

OSH decision good news for employers

Employers will welcome a recent case in the High Court which is likely to have a significant impact on OSH accident investigations.

In *Bull v Utumapu*, a fatal accident occurred on a farm near Taihape. An inspector from the Department of Labour began investigating the accident. As part of the investigation, the inspector gave notice that she wanted to interview Mr Bull and Mr Speedy who were directors of the company (the deceased's employer). Mr Speedy was also the farm manager.

The lawyer acting for Mr Bull and Mr Speedy asked for a written summary of the questions that they would be asked and for copies of all documents relating to the investigation to be provided to them before the interview. The inspector responded with a brief summary of the general areas that the questions would focus on, which were:

- The relationships, roles and responsibilities of those interviewed and others in the workplace.
- The management of health and safety in the workplace.
- Health and safety practices in the workplace, including conditions, materials, or equipment that affect the safety or health of employees.

The High Court confirmed that defendants in an OSH investigation have a "right to silence" as well as the "right against self-incrimination". This is because the interviews were being sought as a means of investigating possible offences.

As a consequence "adequate notice must be given of the specific matters to be covered". The High Court decided that a person being interviewed has the right to know details of the questions that they would be asked and the allegations which the interviewee might face, in advance of the interview. Accordingly, the above points were not sufficiently specific.

The High Court went on to say that where the employer is a company, the inspector is not necessarily empowered



to nominate or require the employer to nominate, an individual to undergo an interview on the employer's behalf. So, directors or management of a company cannot be compelled to undergo an interview as a representative of the employer. This finding related to Mr Bull who was a director of the company but was not himself the employer and was not in control of the workplace. Accordingly, Mr Bull could not be forced to undergo an interview as a representative of the company.

While health and safety legislation is onerous, the seemingly unwieldy powers of OSH inspectors have clearly been tamed.

Employers are advised to take the time to seek legal representation and advice following an accident in the workplace. Please call us if you need assistance.

Are your annual holiday pay calculations correct?

Employers need to ensure they fully understand the calculation of annual leave payments, particularly where bonus payments are concerned.

This was highlighted in a recent Employment Relations Authority case, *Board v Adecco NZ Ltd*. In this case, alongside a dispute regarding unjustified dismissal for her redundancy, Ms Board claimed she was owed holiday pay due to her 2003 and 2004 bonuses being excluded from the assessment of average weekly earnings when calculating her holiday pay. The Authority held that both years bonuses (as part of an annual bonus plan) should have been taken into account in calculating Ms Board's holiday pay.

Under the Holidays Act 2003 (s21) 'annual holiday' calculations are to be based on the greater of the employee's ordinary weekly pay or the employee's average weekly earnings over the past 12 months. 'Ordinary weekly pay' includes incentive-based payments such as bonuses, if those payments are a regular part of the employee's pay. Clearly then, a structured incentive programme, paying out annually on preset criteria, should be incorporated into the annual gross earning for calculating annual leave and final pays. Although one off incentives or bonuses are not captured in 'ordinary weekly pay', they will be captured in the average weekly earnings for the past 12 months.

If incentive-based payments would have been received



had the employee worked on a public holiday or sick day, those payments should be included in the calculation of 'relevant daily pay.'

It is well worth checking the wording of your new and/or existing bonus schemes and whether they are to form part of that annual leave or holiday pay calculation. If you are unsure, give us a call and we can take some pressure off the end of year accounts.

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