



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

Level 8

Kirkcaldies North Tower
45 Johnston St, Wellington
Phone 04 499 5534
Fax 04 499 7443
enquiries@cullenlaw.co.nz
www.cullenlaw.co.nz
PO Box 10 891, The Terrace
Wellington 6143
New Zealand

Peter Cullen

Partner

peter@cullenlaw.co.nz

David Burton

Partner

david@cullenlaw.co.nz

Charles McGuinness

Senior Associate

charles@cullenlaw.co.nz

Jenny Jermy

Senior Solicitor

Jenny@cullenlaw.co.nz

Sheryl Waring

Solicitor

sheryl@cullenlaw.co.nz

Sarah Cates

Solicitor

sarah@cullenlaw.co.nz

Fred Hills

Law Clerk

fred@cullenlaw.co.nz

DISCLAIMER: This newsletter is intended to provide our clients with general information. While all statements are believed to be correct, no liability can be accepted for incorrect statements. Readers should not act or rely on this general information without seeking specific legal advice.

Paying the bill for employee theft

The cost of investigating employee theft can be an unwelcome but nonetheless necessary expense. But employers can take heart that they need not bear the cost alone. A recent case has highlighted how employers can claim back some of these costs from the offending employee.

Caught on camera

Mr Bond had worked for Restaurant Brands Limited (RBL) for almost 30 years. For 20 of those years he was the general manager of the Upper Hutt Store of Kentucky Fried Chicken.

RBL hired the services of Paragon investigators after an audit revealed monetary discrepancies at the Upper Hutt store. Covert cameras were installed and Mr Bond was observed acting suspiciously on two occasions. In particular on 22 July 2009 he was seen taking \$80 from the till.

Mr Bond was questioned by investigators from Paragon and the RBL Loss Prevention Officer, but his explanation for his actions was feeble and implausible. RBL determined that Mr Bond had taken company funds and so on 28 July 2009 Mr Bond was dismissed for serious misconduct.

Mr Bond was charged by the Police and later pleaded guilty to the theft of \$80.

What RBL claimed

At the Employment Relations Authority RBL claimed that Mr Bond should pay \$1,545 towards legal costs, \$5,000 towards investigation costs, \$3,000 towards staff costs during the investigation, and general damages of \$3,000 for Mr Bond allegedly covering up the theft and allegedly stealing more than what he was caught with.

The determination

The Authority determined that in the circumstances an award of damages was justified. Mr Bond's theft breached the implied duty of fidelity in his employment with RBL and as a result of this breach it was foreseeable that RBL would suffer loss.

RBL was considered to have reasonably engaged Paragon by the fact that Mr Bond was

caught stealing. Mr Bond was ordered to pay \$5,000 as the Authority considered that this was a fair proportion of the total investigation cost. RBL was awarded \$2,381.41 special damages for staff costs. The amount sought was only slightly reduced to reflect the absence of a staff member from a particular meeting. The claim was reasonable because the cost reflected the need for staff to liaise with Paragon for work they would not usually do. It also reflected the fact that staff were prevented from performing their regular duties.

Legal costs of \$1,545 were also awarded because RBL had established a link between its decision to obtain legal advice and Mr Bond's actions. RBL demonstrated this causative link by highlighting the seriousness of the matter in relation to Mr Bond and the alleged losses for which it sought recovery.

Unlike RBL's other claims, the Authority declined to award any general damages based on what it suspected its total loss from thefts to be. Apart from this one rejection, the Authority awarded RBL special damages and legal costs of \$8,926.41.

Glass half empty or half full?

While any employer would be pleased with the award of special damages and legal costs, the award failed to restore what RBL identified as its total loss. In this sense the award falls short of bringing RBL to a break even point.

However, to look at the award from this perspective would be missing the point. Even though RBL could not recoup what it saw as the total amount allegedly stolen, it was still able to offset a significant amount of necessary business expense.

This was made possible because of the invoices provided, details of staff costs, and by demonstrating how the costs were particularly caused as a result of Mr Bond's actions. This gave the Authority the basis it needed to make the award.

Importantly, RBL did not jeopardise its award by compromising its investigation process. This is to RBL's credit, especially as secret surveillance of staff is full of traps for the unwary.

Conclusion

While justified dismissal for theft does not recover the cost incurred following employee misconduct, employers can take heart that through the Authority they can claim business expenses that would not have otherwise been incurred.

In order to put forward a compelling case employers should be mindful of the following guidelines:

- adhere to the proper investigatory process for the employee concerned;
- provide evidence of the cost actually incurred, including invoices and time sheets;
- show that the investigatory action taken was reasonable;
- demonstrate that the cost was incurred directly as a result of the employee's action;
- be fair and reasonable in your claims – demonstrate to the Authority that you have considered the relative position of the employee concerned and what their contribution to the loss was; and
- do not base a claim for damages on suspicion – if the claim of damages cannot be specified, the Authority is unlikely to award damages.

Panel for External Legal Services to Government

Cullen – The Employment Law Firm is one of only eleven law firms appointed to the Panel for External Legal Services to Government to provide employment law advice to government (and all of their associated entities) throughout New Zealand.

Senior Associate — Charles McGuinness

Cullen — The Employment Law Firm is pleased to announce the promotion of Charles McGuinness to the position of Senior Associate.

Charles has a wealth of experience in employment law and represents a range of employer and employee clients from the public and private sectors.

Charles' advice is focused on being strategic, practical and effective.



SOCIAL MEDIA and EMPLOYMENT LUNCHTIME SEMINAR — 20 JUNE 2012

Social media has opened a new frontier of communication in the 21st century. Employers need to be aware of what this will mean for their businesses.

Despite this, many employers remain uncertain about how to properly respond to the use of social media by employees, both in the workplace and in their own time. At the same time many businesses are unaware of the potential competitive advantages that social media can offer.

Peter Cullen, Partner, **Cullen – The Employment Law Firm**, and Tom Reidy, Managing Director of social media agency **Catalyst90**, will be presenting this seminar. The seminar is designed to give practical advice to employers on the legal and competitive implications social media can have for their businesses.

Date: Wednesday, 20 June 2012

Time: 12:00pm–1:30pm

Location: NZIM Wellington, Level 7, Lumley House, 3-11 Hunter Street, Wellington

Price: Members — Free
Non Members — \$17.39 plus GST

Enrol: www.nzimcentral.co.nz or call NZIM 04 495 8300

The seminar will cover the following issues:

- Social media and the employment relationship of trust and confidence
- Monitoring employee use of time
- Bringing the employer into disrepute
- Confidentiality and security
- Employee social media policy
- Employee privacy
- Disciplinary action/dismissal
- What employers need to know when interviewing potential employees
- Maximizing business visibility
- Social media as a hiring tool
- Controlling the effect of social media
- Troubleshooting