



# dundas street dispatch

Third edition | February | 2014

## New website

Over the last couple of months we have been building our new improved website which is accessible on both desktop and mobile. We are very pleased to announce it is now live.

Check it out: [www.dundasstreet.co.nz](http://www.dundasstreet.co.nz)

A part of developing it we wanted to find words or an expression which captured our brand. We came up with Clear. Fresh. Sharp.

- Clear. We give succinct, easy to understand, easy to implement advice
- Fresh. We are energetic and creative
- Sharp. We have an edge and respond to your timeframes & needs

We are sure you will find something new on the site. We have broken down our expertise into six sections and included client quotes (without attributing them to authors to retain confidentiality), so a big thank you to all of you who have provided feedback about our service over the years.

If you have feedback or ideas for the site let us know, so we can keep it useful and meaningful. If you are on twitter make sure you add us to your newsfeed so we can send you our comments and links from time to time as well as breaking news about developments in the law upcoming events and maybe even what Susan is wearing...

## Blair Scotland, Partner

We are delighted to announce that Blair has now become a Partner at Dundas Street.

While Blair has been a significant member of the leadership of the firm from day 1 his elevation to Partnership marks a recognition of this leadership role and extends this commitment to the firm management as well.

In addition to being a great team player and leader Blair is a very senior practitioner with over 15 years employment law and those who have worked with him will be acutely aware of the high level of skill, integrity and professionalism he brings to his craft.



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If you would like to opt out of receiving this newsletter then please e-mail our Office Manager:

[esther@dundasstreet.co.nz](mailto:esther@dundasstreet.co.nz).



## WorkSafe NZ releases bullying guidelines

Last week WorkSafe NZ released the long awaited guidelines on workplace bullying. Entitled “*Preventing and responding to workplace bullying*”, the document provides useful guidance for employers, employees and those involved in dealing with workplace issues on how to identify and manage the difficult issue of bullying.

The guidelines define bullying in terms of “i.” It can include behaviours such as humiliating, intimidating, threatening and/or victimising a person or group. The definition is a lot wider than those previously adopted by the Employment Relations Authority and does not focus on the intentions of the perpetrator.

The guidelines provide detailed information on not only how to identify bullying, but how to take steps to



prevent it, what to do as a victim of bullying or as someone accused of such behaviour, how to measure bullying and guidance on investigation. The guidelines even provide a draft bullying policy and other assessment tools for employers to consider implementing.

A copy of the guidelines can be viewed and downloaded from WorkSafe’s website:

[www.business.govt.nz/worksafe](http://www.business.govt.nz/worksafe)

## Out of sight, out of mind?

These days, the 90-day period during which a personal grievance claim can be raised is relatively well-known. Slightly less well-known is the ability of employees or former employees to obtain permission from the Employment Relations Authority or Employment Court to raise claims **after** the 90 day period has expired on the basis of ‘exceptional circumstances’.

For employers wanting certainty to move on with business and life in general, the news gets potentially worse. ‘Exceptional circumstances’ include four specific statutory situations which, at first glance, appear anything BUT exceptional. Those grounds are also not exhaustive (although to date, all successful applications for leave have resulted from the existence of one of the ‘big four’).

### **Trauma**

The most potentially interesting ground is where the matters or events at issue left the employee or former employee so traumatised or affected that he or she was unable to properly consider raising a personal grievance within the 90-day period.

In good news, the courts have consistently interpreted this ground reasonably tightly. It requires some substantial injury (usually mental, and supported by professional medical or related evidence) that remains in play throughout the entirety of the 90-day period and which has been caused by the matters at issue. The ability to take legal advice, to take up other employment, to get married or to make other relatively complex personal or business-related decisions during the 90-day period have all resulted in leave applications failing. Similarly, depression that



could not be linked directly to the sexual harassment a former employee claimed to have suffered was also not enough.

### ***Sloppy representatives***

Leave to raise a claim out of time will also be granted where the employee or former employee made reasonable arrangements to have a legal representative deal with matters on his or her behalf.

As long as a clear instruction to go ahead with the claim was given within the 90-day period (even on day 82, in one case), leave will generally be granted. More recently however, both the Court of Appeal<sup>1</sup> and the Employment Court<sup>2</sup> have made clear that in some situations (especially where a skilled and specifically knowledgeable representative or advocate is involved and the employee has made clear that he or she is dissatisfied with some employer action), an express instruction to raise a grievance will not be required.

### ***Problem resolution process and reasons for dismissal***

In happier news, the final two specified grounds are well within an employer's ability to control. Ensuring that a problem resolution process that identifies the 90-day requirement is included in every employment agreement (potential ground three), and complying with all statutory requests for reasons for dismissal (potential ground four), will generally be enough to close them off.

Be sensible and cautious when it comes to remaining able to defend possible 'out of time'

claims. Employee files and information should not simply be shredded or deleted after 90 days, especially where a relationship has been acrimonious or problematic. The 'exceptional circumstances' definition is not exhaustive, and the ingenuity of the legal mind is limitless.



And remain vigilant! If a personal grievance is raised with an employer, the employee or former employee generally has three years to pursue it through the Authority before it can be considered to have died a respectable legal death. Be aware, however, that even this rule is not sacrosanct – the time limit can be extended if the Authority believes that the particular situation warrants it.

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<sup>1</sup> *Melville v Air New Zealand Ltd* (2010) 8 NZELR 190.

<sup>2</sup> *Davies v Dove Hawkes Bay Inc* [2013] NZEmpC 83.





## Harmful Digital Communications Bill

The New Zealand and Australian media was awash over the weekend with news of the death of troubled media star Charlotte Dawson. Ms Dawson had been open about her struggles with depression, and had been the target of social media trolls, with many sending her threats on Facebook and Twitter encouraging her to harm herself.



Parliament is currently considering the Harmful Digital Communications Bill, which creates a regime to combat digital communications which are offensive and can have horrifying consequences for victims. Communications via email, Facebook, Twitter and other media can also have important consequences for employment relationships when sent between clashing colleagues or directed upwards at managers or downwards at junior staff – and it doesn't matter whether these communications are sent during or outside office hours.

The Employment Court has already made it clear that Facebook posts, even those ostensibly protected by a privacy setting or directed at only an employee's network of friends and therefore

not visible publicly, may not be regarded as protected communications beyond the reach of employment processes.<sup>3</sup> As the Fair Work Commission of Australia has noted:

*"It would be foolish of employees to think that they may say as they wish on their Facebook page with total immunity from any consequences."*<sup>4</sup>

The Harmful Digital Communications Bill sets out to tackle the issue by making it illegal to post material online that is *"grossly offensive, indecent, obscene, menacing or knowingly false"*. A number of cases before the Employment Relations Authority in the last few years have involved this sort of conduct taking place on social media, and which would likely be amenable to prosecution under the Bill as presently drafted.

In *Adams v Wellington Free Ambulance*,<sup>5</sup> Alana Adams was dismissed from her employment with Wellington Free Ambulance for serious misconduct following a complaint from a co-worker about the way Ms Adams had spoken to him. The co-worker referred to abusive comments Ms Adams had made through Facebook. Ms Adams unsuccessfully argued that the Facebook comments were outside working hours and therefore were none of the employer's business. The Employment Relations Authority found that Ms Adams' Facebook interactions were a legitimate concern for her employer, as they showed that her reaction to workplace incidents were also playing out on the internet. These exchanges were relevant to the employer who was obliged to investigate problems between co-workers that could impact on health and safety.

<sup>3</sup> *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 188.

<sup>4</sup> *Fitzgerald v Smith t/a Escape Hair Design* [2010] FWA 7358 at [52].

<sup>5</sup> *Adams v Wellington Free Ambulance Service Inc* ERA Wellington WA81B/10, 23 July 2010.



The Facebook exchanges in *Adams* would most likely have amounted to harmful digital communications as defined in the Bill in its current form. “Harm” is defined as “serious emotional distress” and her case, Ms Adams’ interactions clearly had this effect on her co-worker.

The new civil enforcement regime provides for initial complaints about harmful digital communications to be made to an “approved agency”, which is yet to be identified. The approved agency may investigate a complaint and attempt to resolve it by negotiation, mediation, and persuasion. Where the approved agency cannot resolve the complaint, an individual may make an application to the District Court for a number of civil orders, including requiring harmful digital communications to be taken down, requiring the defendant to cease the harmful conduct, or ordering the identity of the author of an anonymous communication be released.

These proposed powers of the approved agency and the District Court will impact employers where the communications are part of a workplace dispute, as the effect of an investigation or order may have flow-on effects in that workplace. For example, the employer has a

duty under the Health and Safety in Employment Act 1992 to take all practicable steps to ensure the safety of its employees, and if it becomes aware of a complaint (whether by direct knowledge or possibly through contact from the approved agency) it will be obliged to conduct its own investigation of the issue to determine whether disciplinary consequences are warranted. This may give rise to simultaneous employment and criminal investigations taking place, which may be problematic because of the differing evidentiary standards that may apply to each investigation, as well as the effect of criminal law protections such as the right to silence.

The approved agency will take into account a range of factors to determine the level of harm caused by a digital communication - including the extremity of the language, whether the post was anonymous, repeated, or circulated, and the truth or falsity of it. Under the Bill as drafted, Ms Adams may well have been staring down the barrel of a 3 month term of imprisonment or a \$2000 fine, in addition to the consequences for her ongoing employment.

The Bill has now closed for submissions and a Select Committee report is due at the start of June.

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