

IN BRIEF FROM RAINEY COLLINS

AUTUMN 2004

Welcome

*to the Autumn edition
of our Rainey Collins
Newsletter In Brief.*



*This edition highlights
some important changes to the law
for employees, employers and families
as well as providing a handy
checklist for Directors. These articles
are also available on our website
www.rcw.co.nz if you want to send
copies to anyone interested. If family,
friends and work mates would like to
receive their own copy then let us
know. We value your feedback and
look forward to hearing from you.*

James Johnston
Chairman of Partners

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Holidays Act: 10 Vital Points

On 1 April 2004 several major changes to the holiday laws took effect. Employers must know what these new provisions are or risk personal grievances or prosecutions.

1. Advice of Rights

Employers must advise employees of their entitlements under the Act and that information is available from the union (if they are a member) and the Department of Labour.

To show that this has been done these points should be included in all employment agreements along with a provision concerning the opportunity to take independent advice.

2. Four Weeks Holiday

This will become standard from 1 April 2007 and cannot be bargained away. Leave is to be expressed as so many weeks (not days).

3. Annual Holidays Must Be Taken

The employer must allow the employee to take all their annual holidays. They can require them to take annual leave by giving 14 days notice in writing.

4. Annual Holidays Do Not Lapse

If employees fail to take holidays then clauses preventing carrying forward are of no effect. Holidays remain due until they are taken. Allowing a delay will put up your costs as wages rise as holidays are paid at the current rate.

5. Two Weeks Uninterrupted Leave

Employees are entitled to take two weeks of their leave in an uninterrupted block.

6. Sick Leave

Sick leave of five days after six months service must be allowed. A further five days is due after each subsequent 12 months.

Sick leave can be accumulated up to 15 days meaning an employee can have 20 days available to them.

7. Sickness While On Holiday

If an employee is sick while on holiday they are entitled to sick leave and can take their holidays at some other point. Make sure you have clear processes in place for employees to report sickness while on holiday and provide evidence to support their claim.

8. Public Holidays

If the employee is required to work on a Public Holiday they will be paid at time and a half for the hours worked on that Public Holiday and will be given a day in lieu to be taken at an agreed time. Agreements may not state that the pay includes the extra pay. It must be paid on top of ordinary pay.

9. Close downs

Only one close down per year is allowed. A 'close down' is when the business is shut for a period and staff are required to take their annual leave during this time.

10. Bereavement Leave

Employees are entitled to:

- Three days for the death of a spouse, parent, child, brother or sister, grandparent, grandchild or spouse's parent.
- One day on the death of another person if the employer accepts that a bereavement has been suffered. Relevant factors include closeness of the relationship, responsibility for arrangements and cultural responsibilities.
- If more than one bereavement is suffered at the same time then the employee is entitled to leave for each.

The mechanisms for calculating leave and public holiday pay are complicated. The onus is on the employer to get it right.

Although not part of the Holidays Act you should note that minimum wages have also gone up.

- The adult rate (18 and over) is now \$9.00 per hour.
- The youth rate (16-17) is \$7.20 per hour.
- The minimum training wage is also \$7.20 per hour.



Alan Knowsley

Relocating Your Children After Separation

How to Improve Your Chances of Getting Court Approval.

Sometimes relocating your children after a relationship breakdown is not a simple matter of just moving to a new town or country. There are serious downsides if the Court does not approve the move. You can even be required to give up your new job, home and schools and return to where your former partner lives.

Parents who have the primary care of their children often decide to move to another city or even country. Reasons include making a fresh start after a relationship breakdown, moving away with a new partner, or moving for work or lifestyle opportunities in a different centre. When there is a dispute these situations are commonly called relocation cases.

If your child's other parent agrees to you and the children relocating there is no problem. If they do not agree there are two options:

1. Go anyway and hope that the other parent will not apply to the Court for you and the children to return home.
2. Make your own application to the Court to allow you and the children to relocate.

If you go to Court and your case does not settle a judge will ultimately decide whether you can relocate or not. Be aware that New Zealand Courts allow fewer parents to relocate than the Courts in the United Kingdom or Australia.

If you have to justify to the Court why you want to relocate the most common factors in successful cases are: providing a better quality of life for the children in an improved

environment and the children already having a settled life in the new centre. It is important to note that going anyway is no guarantee of success in the Courts. There are plenty of cases where the Courts have required parents and children to return to the access parent's location. The Court has to decide whether the move is in the best interests of the children.

If you have to make a case to the Court for you and your children to be allowed to relocate here are five things to think about:

1. It is important that the proposal to move is reasonable and well thought out.
2. You should do as much research as possible and present the Court with lots of information about the details of the children's life in the new location. For example, some people have provided the Court with a video showing the new town or city, the school the children will go to, the local parks and other facilities.

3. Have well thought out proposals for the children to have continuing contact with the other parent including travel arrangements and phone/letter contact in between visits. Write these proposals down as bullet points.
4. Clearly set out the family and friends support you and your children may have in the new location.
5. If you are returning to your country of origin partly because you are homesick for your own culture and language let the Court know.



Shelley Stevenson

Free seminars are being held by Rainey Collins on child care on 5 May, 2 June and 30 June.

Did you know?

Limited Licences to Avoid Extreme Hardship

If you really need to be able to drive but have been disqualified, either for demerit points or other reasons, then in worthy cases disqualified drivers can obtain a limited licence to drive. The driving is limited to the minimum necessary to alleviate extreme

hardship to the disqualified person or undue hardship to someone else that is affected by the disqualification. The other person affected may be anyone, including an employer, your partner or your children.

Upcoming Free Seminars

The following free seminars are being run by Rainey Collins to assist you understand what your rights are and how to go about organising your affairs to suit you best.

- **29 April** Family Trusts De-mystified – Nick Miles
- **5 May** Child Care – Jacinda Rennie
- **19 May** Relationship Property – Shelley Stevenson
- **2 June** Child Care – Conrad Bace

- **16 June** Relationship Property – Jacinda Rennie
- **17 June** Family Trusts De-mystified – Nick Miles
- **30 June** Child Care – Shelley Stevenson
- **14 July** Relationship Property – Conrad Bace

You can enrol for these seminars by phoning 04 4736850 or 0800 733424 or by registering on our website www.rcw.co.nz on the Forms page. The seminars are held at Level 8 Rainey Collins House, 2 Woodward Street, Wellington at 5.30pm.

Suspension From Work – Traps for Unwary Employers

If you suspect any employee of improper behaviour it is tempting to suspend them while you investigate the allegations. This could land you in hot water unless you have incorporated in their employment agreement a power to suspend. An employer does not have a right to suspend an employee from work unless there is a specific agreement or statutory right to do so, such as during a strike. According to the Employment Court, an employer's duty to maintain the employment relationship extends not only to remuneration but also to allowing the employee to do his or her work. Any unlawful 'suspension' of the employment contract will be a breach of that agreement.

If an employee is suspended unlawfully then they can raise a personal grievance with the employer. A recent unlawful suspension case resulted in an award of \$45,000 to the employee.

If there is no power of suspension in the agreement, an employer will have to investigate the allegations while the employee remains in the workplace.

However, there are very limited circumstances in which a suspension on pay, even without a contractual right, will be lawful. That is when the suspension is by consent, where the work is fluctuating and

temporarily unavailable and when an employee becomes temporarily unable to perform their employment.

Even where a right to suspend an employee does exist, the process must still be procedurally fair. The employee must be given an opportunity to 'avert the suspension in advance' and be heard about the suspension decision. Issues that must be addressed include whether there should be a suspension, the likely length of it and whether it should be on pay. Redeployment to another area on a temporary basis may remove the need to suspend by taking the heat out of a situation. Employees are entitled to have a support person present when they are spoken to and you should try to get their agreement to the proposed process.

Employers must carefully plan any proposed use of suspension rights; first to ensure that such rights exist in regard to a particular employee, and then to make sure that the suspension process is correctly carried out.

Failing to do so can be an expensive mistake.

Conrad Bace



What To Do When There is a Death in the Family

Death can be a very emotional and stressful time for those left behind. These eight points will help you make the necessary arrangements and avoid causing further upset when a family member dies.

1. If the death occurs at home you should inform the doctor who has been attending and get in touch with a funeral director. If it happens in hospital, only a funeral director needs to be contacted. Certain formalities as to certification of death need to be observed but the funeral director will guide you on what needs to be done.
2. Other family members and perhaps close friends should be informed as soon as possible.
3. The funeral director will arrange to meet you to discuss the funeral. Details will be required in order to register the death, so it is helpful if you have this information available. Briefly, the full names of the deceased, dates of birth and marriage, full names of spouse and names and ages of children need to be supplied. Also the names and occupations of the deceased person's parents.
4. You will need to decide where and when the funeral is to be held, and you may wish to choose someone to speak at it. A good eulogy needs to be well prepared, so it is always helpful to be able to give those concerned plenty of advanced notice.
5. The likely expense of the funeral is something that should be discussed with the funeral director. As part of this process a coffin needs to be chosen. Also, the deceased may have left directions in his or her Will so an enquiry about this should be made with their lawyer as soon as possible.
6. The wording of the death notice needs to be considered and placed in the relevant newspapers by you or the funeral director.
7. As soon as a Bank is aware of the death of a customer, all accounts will be frozen. This means that any automatic payments will cease although payments into the account can continue to be received.
8. In due course a list of the deceased's assets and liabilities will need to be compiled by the executor. The administration process will be speeded up if this list is accurate and available promptly.

Nick Miles

Directors' Duties Checklist

The consequences of failing to fully discharge Directors' duties are very serious. Directors can be prosecuted for breaches and face claims from disgruntled shareholders and creditors.

To help you know what is required from a Director, we have summarised the key duties and obligations of Directors of companies.

1. Good Faith and Best Interests

A Director, when exercising powers or performing duties on behalf of a company, must act in good faith and in what they believe are the best interests of the company. This duty preserves the right of the Directors to make a business judgement. What is in the best interests of the company will often, but not necessarily, be what is in the best interests of the existing shareholders. In the event of insolvency, the company's interests may be aligned with the creditor's interests.

The Courts will not generally 'second guess' a Director's actions or decisions provided they are supportable. There will be limits as to the degree to which Directors can rely on advice from others without making their own inquiries.

2. The Duty of Care, Diligence and Skill

A Director, when exercising powers and performing duties, must exercise care, diligence and skill that a reasonable Director will exercise. This is not a single standard but is based on the circumstances, including the

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Directors' Duties Checklist

continued

nature of the company, the nature of the decision and the Director's position and responsibilities. This is an objective test by which the Director's actions will be measured. There is a limit to which a Director can avoid such a duty in the event of delegation and/or in the event of reliance on reports and financial statements and advice.

"... more is required of Directors than ... indifference, the legislature requires diligence and action"

"... Directors should bring an informed and independent judgment to bear on the various matters that come to the Board for decision."

A Director should understand the business, understand the financial statements and exercise informed independent judgement in every case.

3. Management

The Board of Directors has primary responsibility for the financial performance and statutory compliance of the company. Where Directors have a role in the management of a company, their role should be explicit. The meaning of the term 'Director' for the purposes of this statutory provision is very wide, including any person acting as a Director or who is able to instruct a Director.

4. Proper Purpose

A Director must exercise a power for a proper purpose. The meaning of this statutory provision remains untested. It may be relevant where the Board is locked in a struggle with shareholders or endeavouring to forestall a takeover. Where a Board engineers a share issue to produce more sympathetic shareholder support, this may be a situation where Directors' motives are questioned.

5. Companies Act Compliance

A Director must not act or agree to the company acting in a manner that contravenes this Act or the company's constitution. This provision does not create a separate offence but may be useful to shareholders obtaining relief against the Directors proposing to undertake (or refrain) from certain action. There are also many other pieces of legislation which must be complied with.

6. Major Transactions

These should not be entered into without a special resolution or be conditional upon such a resolution. A 'major transaction' is one involving the purchase or disposition (or giving rights over) of assets which are more than half the value of the company's total assets. If the company undertakes such a transaction in breach of these requirements it cannot rely on this fact to avoid its commitment to others.

7. Conflicts of Interest

A Director will be 'interested' if in relation to any company transaction if he/she:

- Is a party
- Will or may derive material financial benefit
- Has a financial interest in a party to the transaction
- Is a Director/Trustee of another party that will obtain a material benefit (exceptions are made for wholly owned subsidiary and/or holding company)
- Has a close relative who will/may get a material benefit
- Is otherwise directly interested.

In such a case the Director should declare his or her interest and record it in a register. If the transaction is not recorded in the register the company may have the option of avoiding the transaction if it did not obtain

fair value at the time. The company cannot use this provision to avoid a transfer to a genuine third party. A Director may still vote on the transaction and participate once their interest is noted. The boundaries as to what will be considered material are not precise and a prudent Director will generally disclose all transactions even where the interest is tenuous and the amount minor.

8. Reckless and Insolvent Trading

A Director must not agree to the business being carried on in a way likely to cause substantial risk of serious loss to creditors or to cause or allow the business to be carried on in a way likely to create substantial risk of serious loss to company's creditors. The Director must not agree to the company incurring an obligation unless he or she believes, on reasonable grounds, the company can meet that obligation when required. Directors should ensure that up-to-date financial records are kept and that they read and understand those records and reports.

Although a business must be allowed to take risks and the fact of temporary insolvency may occur, what is significant is the decisions made, the action taken (or the inactivity of the Directors) in light of that information.

If you are a Director or are contemplating an offer of a Directorship you should be familiar with the statutory and common law obligations that go along with being a Director in a New Zealand company. You should also consider membership of the Institute of Directors in New Zealand and attending Directors' courses run by the Institute.



James Johnston

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