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M A C T O D D

L A W Y E R S

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Welcome to the Winter edition of *Commercial eSpeaking*. In this issue we highlight some key points in the government's May Budget which will affect all New Zealanders, as well as articles that will be useful to you in your day-to-day business dealings.

To talk further with us on any of the topics in this e-newsletter, or on any other legal matter, please be in touch. Our contact details are above.



A no surprises Budget

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The Minister has played it safe with cautious spending in key sectors, buoyed by its inheritance from the previous government of a strong fiscal position.

Operating from a healthy economy, the government has focussed its spending in the health, education and housing sectors.

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Medical grounds for terminating employment – what is the process?

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A no surprises Budget

There are few surprises in the government's 2018 Budget presented on 17 May, the first from Minister of Finance, the Hon Grant Robertson.

Treasury has forecasted economic growth of about 3% per year on average to June 2022, with our economy projected to grow at a rate faster than that expected for New Zealand's major trading partners.

The Minister has played safe with cautious spending in key sectors, buoyed by its inheritance from the previous government of a strong fiscal position.

Operating from a healthy economy, the government has focussed its spending in the health, education and housing sectors.

Kiwi health is a Budget winner

As expected, the emphasis in this year's Budget is on the health and wellbeing of New Zealanders, with a strong focus on lifting a large percentage of Kiwis out of poverty. This includes:

- » Significantly more funding for the district health boards to help rebuild ageing hospital and health infrastructure. There is particular emphasis on core services such as



maternity services, disability support, air ambulances and bowel cancer screening.

- » Free GP visits will be extended from those under 13 years old, to cover those under 14 years. This will be available from December.
- » Community Service Card holders will get cheaper visits to their GP.
- » Eligibility is to be extended for the Community Services Card to include anyone living in state housing, receiving the accommodation supplement or income-related rent subsidy.

Education

- » There is new funding of \$395 million over the next three years for new schools and hundreds of additional classrooms. Christchurch gets a considerable chunk of this with \$62 million being allocated to the rebuilding of its schools.
- » The Ongoing Resourcing Scheme (ORS) and other learning support initiatives for students who have very high and/or complex learning needs are to receive a funding boost.
- » Early childhood education gets more funding to meet the increasing demand of New Zealand's growing population.



Housing

The government has indicated a significant investment in public housing.



- » More than 6,000 state houses will be built over the next four years.
- » Funding will be provided to implement the Healthy Homes Guarantee Act 2017 that will regulate healthy home standards such as heating, ventilation, draught stopping, drainage and moisture.
- » A new four-year programme has been established, to be known as Warmer Kiwi Homes, to help make the homes of lower-income New Zealanders warmer and drier. The first year of the



Compensation for emotional harm in the workplace – trending upwards

Compensation awards for employees who have suffered emotional harm in the workplace have traditionally been low, which has been favourable for employers facing claims by employees.

Recently, however, compensation amounts have increased and are achieving greater consistency for employees. Employers now, more than ever, need to treat their employees properly to ensure they do not face significant compensation awards for personal grievance claims.

The law

The Employment Relations Act 2000 allows the Employment Relations Authority (ERA) or the Employment Court to award compensation for humiliation, loss of dignity and injury to feelings, where an employee has a personal grievance. This is almost always claimed by employees who say they have been unjustifiably dismissed or otherwise disadvantaged in their employment.

The power to compensate an employee for this type of emotional harm exists alongside that to compensate them for lost wages and benefits resulting from their dismissal. Emotional harm has always been difficult to measure as it is

subjective and it relates to the employee's feelings.

Historically low awards

Most awards over the past 25 years have been for under \$10,000. Although a few higher awards have been made (such as \$35,000, \$40,000 and \$50,000), these were rare and generally involved well-resourced public sector and large corporate employers.

Change in the air

There is now, however, a change in the air. In a 2015 case, the Employment Court said that although there needed to be consistency across awards, there was

danger in keeping them at an artificially low level¹. In 2016, the court said that while awards should not be over-generous, they should nevertheless be fair, realistic and not miserly².

Then, in an October 2017 case³, the court introduced the assessment of compensation in terms of three bands:

- » Band 1 – low level loss/damage
- » Band 2 – mid-range loss/damage, and
- » Band 3 – high level loss/damage.

This case involved a nurse, whose conditions of work had changed without proper consultation, and she was required to spend up to 30% of her time travelling. When the nurse refused to accept the

¹ *Hall v Dionex Pty Ltd* [2015] NZEmpC 29 at [88]

² *Wakairua v Chief Executive of Department of Corrections* [2016] NZEmpC 175 at [237]

³ *Waikato District Health Board v Archibald* [2017] NZEmpC 132

Business Briefs

Is your business infringing existing intellectual property rights? Do your homework.

A trade mark can be a valuable asset which can help your business to develop a reputation in the market and distinguish your goods and/or services from others. It's risky, however, to not consider existing third party intellectual property rights before you start to trade.

There would be nothing worse than finding the perfect location, deciding on a business name and launching into trading, only to receive a letter six months later to say that your business is infringing existing third party intellectual property rights, and that you must stop using it immediately. In most situations the only way forward is to re-brand and potentially lose your existing goodwill and customer recognition.

To avoid the cost, delay and potential market confusion that this situation could cause, we recommend that you complete a 'freedom to operate' search before you open for business. This will involve searching for existing registered and unregistered intellectual property rights. Registered intellectual property, such as trade marks, can be searched

on the Intellectual Property Office of New Zealand (IPONZ) website



registers [here](#). Existing unregistered intellectual property rights can be identified using Google or any other search engine.

If your intended name, logo or slogan is not already a registered mark, or not already used in trade by another business, you can apply for registration under the Trade Marks Act 2002. Registration of the trade mark will protect your ownership right in that mark and give you exclusive rights to use and manage the mark in New Zealand. ■

Medical grounds for terminating employment – what is the process?

When your employee becomes ill, or has an injury, with long-term effects, it takes not only a toll on them of course, but also on you as their employer as there is sometimes quite a disruption to your business.

How long must you wait for your employee to return to work? Answering this question is not straightforward. Every situation will have its own unique circumstances that will influence timeframes around your staff member returning to work.

If your staff member is unlikely to return within what you consider to be a reasonable time, or is taking long periods of leave for similar reasons, you may be considering terminating their

employment. Before making this decision, it's essential that you undertake a fair and reasonable enquiry – both from a legal standpoint and also to simply be a fair and reasonable employer.

The first step in this enquiry process is to write to your staff member:

- » Explaining your reasons for the enquiry
- » Explaining the possible outcomes, such as reduced duties or termination
- » Asking for relevant medical information
- » Offering an independent assessment by another medical professional, and
- » Providing an opportunity for your employee to respond.

Once you have the above information, you should liaise with your employee to establish whether they can return to work full-time or on reduced, light or alternative duties. If, after hearing their response, you believe there is no suitable alternative to termination, you need to provide appropriate termination notice to them.

Your employment agreements should address the entire process from the first sick day to the notice of termination. If they don't, or if you are unsure, we recommend you talk with us before making any move to talk with your employee. ■

Bright-line test extends tax liability: what this means for your residential rental property if purchased to run your business

You are probably now well aware that the bright-line test has been extended to five years.

If you own a residential rental property or a holiday home, changes to the bright-line test may mean you have to pay more tax. The current law came into effect 1 October 2015 and states that if any residential rental property, or a holiday home, is sold within two years of being purchased, you have to pay tax on any profit from the sale. This timeframe has now been extended to residential rental property sold within five years for property purchased on or after 29 March 2018. There's more detail on how this will work [here](#).

Former residential property purchased for the purposes of running a business may be exempt from the bright-line test if it's no longer considered to be residential property. If, however, you buy residential property and then convert it into your business premises within the bright-line test period, it may be deemed a sale from you to your business and subject to this tax on that basis.

The bright-line rules are complex and strictly enforced by Inland Revenue. If you're in any doubt about what to do, please contact us. ■

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A no surprises budget

programme will focus on ceiling and underfloor insulation. From 1 July these lower-income home owners can access grants to cover up to two-thirds of installation costs. The second year grants will cover the installation of a heating device.

Business and tax



The business sector will benefit from \$1 billion that will be available over the next four years for tax rebates from the R&D tax credit (12.5 cents/dollar which was announced in April). This will be available from 1 April 2019.

The Budget holds few tax initiatives. Rather, the government is relying on the anticipated findings of the Tax Working Group chaired by Sir Michael Cullen which is reviewing the current tax

regime. It's expected the Group's recommendations will be available by the end of this year, with any new major tax policies being part of the government's 2020 election manifesto.

Already signalled by the government is the so-called 'Amazon tax' where overseas businesses that ship goods valued at less than \$400 to Kiwis will need to pay GST.

For property investors, the government has already indicated it will ring fence investors' tax losses on rental properties; this is expected to net significant tax revenue. Earlier this year, the government announced the extension to the bright-line text, see more on that on [page 4](#).

The Minister for Revenue, the Hon Stuart Nash, says that the government is committed to a tax system that is simple, balanced and fair.

To read the Minister's presentation of the Budget to the House, go [here](#).

We acknowledge the source of some of this material from The Treasury's Budget-at-a-Glance document. ■

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Compensation for emotional harm in the workplace – trending upwards

new requirements she was made redundant. The court awarded her \$20,000, saying that her level of harm fell within the middle of Band 2.

The court did not specify the amounts that would apply for each band. In one subsequent case⁴, however, the ERA interpreted the decision as theoretically justifying awards of between \$1 to \$13,333 for Band 1, \$13,334 to \$26,666 for Band 2, and \$26,667 to \$40,000 for Band 3.

The bands approach is now being used by the ERA and the Employment Court and has resulted in a number of awards within the range of \$15,000 and \$25,000. Recent examples are:

- >> A taxi driver who had her hours changed from a day shift to a late shift without proper consultation and without her consent. She was awarded \$15,000⁵.
- >> An employee who was constructively dismissed from

her job as a head chef was assessed as being entitled to an award of \$20,000. This award was reduced to \$8,000, however, because of contributing behaviour on her part⁶.

- >> A cleaner who was unjustifiably dismissed was awarded \$15,000⁷.
- >> A sales consultant who was unjustifiably dismissed was awarded \$20,000, even though she had only been employed for six weeks. Her employer had also posted adverse comments about her online following the dismissal; this had continued and escalated the harm⁸.
- >> A store manager who was constructively dismissed from her job was assessed as being entitled to an award of \$25,000. However, as she had only claimed \$10,000, the award was limited to that amount⁹.

- >> An employee who worked for a funeral business was unjustifiably dismissed by her employer who used a 90-day trial period clause in her employment agreement (which was held to be invalid). She was awarded \$15,000¹⁰.

Looking ahead

Emotional harm awards of about \$20,000 may become the new normal. It's also worth noting that over and above the compensation award given, an employer may face possible penalties and legal costs, as well as additional awards for lost wages and benefits for unjustified dismissal cases. Only time will tell if this will increase the number of employment claims.

We recommend that all employers should ensure their actions and processes with their employees pass muster. If you're in any doubt, don't hesitate to contact us – it's better to be safe than sorry. ■

⁴ *King v Café Allwood Ltd* [2018] NZERA Christchurch 33

⁵ *Anderson v Blue Star Taxis (Christchurch) Society* [2018] NZERA Christchurch 41

⁶ *Ibid*, #4 above

⁷ *Atkinson v Trinity's Cleaning Services Ltd* [2018] NZERA Christchurch 18

⁸ *Cheng v Richora Group Ltd* [2018] NZERA Auckland 28

⁹ *Dawber v Church Lane NZ Ltd* [2017] NZERA Christchurch 211

¹⁰ *Stojanovich v Remembrance Funerals Ltd* [2017] NZERA Christchurch 201