cullings

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

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Christmas closedowns and holiday pay

Many businesses close down or have a skeleton staff over the Christmas period. Employees have typically taken this break as a combination of annual leave and paid public holidays.

A recent decision of the Employment Court has cast doubt on this practice.

EPMU v SCA

SCA Hygiene Australasia Limited (SCA) manufactures disposal nappies from its plant at Swanson. In part of its operations employees work 12 hour shifts on a fixed rotating roster. Each year the plant has an annual closedown. When the closedown commences, the roster is suspended and is then reinstituted from the point the roster was suspended at the conclusion of the closedown.

During the closedown the employees were required to take this as annual leave and paid public holidays. The collective employment agreement provided that both annual leave and public holidays taken over the closedown period were to be paid on the basis of an 8 hour day (as opposed to the employees' usual 12 hour shifts).

In 2007 the *Engineering Printing and Manufacturing Union* (EPMU) raised a dispute claiming that the employees' annual leave should be paid at the rate of 12 hours per day rather than 8 hours per day.

Under the *Holidays Act* payment for:

- annual leave is calculated on the employee's ordinary weekly earnings at the beginning of the holiday; and
- public holidays is calculated on the employee's relevant daily pay.

The Employment Relations Authority determined that SCA had correctly paid the public holidays. The EPMU challenged the determination in the Employment Court.

In the Employment Court, SCA claimed that the employees were not required to work on the closedown days and therefore the days were not 'otherwise working days' for the purposes of the *Holidays Act*. It claimed that in accordance with the *Holidays Act* the public holidays were not treated as a part of the employees' annual leave. To be paid public holidays the days needed to be 'otherwise working days' for the employees.

The Court agreed with SCA that the public holidays were not 'otherwise working days' for the employees. This was based on the contractual closedown period and the patterns of work over previous years. The Court said that there was no requirement for SCA to pay out relevant daily pay at 12 hours for the public holidays. The Court said there was no legal requirement to pay out the public holidays at all. By providing a contractual payment for the public holidays at the rate of 8 hours per day, SCA was providing a benefit beyond the employees' minimum entitlement.

What this means

Many employees' employment agreements will not have a contractual provision which provides the rate for calculating public holidays (particularly over the Christmas closedown). Typically, the agreement will be silent or refer back to the provisions of the *Holidays Act* for calculation of payment.

The decision means that from a legal perspective, employers are only obliged to pay for public holidays if the public holiday was a

Christmas closedowns ... continued

day the employee would ordinarily have been working on.

For most public holidays it will be clear whether the public holiday is a day the employee would have ordinarily worked. However, where the employer has a regular annual closedown over Christmas the employer may have no obligation to pay their employees for the public holidays.

Review of the Holidays Act

The Minister of Labour is currently consulting on recommended amendments from a working party she appointed to review of the Holidays Act. While this issue was not addressed, the Minister has indicated that this may be amended as well to ensure employees do receive payment for public holidays during any period of closedown. Watch this space.

NEWSFLASH

This week the Employment Court found that an employee dismissed during her 90-day trial period was unjustifiably dismissed. 90-day trial periods are another area subject to change under the proposed new employment law package. The outcome of the case suggests that 90-day trial periods may not be as 'risk free' as employers might think.

Heather Smith was dismissed from her position at a Stokes Valley pharmacy. There had been a transfer of ownership and Heather did not sign her new employment agreement until one day after she had begun working for the new owners. The new agreement contained a 90-day trial period clause and the employer dismissed Heather within the 90 days, claiming it was entitled to do so under the 90-day provision.

The Court found the dismissal was unjustified. The legislation requires that an employee signing up to a 90-day provision must be a "new" employee. The Court said Heather was not a "new employee" as she had been employed by the new employer for one day before she signed her agreement. It was also not insignificant that she had been working at the pharmacy under the old ownership for a number of years.

The employer made several other mistakes. One was that the employment agreement contained obligations on the employer to provide assessment and improvement for Heather during the trial period. This did not formally occur. The effect of all this on Heather, an employee with a previous good record of employment, was concerning to the judge.

The lessons for employers utilising the 90-day trial period:

- Ensure that new employees sign their employment agreement before they begin working
- Specify in the agreement whether or not notice can be paid instead of worked out
- If including self-imposed obligations (eg to provide development to employees during a trial period), ensure those obligations are met.

The 90-day trial period legislation as it currently stands should be treated carefully by employers. Despite Parliament's intention to provide a risk-free trial period for employers to assess employees, the Court has taken a contrary approach which creates risk to employers.