



## Am I dismissed or not?

### Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

You would think that it would be crystal clear when someone has been dismissed from their employment. And in most cases it is. But on occasions, it can be a real head scratcher. A recent case from the Employment Court, **Concrete Structures (NZ) Limited v Sam Ward**, saw the Chief Judge state that a dismissal can occur even when neither the employee nor the employer subjectively believes that a dismissal has occurred.

At first sight this seems very odd, as it suggests that a dismissal can be outside the control of either party and somehow be visited upon an employee and an employer from on high. It's especially puzzling when you consider that the accepted definition of a dismissal is "*the termination of employment at the initiative of the employer*".

The answer lies in the fact that the test for assessing whether an employee has been dismissed is objective; in other words, it doesn't matter what the parties believe happened, it's what actually happened that counts. In the Concrete Structures case, Mr Ward's belief differed from reality. He wanted to stop working away from home for extended periods but this did not suit the employer. While purporting to offer Mr Ward a 'sabbatical', the employer had also written him an email referring to "*drawing a line*", his "*last day*" being 11 November, and ending with the words "*Thanks again for all of your efforts to date, I have thoroughly enjoyed working together*". At a later meeting on 7 November the employer understood that Mr Ward had agreed his last day would be 11 November in accordance with the earlier email. The employer also arranged the return of equipment, stopped his access to emails and prepared a "*final pay checklist*".

Whilst Mr Ward told the Employment Court he did not believe he had been dismissed at the 7 November meeting, the Court held that he was suffering mental health issues at the time and a reasonable person in his position would likely have considered that their employment was being terminated.

What the case really demonstrates is that if you say one thing to an employee, but do something which demonstrates a quite different intention or effect, then the courts will look behind your words to find the real situation.

Two more common situations where it is often hotly disputed whether there has been a dismissal is where the employee resigns, and where the employer asserts that the employee has abandoned their employment.

A resignation can still be a termination at the initiative of the employer where it has behaved towards the employee in such a way as to effectively compel them to resign; this is called a constructive dismissal. The behaviour of the employer leading to the resignation has to be so bad as to amount to a breach of the employee's employment agreement, and serious enough for it to have been reasonably foreseeable to the employer that the employee would resign. Mere unreasonable behaviour by the employer is not enough therefore. If the employee leaves it too late before resigning, or does things that suggest that the breach has been waived by them, then they cannot later resign and claim to have been constructively dismissed.

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Peter Zwart, Dean Kilpatrick, Jane Taylor or David Appleton.**

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Termination of an employment agreement because of abandonment is not a termination at the initiative of the employer, and so is not a dismissal as defined, but can still be effective in bringing an employment to an end. It requires an express clause in the employment agreement which states that the employment will be deemed to have come to an end if the employee is absent from work for a specified period of days (usually three) without notifying the employer and without consent. Many situations where the employer tries to rely upon an abandonment argument to say an employee was not dismissed fail because they made no effort to reach out to them. The courts have said that an employer should be cautious in drawing an inference of abandonment and *“must face a high threshold if contending that the employment ended on the employee's initiative in that way”*.

So, be cautious if your employee appears to have gone AWOL. Always take steps to trace them, and give them a chance to get in touch. If in doubt, give us a call!

## Employment Relations Seminar

Our next Employment Relations Practice Course has been set down for **Tuesday 16 and Wednesday 17 March 2021.**

Topics covered include:

- Pre-employment
- Dealing with absences from the workplace
- Discipline and Termination
- Performance Management
- Holidays Act
- Parental Leave
- Negotiations and Good Faith
- Redundancy and Restructuring
- Introduction to Health and Safety
- Policies
- Legislative Updates

Further information in regard to the course content and registration details can be found on our website – [www.mgz.co.nz/training](http://www.mgz.co.nz/training)

## COVID -19 UPDATE

## Financial Support for Businesses

### NEW Short-term Absence Payment

A new government fund for employees who need to self-isolate after a COVID-19 test was introduced on 9 February 2021.

Employers with staff who can't work from home but need to self-isolate pending a COVID-19 test result, will qualify for a one-off \$350 government payment for each eligible employee.

The payment is to help businesses keep paying eligible employees who:

- cannot work from home; and
- need to miss work to stay at home while waiting on a COVID-19 test result (in line with public health guidance).

It will also be available to self-employed workers.

Parents or caregivers who need to miss work to support their dependents who are staying at home awaiting a test result will also be eligible.

### Leave Support Scheme

The COVID-19 Leave Support Scheme continues to be available.

The payment rates are:

- \$585.80 for people working 20 hours or more per week (full-time rate)
- \$350 for people working less than 20 hours per week (part-time rate).

The Leave Support Scheme is for employees and self-employed people who meet certain health criteria (for example workers who are sick with COVID-19 or meet the other eligibility criteria).

### Resurgence Support Payment

A Resurgence Support Payment will also be available from late-February 2021 for eligible businesses throughout New Zealand, if there is a move to Alert Level 2 or above for 7 or more consecutive days. This one-off payment is to help businesses affected by the Alert Level upgrade with fixed costs.

Further information can be obtained here - <https://www.workandincome.govt.nz/about-work-and-income/news/2020/covid-19-financial-support-for-businesses.html>