

## Looming job losses as squeeze tightens

Around the world, many are apprehensively watching the US housing market slump, sub-prime mortgage crisis, slowdown on Wall St and growing industry layoffs.

Economic downturn, or recession, is looking a very real prospect, with some saying that a recession in the US economy has already arrived. The decline in economic activity that the US is currently facing is feeding concerns that global economic growth will slow.

Only time will tell if New Zealand is going to experience an economic squeeze. However, there are signs that we may already be feeling some effects. For instance, Fisher & Paykel recently announced planned lay-offs at its whiteware factory in Mosgiel, blaming the downturn in the US house market.

Not so intimately connected with the US situation, but still of note, are the ongoing high profile business closures/relocations and associated redundancies, particularly in manufacturing as a result of the high dollar. Fletcher Building, Click Clack, and Postie Plus have all laid off workers in the not so distant past.

Restructuring and ensuing redundancies may become an economic necessity for more and more New Zealand businesses if we experience



an economic squeeze. Redundancies need careful handling. Employers should make an effort to dot the 'i's and cross the 't's to try and minimise costly personal grievances that could strain already stretched resources.

Generally, employers have the management prerogative to organise their business as they see fit. In most instances, courts will not interfere with redundancies if the employer has genuine reasons. However, process is everything.

The penalties for failing to be fair can be substantial. Other considerations include the cost and amount of management time that personal grievances take up. There is sense, then, in trying to reduce the risk of a personal grievance before going down the redundancy path. Employers should spend some time planning the process and taking legal advice.

If someone challenges their dismissal by redundancy, as mentioned, employers must be able to prove they had genuine reasons for making an employee redundant and that the process leading to that redundancy was fair.

What is a genuine reason? There is no iron-clad definition. But for instance, there is likely to be a genuine reason where the employer honestly and reasonably believes that the position has become surplus to the company's

needs (such as if fewer salespeople or production staff are needed due to a decline in demand for a product).

Regardless of the reason, employers are required to follow a fair procedure. Each situation will need to be assessed to determine what is appropriate; no one formula applies in all circumstances.

In general, however, employers should consult with potentially affected employees (at an early stage) and ensure that they have applied fair selection criteria in deciding who is to be made redundant. Employers should also consider redeployment possibilities, and give adequate notice to potentially affected workers. It is particularly important that, before decisions are made, employees are given the opportunity to have input into a number of matters (like the restructuring proposal and possible impacts).

Where employers are unsure about whether they have genuine reasons, or the appropriate procedure to use, or how to implement redundancies in their business generally, they should seek some advice.

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# Rulings send message to employers



misconduct. Mr Housham won his personal grievance for unjustified dismissal, and was awarded \$20,000 compensation as well as 11 months' lost wages.

A similar tale unfolded in *Murphy v Steel & Tube New Zealand Ltd*. Mr Murphy was dismissed following an argument with a co-worker, where Mr Murphy struck the co-worker to the floor. Mr Murphy said that he had not meant to harm his colleague and acted in self defence. Steel & Tube concluded that the co-worker's injuries meant that Mr Murphy had been aggressive and was fighting in breach of the company's policies. Physical or verbal violence was described in the policy as amounting to serious misconduct. Mr Murphy also won his personal grievance for unjustified dismissal. He was reinstated, awarded \$4000 compensation and nine months' lost wages.

The Employment Court in both cases said that while an employer is entitled to have a "zero tolerance" to violence policy, that does not absolve the employer from critically assessing all the circumstances. An employee attacked by another, or reasonably fearing he is going to be attacked, is entitled to take reasonable steps to avoid actual or imminent assault. These could include what would amount to a technical assault upon the aggressor - pushing the aggressor away, tackling the aggressor to prevent further blows or the like.

The cases highlight the need for a thorough and fair investigation into incidents of physical violence at work. In both cases, the employer undertook a prompt and, on the face of it, thorough investigation.

However, both employer investigations were found wanting by the Employment Court. In each incident, the facts were in dispute and witness accounts were inconsistent. The Employment Court considered that inconsistent witness accounts should be put to the employee for comment. A failure to do that in these cases resulted in the employer coming to a wrong, or unjustified conclusion. On top of that, several procedural errors meant that in both cases, the dismissals were unjustified.

So, where does this leave employers dealing with workplace fighting? Clearly it is not appropriate to take no action at all for fear of a personal grievance being raised. Nor can you simply dismiss both employees by relying on a 'zero tolerance' approach to fighting at work. Instead, employers investigating a physical fight at work need to make sure that they conduct a thorough, full and fair investigation into all the circumstances.

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## Fisticuffs at work could cost you your job - just ask Trevor Mallard.

Employers investigating a stoush between staff will regularly be told, "he started it", or "I was just defending myself". Many believe, particularly where they have a 'zero tolerance' approach to violence, that any such behaviour amounts to serious misconduct, justifying instant sacking.

But two Employment Court decisions highlight the need for a thorough and fair investigation into any physical violence at work and underline the difficulties with a 'zero tolerance' approach. In both cases, employees were fired for serious misconduct following a physical fight at work. The workers in each case said they were acting

in defence against an assault or a perceived threat of assault - and that's the sticking point.

In *Housham v Juken NZ*, Mr Housham was sacked for serious misconduct for engaging in a situation of physical violence on company premises. He had been involved in an altercation with a contractor where the contractor punched him in the face, and Mr Housham, afraid of being hit, tried to push the contractor away. Juken's code of conduct stated that "engaging in acts of violence against any person on company premises (note: includes fighting even if provoked)" amounted to serious

## IN BRIEF

### Proposed law changes

Proposed changes to be introduced this year (announced 23 March 2008) will herald:

- Introduction of a minimum entitlement in relation to meal and rest breaks.
- Requirement for employers to provide facilities and breaks for employees who wish to breastfeed.
- The ability to transfer public holidays for shift workers where the shift crosses midnight on a public holiday.

### Expertise expands

The Sydney employment team has recently expanded with the appointment of Jean Wang. Jean previously worked at Australian Business Lawyers where she gained experience in many areas of industrial relations and employment law, including enterprise agreements, industrial disputes and award interpretation. Jean also has Mandarin speaking skills.

She will work closely with our Sydney employment law experts Ken Brotherson and Aaron Dearden.

# Impractical decision fraught with pitfalls

A Supreme Court decision is set to cause headaches for those involved with shift work - both employers and workers.

Until recently, employers and employees could agree to treat the shift straddling a public holiday as an ordinary shift and treat a different (usually the next) shift as the public holiday. But the recent Supreme Court decision involving the NZ Airline Pilots Union and Air New Zealand has changed the public holiday landscape.

The collective agreement between the Airline and the pilots set out 11 holidays a year (on top of the 11 public holidays in the Holidays Act), and said that pilots could be asked to work public holidays on a roster system. The airline said that the pilots had agreed that when they were required to work a public holiday, they would observe the public holiday on one of the additional 11 days provided for (so the holiday would be transferred), and that the pilots were not entitled to time and a half for working on the new transferred day. The pilots challenged this position.

The Supreme Court looked at the meaning of 'public holiday' under the Holidays Act 2003 and decided that it is always a day, i.e. a 24 hour period from midnight to midnight. So, while a public holiday can be transferred to another day, employers are still required to pay time and a half to anyone who works on the actual public holiday.

The effect is that where a shift straddles a public holiday, an employer is obliged to pay workers time and a half from midnight until the end of a shift or from the start of the shift until midnight, so there is now little advantage in transferring the holiday.

In light of the decision, a large number of employers will be faced with the administrative hassle of paying workers time and a half for



only those hours worked after midnight on the morning of the holiday, and before midnight on the evening of the holiday. No doubt some employees will also view the law as impractical, especially those with rotating shifts, who could potentially lose out on time and a half payments. This could occur if, for example, their shift starts at a later time than the previous shift.

It may also mean that some employers restructure shifts around public holidays to minimise the administrative impact. For instance, asking employees to work on ordinary days, rather than on public holidays (eg. starting at 8pm, finishing at midnight (as the public holiday begins) and then starting the next shift at midnight (as the public holiday ends) and finishing at 5am). This would impact on an employee's potential to receive time and a half entitlements, not to mention the potential disruption to the worker.

The decision overturns the previous Heinz Watties v National Distribution Union ruling in 2005 which decided that, for the purpose of public holidays, a "day" was not confined to a 24 hour period, and it was common sense for the public holiday to coincide with an employee's shifts. This meant that where employees worked shifts straddling a public holiday, the public holiday could be transferred to a different

shift. If the employee worked the public holiday shift they were entitled to be paid time and a half, and if they did not then they would be paid what they would ordinarily receive. So for instance, where employees worked two shifts on a public holiday (in the early morning and then the evening of the holiday) the second shift could become the public holiday shift.

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## STOP PRESS:

In response to the Air New Zealand decision, the Government announced plans on 23 March 2008 to amend the Holidays Act 2003 this year. This will allow the transfer of public holidays for employees whose shifts span two calendar days and at least one of those days is a public holiday. Shifts will be able to be transferred if there is genuine agreement between the employer and employee and employees keep their statutory rights to public holidays.

## Upcoming seminars

We will be running a number of seminars throughout 2008, including:

- KiwiSaver, The Next Challenge, employer contributions.
- Flexible Working Arrangements, the new legal requirements and how to incorporate them into your workplace.
- Restructuring and Redundancy.
- Holidays Act.
- Parental Leave.

If there are any topics you would like to see featured in our seminar series, please email [info@DuncanCotterill.com](mailto:info@DuncanCotterill.com)

## Key dates to remember

### 1 April 2008 KiwiSaver

All employers are required to match the contribution of their employees to KiwiSaver, rising from 1% now to 4% of their gross salary or wages by 20/11/12.

Employers will be reimbursed by a new tax credit, capped at \$20 per week per employee.

### 1 April 2008 Minimum Wage Changes

The minimum wage for all employees aged 16 and over rises to \$12 an hour. The training wage rises to \$9.60 an hour. Abolition of youth rates, except for new entrants.

### 1 July 2008

Flexible Working Arrangements legislation comes into force. We have developed a Flexible Working Arrangements Policy, together with a Flexible Working Arrangement Application Form for use by employers. Please contact us for details.

# Australia Forward with Fairness

On 28 March 2008 the much anticipated Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Transition Act) took effect.

The Transition Act aims to ensure a smooth transition from the previous WorkChoices legislation to Labor's new workplace relations system over the next two years. The Government has given itself until 31 December 2009 to fully implement its workplace relations platform. The key component of the Transition Act is a process to fulfill the election promise of abolishing Australian Workplace Agreements (AWAs). AWAs are statutory individual employment agreements. Existing AWAs will be allowed to remain in force, but once the Transition Bill becomes law no new AWAs can be made.

The Transition Act allows for Individual Transitional Employment Agreements (ITEAs) to be used until 31 January 2009. ITEAs would typically be used where AWAs expire before 31 December 2009, or for new employees where the employer already has AWAs in place with existing employees.

The Transition Act also re-introduces a "no disadvantage test" by which workplace agreements will be assessed. The assessment will revert to reference to any applicable industrial instrument rather than simply the Australian Fair Pay & Conditions Standard for

all agreements. The assessment will be conducted by the Workplace Authority Director.

As part of the transition process, the Government has also released details of its proposed 10 federal national employment standards which will complement a modernised award system from 1 January 2010.

The draft National Employment Standards are:

- Maximum weekly hours - a maximum 38 hour week for full-time employees plus reasonable additional hours.
- Flexible working arrangements - adopting a process for employees to request flexible working hours until children reach school age.
- Parental leave and related entitlements - a right for parents to take separate periods of 12-months unpaid leave, up to a total of 24 months.
- Annual Leave - 4 weeks paid annual leave for full-time employees and an additional week's leave for shift workers.
- Personal/Carers and Compassionate leave - 10 days of paid personal sick/carer's leave per year for full-time employees plus 2 days unpaid personal leave for 'genuine caring purposes' or 'family emergencies' and 2 days paid compassionate leave on the death or serious illness of a family member.
- Community Service Leave - leave for prescribed community service activities including jury

service and emergency services duties.









- Long Service Leave - the introduction of a uniform national long service leave standard.
- Public Holidays - The right for employees to reasonably refuse to work on common national public holidays and regional public holidays. Where an employee works on a public holiday, the employee may be entitled to penalty rates or other compensation.
- Notice of termination and redundancy pay - employees will be entitled to between 1 and 5 weeks notice of termination of employment (except in cases of summary dismissal). In the event of redundancy, employees in workplaces with 15 or more employees and who have at least 12 months continuous service, will be entitled to severance pay up to 16 weeks after 9 years service.
- Provision of Fair Work Information Statement - employers are to provide all new employees with a Fair Work Information Statement containing information for employees.

A significant feature of the 10 employment standards is the introduction of a national long service leave standard, to apply to employees of corporations rather than the current disparate State Systems.

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