

Windfalls for wayward employees?

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Recent media reporting would have you believe employees are receiving windfall payments for minimal and questionable work. Headlines can be deceiving.

Consider for a moment - "Construction company to pay \$17,000 to builder with a drinking problem".

Few people would read such a headline and consider a boozy builder to be deserving of a \$17,000 payday. Another recent headline also raises an eyebrow: "Café worker awarded \$9,000 for a day's work".

Do café workers really earn that much? How can such high awards be justified? In these instances (and others) the answer lies with the actions or inaction of the employer, rather than the conduct of the employee. The Employment Relations Authority (the Authority), which investigates and determines employment relationship problems, found the employers in both of the above cases to have fallen short of the legal minimum standards required from New Zealand employers.

The awards referred to by the media include lost wages and payments for hurt and humiliation, but also in the case of the builder, include significant penalties for breaching minimum employment standards. In New Zealand, these employment standards ensure that all employees enjoy rights, including paid time off when they are sick, paid holidays, access to their employment records, minimum rates of pay, and freedom from exploitation. For the most part, these minimum standards cannot be contracted out of; they must be given to every employee.

While the builder had an alcohol problem and a gambling addiction, he was still entitled to an employment agreement. He was also entitled to minimum periods of paid annual leave, and time and a half plus a day in lieu when he worked on a public holiday. The Authority found that his employer had refused him these minimum rights (*May v Solidbuilt Construction 2017 Limited* [2019] NZERA 54).

The café worker only worked for one day, but she was employed to work and was not paid anything. She was not told by the café that she would not be paid until after she had finished the day's work. The Authority determined the café worker was an employee and she was entitled to wages. If her employment ended she was entitled to notice of her termination, or a payment in lieu of notice. The Authority found that the café worker suffered distress as a result of her employer's actions, and awarded \$7,000 as compensation for hurt and humiliation (*Mawhinney v Sfizio Limited* [2019] NZERA 49).

While a \$7,000 hurt and humiliation payment might have previously been an average payment, the Chief Judge of the Employment Court released guidance on banding in 2018. An award of \$7,000 is now considered a "low band" award. Average hurt and humiliation awards are likely to be much higher in 2019.

What can employers do to avoid such penalties and adverse employee awards?

1. Have an employment agreement

Having a written and signed employment agreement is a legal requirement. In both of the cases discussed above, a written employment agreement would have gone a long way towards preventing the problems that eventuated. It is not too late. If you have employees that you know have never been given an employment agreement, meet with them and remedy the situation now. Having an agreement in place, albeit belatedly, is far better than having no agreement.

2. Keep wage, time and leave records

This is a legal requirement of all employers for each employee.

3. Consult with your employees before making decisions that will affect their employment

Employers and employees have reciprocal duties of good faith, which include the requirement to be open and communicative with each other. Adhering to this duty will (for the most part) resolve potential employment problems.

4. If in doubt, seek professional advice.

This article was written by [Susan Rowe](#) and [Shaun Brookes](#) for the [NBR](#) (March 2019).

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