

To pay or not to pay? What are an employer's obligations when natural events strike?

Employers are being dealt a raft of issues with which to grapple in 2011. Many stem from Canterbury - what with the earthquakes and then the snow - but the employment issues which have arisen around these events are relevant wherever your business is based.

The focus in both has been safety and pay. The issue was recently highlighted with the story of a Christchurch woman who had been told by her boss to use two days' annual leave after the snowfall trapped her at home with her children.

It's an interesting issue and raises the tricky question - Should employees be forced to use their annual leave if they do not come into work after a heavy snowfall or natural disaster?

The answer is not straightforward and there is no "one size fits all" solution.

In some instances, this type of scenario is expressly provided for in an employee's written employment agreement. Typically, clauses of this nature are found in businesses which rely on the weather to be able to operate, for example in the building trade. If a clause dealing with this situation exists, it will usually provide for any absence from work to be unpaid in these circumstances, or for employees to take annual leave in order to be paid for the day's work that has been missed.

Most employment agreements will be silent on the issue of what happens if a workplace has to close because of the weather or some other situation outside the control of either the employer or employee.

But generally speaking, there is an obligation on employers to pay employees who are "ready, willing and able" to work, but cannot because the workplace is closed or otherwise off limits.

In these situations, employees will normally be entitled to be paid for the day, without having to take annual leave. This is the case even though they did not actually work on the day because the office was closed or they were sent home.

While business interruption insurance and the Government wage subsidies helped many Canterbury employers after February, there is generally no assistance when businesses might only be closed for a day or two. This places a significant burden on employers to continue to pay staff when they are not able to operate and generate an income.

The situation is different where businesses are open and operating but employees either choose not to come into work, or cannot come in due to childcare requirements or concern over road conditions.

In these circumstances, it can be fair for employers to ask their staff to take annual leave if they cannot come into work but still wish to be paid for that day. If the employee does not wish to use their annual leave entitlement, then the day away from work would be unpaid.

The situation is by no means black and white. There may be instances where the strict application of these general principles will not be fair and reasonable. In considering whether an employee is ready, willing and able to work, an employer may need to take into account whether the employee could actually have made it into work but chose not to, or whether the employee could truly have not made it into work safely. Each case will need to be considered on its own merits.

It is also important to remember that the employment relationship is founded on good faith. This places a legal requirement on both employees and employers to deal with each other openly and honestly. The onus is on both parties to keep in touch about their personal circumstances and the work situation. This does not mean that a Spanish Inquisition into the employee's ability to get their car out of their driveway is fair and reasonable. Neither does it mean that an employee can simply not show up to work and assume they will be paid for the days they have been away.

The key to resolving any issues that might arise is in many cases clear, prompt and honest communication on both sides. If employers or employees have any concerns about these issues, it is best to take some advice.

YOUR EMPLOYMENT CONTACTS



Scott Wilson

Partner

s.wilson@
DuncanCotterill.com



Raewyn Lovett

Partner

r.lovet@
DuncanCotterill.com



Ken Brotherson

Partner

k.brotherson@
DuncanCotterill.com



Mark Lawlor

Partner

m.lawlor@
DuncanCotterill.com



Aaron Dearden

Partner

a.dearden@
DuncanCotterill.com



Sarah Townsend

Associate

s.townsend@
DuncanCotterill.com



Kirsty McDonald

Associate

k.mcdonald@
DuncanCotterill.com

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