

Absenteeism: When can a fair employer reasonably cry halt?

Small businesses can be hit hard if any of their employees have to take long term sick leave.

The recent outcome of an employment case vindicates the actions of one such company whose patience ran out after an employee took prolonged sick leave, giving no indication of a return date.

The case of *Alsop v Forbes & Davies Ltd* put the spotlight on the dilemma employers face when long term absenteeism puts strain on the business. It raised the question: when can a fair boss end employment when one of his/her workers is genuinely ill?

In *Alsop v Forbes & Davies Ltd*, the employer ran a small business, with six staff. When Mr Alsop was first employed, he had health problems and needed to take days off work. After five months, Mr Alsop had taken 21 days off sick. This was putting stress on other staff.

The employer wrote to him informally, asking for better attendance, and offering to help if possible.

Mr Alsop took more days off. The employer wrote again, saying that the absences had to stop, and warning about disciplinary action. Mr Alsop continued to take sick days. The employer gave him a first and final warning for absenteeism.

Again, the employer offered to help where possible.

Mr Alsop continued working for several months, until he injured his hand. He sent his employer a medical certificate in the mail, for 14 days off work. He then sent a second certificate for another 14 days off, then two more certificates.

The employer wrote to Mr Alsop, asking him to make contact about when he would be able to return to work, and indicating there were difficulties holding his job open. There was no response. Eventually, his manager contacted him by phone. Mr Alsop refused to give any firm date for his return to work. His manager said the job couldn't be held open indefinitely.

The employer then received another medical certificate, giving Mr Alsop another week off work. The employer wrote to Mr Alsop, ending his employment on the grounds of medical incapacity.

Mr Alsop raised a personal grievance claim for unjustified dismissal. The Employment Relations Authority dismissed his claim, and found that the employer's actions were justified.

The Authority found that this was a small

workplace, where every employee occupied a key position, and Mr Alsop's absence created operational difficulties. The Authority was also influenced by the uncertainty around Mr Alsop's eventual return to work, and how his sick leave had become a "moving target". Finally, the Authority was impressed that the employer had given Mr Alsop a "generous" amount of leave.

This is something of a victory for a small employer, as the Authority gave real credit for the employer's patience and generosity, and the employer's efforts to document warnings and discussions.



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- Bullying and Harassment in the workplace
- Restructuring and Redundancy
- Managing Poor Performance
- Health and Safety in Employment
- Discipline and Termination

- Holidays Act/Leave Entitlements
- Drugs & Alcohol in the workplace
- Misconduct/dismissals
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Please contact Rose O'Shaughnessy, r.oshaughnessy@DuncanCotterill.com for further information or if you have other issues you would like to see featured.

Making Restraints of Trade stick

When can an employer prevent an ex-employee from working for a competitor?

Employment agreements often include restraint of trade clauses to protect a company's confidential information if an employee leaves to work for a competitor.

But they can be notoriously hard to enforce, often because the ex-employee will take care not to openly flout the restrictions, but also because many restraint of trade clauses are ruled to be invalid by the Courts and the Employment Relations Authority.

A recent case shows that there are exceptions. Mr Allright worked for large multinational company, Canon as one of its senior financial officers. After 18 months he resigned, to go to work for one of Canon's direct competitors.

His employment agreement contained a specific clause protecting all of Canon's confidential information and preventing its disclosure. It also contained a restraint of trade clause, which prevented Mr Allright from working for a competitor for three months, and an acknowledgement that \$1000 of Mr Allright's salary was payment to allow for this restriction.

Mr Allright wanted to go straight to work for the competitor. Canon sought to enforce its restraint of trade, and wanted to ensure that



Mr Allright had what was effectively the three month "stand-down" before starting his new job.

The Employment Relations Authority (ERA) considered the matter, including the validity of restraints of trade generally. It said that restraints of trade are contrary to public policy, as they interfere with a person's right to earn a living and the free movement of labour. Therefore, restraints of trade are void. However, they can be upheld if the employer can show it has a proprietary interest worthy of protection (such as an established brand or customer goodwill) and the proposed restraint is no wider than necessary (eg being limited to a certain geographical area).

In this instance, the ERA upheld the restraint of

trade, and required Mr Allright to stand down for three months before starting his new job.

There were several factors which led to this. Canon had confidential information, trade secrets, and goodwill which were worthy of protection.

Mr Allright was a senior executive, with "intimate" access to this information. He was highly qualified and experienced, and would have known and understood what the restraint of trade meant when he signed it. The restraint was only for three months, which was described as being a "reasonable" length of time. It was also limited to the geographical area where Mr Allright had actually worked for Canon. The clause had been carefully drafted, and was not just a "stock standard" provision.

Finally, the ERA considered that the duty of good faith was very important here. The restraint was negotiated in good faith, Mr Allright agreed to it from the start, signed it, and allowed his employer to rely on this. The ERA found that it would have been "wrong" to allow Mr Allright to walk away from his obligations.

This is very good news from an employer's perspective, as it demonstrates that there are practical ways to make such a restraint "stick", and that the duty of good faith also has positive implications for employees who can expect to be bound by the literal wording of their employment agreements when reasonably drafted.

Answering the call of the Vuvuzela

Could Kiwi employers take a leaf out of the book of their UK counterparts over absenteeism?

In the UK, employers were encouraged by the Chartered Institute of Personnel and Development (CIPD) to minimise the effect of absenteeism during the 2010 FIFA World Cup by implementing a staff absence policy during the tournament.

CIPD produced a guide called The World Cup and Absence Management which set out different approaches employers could consider to manage the potential detrimental impacts of absenteeism over the tournament. These included considering:

- Flexible hours - allowing staff to start or finish work earlier or later, or allowing staff to take time off to watch games provided that time is made up on another day.
- Shift swaps - allowing staff to rearrange their shifts around different games provided they

find appropriate cover for their shifts.

- Unpaid leave - allowing unpaid leave as long as business operations are not compromised.
- Screening on site - providing a TV or radio on the premises.
- Internet access - providing staff with access to live feeds or scores on the internet.

It was noted that this type of policy would need to be clear and well-thought out. For instance, if games were screened in the lunch room, staff may become too involved in the match to return to work or they may become excessively distracted if listening to the game live on the radio. And where staff can keep track of games on the internet, then the terms of that access would need to be clearly communicated, particularly where this type of access would ordinarily be a breach of the employer's usual policy.

While likely to be less disruptive to our working

routines, Rugby World Cup 2011 is just over a year away and employers may be wise to consider whether absenteeism is likely to be an issue. A clear and well-thought out policy worked out with staff ahead of time may prevent many problems come kick-off (this might include considering additional bereavement leave in the event a team other than the All Blacks is victorious come finals time).

More generally, employers may need to remind employees of their policy on absenteeism and what is and is not acceptable. For example, it may be that disciplinary action would follow from unauthorised time off without good reason (in other words, calling in sick after a big night at the pub watching the game) or not performing at work (being unable to do much work because of a hangover).

Employers should always obtain legal advice before implementing any new workplace policies to ensure they do not inadvertently render other workplace policies ineffective as a result.

Behaving badly outside the workplace

A case involving a disgruntled social worker highlights how misconduct outside the workplace can justify dismissal.

Misconduct outside the workplace can justify dismissal, especially where the conduct raises questions of an employee's suitability for the job or is connected with the employment in some other way. This can include conduct in a secondary workplace as the recent employment court case of *Fleming v Delamore & Reidy* illustrates.

Vincent Fleming was initially employed by Delamore & Reidy as a social worker. The company provides full-time care for mental health patients and runs five homes in the Auckland region (including Jon's House). Mr Fleming was promoted to service manager of Jon's House and was responsible for managing four mental health workers and overseeing the necessary care and support for patients.

The employment relationship was initially good but began to deteriorate a short time after Mr Fleming returned from a lengthy holiday.

Delamore & Reidy believed that Mr Fleming would benefit from undertaking a business course and, despite an initial reluctance, he enrolled in a series. Unbeknown to Delamore & Reidy he became involved in a dispute with the administration of that institution.

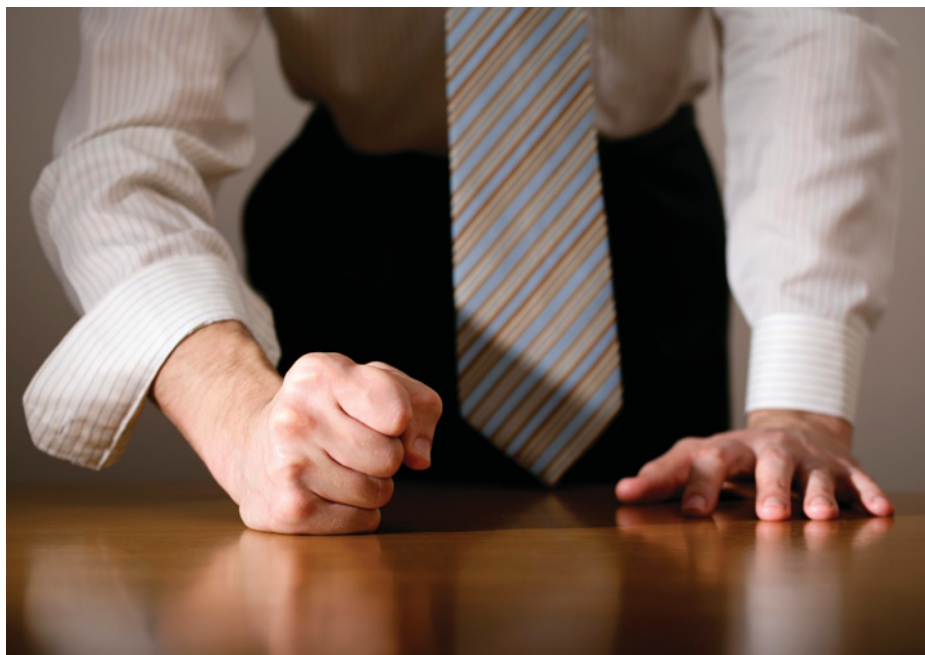
He also became antagonistic towards senior personnel within Delamore & Reidy and raised numerous problems with them relating to what he saw as unacceptable behaviour by his direct reports and a lack of support from his employer. These issues were dealt with, although Mr Fleming never appeared to be satisfied with the outcome.

ABUSE

In August 2008 a staff member raised an issue about Mr Fleming's care of a patient. He viewed this as an allegation of abuse being levelled against him. An investigation was carried out and Mr Fleming was informed that no such allegation was being made and that the matter was now resolved. Not satisfied with this, Mr Fleming applied for mediation over several issues but it was unsuccessful in resolving his concerns. He then filed proceedings with the Employment Relations Authority.

Soon after, Delamore & Reidy received advice from another mental health provider that Mr Fleming had verbally abused its resident patients. This was alleged to have occurred during a weekly support group meeting led by Mr Fleming. This support group work was secondary to that performed for Delamore & Reidy and Mr Fleming was employed by the ProActive Trust for this work.

Delamore & Reidy also discovered that Mr



Fleming was in employment disputes with the ProActive Trust, and another entity where he worked part time, as well as the educational institution where he was undertaking the business course.

On receiving information regarding the allegation of abuse, Delamore & Reidy began an employment investigation, which indicated that Mr Fleming had called the resident "dumb" and a "homo" in front of other members of the group he was leading.

At a disciplinary meeting Mr Fleming (and his representative) denied the allegations and attacked the credibility and capacity of the complainant and other residents who observed the incident on the basis that, given their intellectual impairment, they lacked the capacity to be able to make a complaint of this nature and accordingly their credibility was in question. Not surprisingly, this in itself caused Delamore & Reidy concern, given the nature of the services it provided and that Mr Fleming was a qualified social worker.

MISCONDUCT

Delamore & Reidy looked to carry out further inquiries, given the nature of Mr Fleming's responses. He, however, took the view that it should not make further inquiries. That being the case, the company had no option but to draw an inference from Mr Fleming's actions and decided to dismiss him for serious misconduct.

Mr Fleming pursued a claim alleging he had, among other things, been unjustifiably dismissed

in the Employment Relations Authority and was unsuccessful. He then went to the Employment Court but achieved no more success.

The Court accepted that Delamore & Reidy had acted as a fair and reasonable employer. His behaviour towards patients and residents under his supervision, wherever he was employed as a social worker, was important to his employment by virtue of its specialisation.

INCOMPATIBLE

The Court found that Delamore & Reidy was entitled to take into account Mr Fleming's conduct with a secondary employer, given that this had impacted on the business and was incompatible with the proper discharge of his duties. The Court also accepted that the company was entitled to have lost trust and confidence in Mr Fleming given his contention that the complainant and witnesses were inherently unreliable as a result of their intellectual disabilities. This was at odds with his professional obligations - an important part of his role related to protecting and respecting the rights of patients such as the complainant. The dismissal was found to be justified.

This is a case where Mr Fleming did not help himself. He was, as the Authority concluded, "the architect of his own misfortunes". It does reinforce the point that an employee can be held to account for their conduct outside the workplace where that conduct has the potential to impact on an employer's business and otherwise calls into question the employee's suitability for the role.



Bullying, banter or brusque management?

Employers must take all practicable steps to ensure employees' safety, including safety from psychological harm.

Relentless bullying at work led to the suicide of a Melbourne waitress and resulted in the prosecution of the cafe owner, his company and three employees.

The woman was subject to a litany of mental and physical abuse by her co-workers. They called her fat, ugly, stupid and a whore; spat on her; gossiped about her; taunted her about a previous suicide attempt; and poured fish oil on her bag and clothes.

The cafe owner was aware of the bullying but did nothing to stop it. Under Australian health and safety legislation, the cafe owner was fined AUD\$220,000 for failing to provide a safe work environment. In addition, three employees were each fined between AUD\$10,000 and AUD\$45,000.

While this is an extreme case, the same fine could be made in New Zealand. The maximum fine under health and safety legislation is \$250,000. Employees should also be aware that they can be held individually liable under human rights legislation if their bullying amounts to harassment. The maximum fine is \$200,000.

Bullying can occur in different employment relationships - between a manager and an employee, an employee and a client, or among colleagues or co-workers.

The behaviour is not necessarily obvious. Workplace banter and brusque management are generally not categorised as bullying. But the line between what constitutes bullying and brusque management is far from clear. Dominant or blunt management and insensitive or rude behaviour is not usually deemed bullying. Further, the Employment Relations Authority recognises that some people are overly sensitive and take offence to behaviour which could be regarded as normal workplace banter.

In New Zealand, there is no specific definition as to what constitutes bullying but it is generally defined as unwanted and unwarranted behaviour which is offensive, intimidating or humiliating. It is likely to be continuous or repeated, prolonged and deliberate. Specifically, bullying can include: verbal abuse such as name-calling or offensive language directed at the person; threats of violence; repeated humiliation in



front of others; and teasing or cruel comments about any psychological problems.

An employer has a duty to provide a safe workplace. An employee should report any bullying so that the employer can investigate the problem. However, where the bullying is taking place "under the management's nose," an employer may be liable for not taking proactive steps to address the situation - even where no concerns or complaints have been raised.

Where a report has been received or the employer is aware of potential bullying, the employer should, among other things, undertake a full and fair investigation. The employer can then decide what further reasonable steps should be taken.

Extreme cases of bullying, such as that of the Melbourne waitress, are thankfully rare. However, bullying in the workplace is a serious issue with serious consequences for all.

A recent survey found that one in five Kiwi workers suffer from workplace bullying, one of the worst rates in the world. Overall 17.8 per cent of respondents were identified as victims of bullying. The international range was between 5 per cent and 20 per cent.

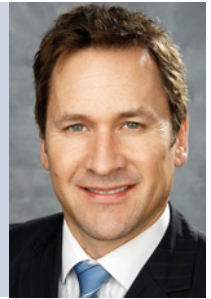
Lead researcher, Professor Tim Bentley said workplace bullying in New Zealand could be "a billion-dollar problem". It hit costs because of decreases in productivity due to worker absenteeism, staff turnover, lower staff satisfaction and time spent investigating bullying.

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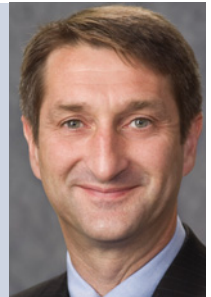
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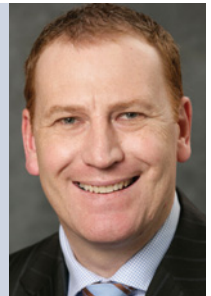
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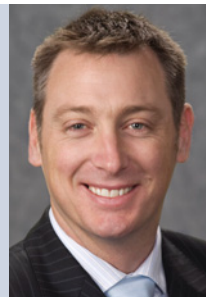
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