels of stress and fatigue are likely to have greater absences from work, higher staff turnover and lower productivity. Many surveys have shown that there is a strong correlation between a mentally healthy workplace and overall business success. It is therefore important to remember that an organisation that ensures the mental health and wellbeing of its workers is also likely to be more successful.

Constructive dismissals – when workplace bullying is alleged

There have been a number of recent cases in the Employment Relations Authority where a finding of constructive dismissal has been premised on mishandled investigations by employers into allegations of bullying. This has reinforced the need for employers to take these complaints very seriously in order to comply with their duty to provide a safe and secure workplace. A failure to properly address such complaints can have significant legal consequences.

What is a constructive dismissal?

A constructive dismissal arises where an employee resigns but does so effectively because the employer has caused them to resign by acting in breach of its obligations to the employee. Constructive dismissal occurs where an employer:

1. forces the employee to choose between resigning or being dismissed; or
2. engages in a deliberate strategy designed to force the employee to resign; or
3. breaches a fundamental duty to the employee such as the duty to remunerate the employee for his or her work.

Clearly, in the context of bullying, the second or third category is the most relevant. The third category effectively acts as an umbrella and the Court of Appeal has established a two stage test¹. This test was described in the following terms:

"For the plaintiff to establish there has been a constructive dismissal he must prove:

- (a) *That his resignation was caused by a breach of duty on the part of the defendant company; and*
- (b) *that the employer's breach, if one occurred, was of sufficient seriousness to make it reasonably foreseeable by the defendant that the plaintiff would not be prepared to work under the conditions prevailing."*²

It can be a risky strategy for an employee to resign and claim constructive dismissal given the difficulties in establishing a breach of sufficient seriousness. Nevertheless, this is a risk that employers need to be aware of. A number of cases have recently highlighted the need for employers to be responsive and constructive in their management of bullying complaints.

[Beckingsale v Canterbury District Health Board \[2015\] NZERA Christchurch 163](#)

The Authority's determination in *Beckingsale* (discussed in our Autumn 2016 newsletter), is a recent example of an employer failing to respond appropriately and address an employee's complaints of bullying. Ms Beckingsale claimed that she was constructively dismissed because the DHB did not appropriately investigate and address her complaints of bullying.

The DHB claimed that Ms Beckingsale resigned without making a formal complaint, which meant that it was not able to carry out a proper investigation and resolve her bullying concerns. However, the Authority disagreed and found that Ms Beckingsale raised her concerns about bullying in writing by email, which constituted a formal complaint, and that the DHB's failure to investigate the complaint amounted to a breach of its duty of good faith.

1 *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers IUOW* [1994] 1 ERNZ 168 (CA).

2 *McGowan v Nutype Accessories Ltd* [2003] 1 ERNZ 120 (EC) at [52].

The Authority found that Ms Beckingsale's resignation amounted to an unjustified constructive dismissal and she was awarded \$10,000 compensation for hurt and humiliation.

[Spotless Facility Services NZ Limited v Mackay \[2016\] NZEmpC 153. \[2017\] NZEmpC 15](#)

The Employment Court recently overturned the Employment Relations Authority's decision in respect of a claim by Ms Mackay that she was constructively dismissed by Spotless Facility Services NZ Limited.

Ms Mackay worked for Spotless as a Kitchen Assistant in Timaru Hospital.

She had a number of altercations with two employees, Ms X and Ms Y, whose conduct she alleged was of a bullying nature. She initially raised the concern orally to her manager, and subsequently by way of a formal letter asking for action to be taken.

Spotless then reminded its employees about the importance of respect in workplace communications and held a meeting with Ms Mackay to discuss the issues she had raised and some allegations other employees had raised against her. The result of this meeting was that Ms X and Ms Y were "coached" on appropriate conduct, but it was never said that the matter would be formally investigated if the bullying continued and the results of the meeting were never communicated to Ms Mackay.

Ms Mackay made a further request for an urgent resolution of the matter and, after having received no substantive response from Spotless, tendered her resignation. She confirmed her resignation during a telephone conversation with the National Manager of Spotless, which assumed critical importance in the Authority and Court decisions. During this conversation, Ms Mackay was informed that Spotless' investigations were ongoing, but that the National Manager had no knowledge of an allegation that Ms Mackay's colleagues were currently collating statements against her to present as a "petition" to the HR department. Ms Mackay alleged that the National Manager's failure to investigate, and advise her that he would investigate, the petition allegation was the "final straw" that caused her to confirm her resignation.

After hearing further evidence from the parties, the Court overturned the Authority's finding of a constructive dismissal in relation to that telephone conversation. It stated that there was no relevant breach of duty by Spotless of such seriousness as to make it reasonably foreseeable that there was a substantial risk of Ms Mackay resigning.

However, the Court found that it had jurisdiction under section 122 of the Employment Relations Act 2000 to characterise the circumstances as a disadvantage grievance. It held that the National Manager's failure to inform Ms Mackay that investigations were ongoing but that he had formed a preliminary view as to how the conflicts should be resolved, and that there was a consensus as to the use of mediation as a way forward towards a constructive outcome, was an unjustified action by the employer. Spotless also failed to address Ms Mackay's concerns in a timely manner, as required by its policy. Ms Mackay was awarded \$2,000 compensation for hurt and humiliation.

[Wearne v State of Victoria \[2017\] VSC 25 \(8 February 2017\)](#)

A recent decision of the Supreme Court of Victoria provides another useful reminder of the importance of taking a proactive approach to bullying complaints.

Ms Wearne alleged that her existing psychiatric disorder was exacerbated as a result of her exposure to bullying and harassment

by her immediate supervisor. She claimed that her employer, the Department of Human Services, had failed in its duty of care to avoid exposing her to an unnecessary risk of injury.

The Court found that the behaviour of Ms Wearne's supervisor did not amount to bullying or harassment, despite an "abrasive" management style. However, it did find that the Department failed in its duty of care to avoid exposing Ms Wearne unnecessarily to the risk of injury in the course of her employment. The Court found that the employer knew of Ms Wearne's psychiatric vulnerability and knew that this was being strained by her poor relationship with her supervisor. While the actions of Ms Wearne's supervisor were never formally notified as bullying through the Department's prescribed procedure, the Court noted that the employer "well understood" the risk to Ms Wearne and stated that the employer ought not to have allowed the matter to drift on unresolved and ought to have adopted more proactive solutions, such as undertaking a formal investigation, arranging formal mediation, and arranging specific training for Ms Wearne's supervisor or moving Ms Wearne to a different team.

The tests applied in this case are similar to those applied under our health and safety law, and the definition of bullying is almost identical. Accordingly, Ms Wearne's case is of relevance to employers who are faced with complaints of this nature.

Comment

If someone does raise an allegation of bullying it is important that an employer takes steps to investigate and reports back to the employee. Liability is likely to arise from a lack of proper investigation and a failure to properly inform the employee what action, if any, has been undertaken. This may not prevent a constructive dismissal claim upon resignation, but it will at least provide evidence that the employer did not breach any fundamental duty owed to the employee.

Employment Standards Deadline

All employment agreements, whenever entered into, must now be compliant with the requirements introduced by the Employment Standards Legislation Bill. Employers were given one year to amend existing agreements where necessary. The deadline for compliance with the changes was 1 April 2017. Accordingly, employers will now be in breach of the law where they have in place agreements establishing zero-hour arrangements; agreements with non-compliant availability provisions; where they cancel shifts without compliant shift cancellation provisions; and where they prohibit or restrict work for another person without compliant secondary employment provisions.

Immigration

Kiely Thompson Caisley's immigration team regularly advises employers on a range of employment related visa applications and associated issues.

In particular, we assist individuals wanting to work in New Zealand on a temporary or long term basis, and employers wishing to recruit foreign workers, with the following:

- Work visas
- Renewals of existing visas
- Approvals in principle

If you require immigration advice please contact Simon Laphorne at laphorne@ktc.co.nz or Stephanie Ball at ball@ktc.co.nz.

Staff Update

We take great pleasure in announcing two promotions within the team at Kiely Thompson Caisley.



Simon Laphorne – Partner

Simon joined the firm in 2016 as a Senior Associate. He began his legal career in the UK in 1997 with Adams Harrison, a firm based in Suffolk. In 2008 he became a Partner at Clarkslegal LLP in London, before moving to New Zealand in 2012, where he worked as a Senior Associate in the employment team of a large national practice. As well as speaking fluent French, Simon has also been a semi-professional footballer and an F.A. qualified coach.

Simon leads the immigration team at KTC, as well as advising on a wide range of employment and commercial matters.



Scott Worthy – Senior Associate

Scott's promotion sees him move from the role of Associate to Senior Associate. Scott has been with the firm for four years, joining after working as a Judges' Clerk in the Employment Court. Scott has gained experience in the Supreme Court, Court of Appeal, Employment Court, Employment Relations Authority and in mediations.

We are pleased to announce four new additions to the team at Kiely Thompson Caisley.



Melanie Nicholas – Practice Manager

Melanie is responsible for ensuring the smooth running of the practice, managing all aspects of day to day operations.

Melanie has been back in Auckland for four years since returning from New Plymouth and is enjoying the buzz and vibe that our beautiful city has to offer. She often spends her spare time with family and friends.



Stephanie Ball – Senior Solicitor

Stephanie completed her Bachelor of Arts and Bachelor of Law conjoint degree at the University of Waikato in 2013. She was admitted as a Barrister and Solicitor of the High Court of New Zealand in April 2014.

Stephanie joined Kiely Thompson Caisley after working with a specialist employment law Barrister, where she gained experience working on a range of employee relations issues, including personal grievances, disciplinary investigations, restructuring and redundancies.



Georgina Todd – Senior Solicitor

Georgina began her career in the employment team at a top-tier law firm before moving into the health regulation sector and then into senior management at one of New Zealand's largest DHBs. Prior to joining KTC Georgina worked for a large international anti-trafficking organisation in South East Asia. Having worked in both the private and public sectors in both legal and senior management capacities, as well as internationally, Georgina brings a unique breadth of experience to KTC.

Georgina completed her LLB and BA at the University of Otago and was admitted as a Barrister and Solicitor of the High Court of New Zealand in 2010.



Hannah King – Solicitor

Hannah completed a Bachelor of Laws (Honours) and a Bachelor of Arts at the University of Canterbury and was admitted as a Barrister and Solicitor of the High Court of New Zealand in December 2012.

After completing postgraduate music studies in Sydney, Hannah returned to the law and began her career in the employment and litigation teams of a full service law firm in Whangarei.

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