cullings

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***cullings*** is the newsletter of ***Cullen – the Employment Law Firm***

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# "But it's part of the culture..."

Misuse of resources has been a hot topic lately with Ministerial spending in the spotlight. This sort of spending, outside the scope of what was originally intended, can be likened to an employment relationship where employees are given use of company resources and subsequently fail to use those resources appropriately. Cases over the years have shown that tight controls and sound policies are a safe way of managing employees' use of things like company credit cards, vehicles and technology, for example.

But what about situations where the company has been seen to condone the use of resources in a certain way and employees have continued to 'misuse' the resources on that basis?

## A case in point

In the case of *Safe Air v Walker* last year, Mr Walker, a 29 year old purchasing officer at Air New Zealand subsidiary Safe Air, was fired for using company computer systems to distribute what were in many instances 'distinctly offensive' materials via email. Safe Air came across the emails while conducting an investigation into possible information leaks by staff. The company fired Mr Walker on grounds that he had inappropriately used its email facilities. Mr Walker challenged his dismissal.

One of Mr Walker's arguments in the Employment Court was that because of the workplace culture at Safe Air and the fact that other staff were sending emails which were of a frivolous or offensive nature, he thought that it was acceptable for him to do so also. He thought the behaviour was condoned. The Employment Court determined that this proposition was unsubstantiated.

The Court gave several reasons for its decision based on the circumstances. For one, Mr Walker said in evidence that he knew at the time that it was wrong to send offensive emails, contradicting his claim that he thought it was accepted practice. Secondly, senior management gave evidence that they were entirely unaware of the breaches of policy until they were revealed in the investigation. Management had also reinforced the email policy to staff in a way that made it "unmistakable" that breaches of the policy would result in misconduct.

Ultimately the Court found that Mr Walker could not reasonably have believed that what he and other staff did was condoned by management. Mr Walker effectively confirmed this when he said that he would have been embarrassed if his senior manager had seen the sort of emails he was sending. This, in conjunction with the other evidence, totally undermined his argument.

A similar Australian case arose in the news last week with employees at Virgin Blue Airlines being dismissed for distributing pornographic materials at work in breach of the Airline's policies. In an application to the Workplace Relations Tribunal in Australia the workers claimed that the sharing of pornographic materials was commonplace in the offices and staffrooms of the employer and was openly condoned by management.

It will be interesting to see the outcome of that case and others like it. With the increasing use of new technologies in the workplace, this kind of scenario will likely be brought before the courts more frequently.

## The Law

The New Zealand courts have considered this issue on a number of occasions. They have established that in situations where the employer has allowed certain behaviour, essentially 'lulling the employee into a false security', the employee may be able to claim that their activities have been condoned.

In a famous case involving a hotel, the court said that a point must be reached at which the employee can "safely assume that the sword

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## *"But it's part of the culture..." ... continued*

of Damocles is no longer suspended overhead by a frail thread but has been taken down and returned to its sheath". The point being that the employer cannot allow the behaviour to continue and 'gather up' evidence only to finally bring down the sword at their own convenience.

Of course if an employer suddenly finds out about misconduct that occurred some time earlier and subsequently takes action, the circumstances may allow a disciplinary process to take place. It is where the employer knew about the behaviour the entire time and brought it up much later that the employee might succeed in claiming the behaviour cannot be used against them.

This principle perhaps signposts that employers should remain alert and address misconduct they are aware of in a timely manner. On the other foot employees should ensure they are aware of and act in accordance with policies in the workplace. At the end of the day the Courts will look at the circumstances when deciding these issues, but employers should ensure misconduct doesn't remain unchecked in such a way that it could be considered to be condoned.

## *Getting the Best Out of Mediation – What employees and employers need to know*

### *Lunchtime Seminar – 19 July 2010*

Almost all employment disputes which cannot be resolved internally wind up at mediation. If the matter doesn't settle there a grievant will typically file in the Employment Relations Authority. It is vital for businesses to know how to most effectively use the mediation process to ensure a successful resolution.

Our ***Cullen-The Employment Law Firm*** seminar is designed to ensure businesses get the most out of mediation by knowing when to proactively suggest mediation, how to frame the mediation, making the best use of the mediator, working with opposing counsel and how to best use your key witnesses. This seminar will provide up to date commentary and practical advice on how to do that.

Please join us to hear from two perspectives; David Hurley, Mediator at the Department of Labour and Peter Cullen, Partner at ***Cullen – The Employment Law Firm***.

12.15-2pm at Wellington Regional Chamber of Commerce, Level 28, The Majestic Centre, 100 Willis Street, Wellington

Free for members, $15 for non-members, GST incl. Bring your own lunch.

## *Coming Up...*

- *Getting the Best Out of Employees – The employment relationship and what to put in an employment agreement* **27 September 2010**

**To enrol for the getting the best out of mediation seminar on 19 July visit www.wellingtonchamber.co.nz.**
**To register your interest for other up-coming seminars contact enquiries@cullenlaw.co.nz**