

Civil defence emergencies - employment issues

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Civil defence emergencies are sudden events that endanger the safety of the public and property. The Christchurch earthquakes are a tragic example of the devastation that can result from a civil defence emergency, with the 22 February 2011 earthquake killing 185 people, injuring thousands and causing severe property damage. In 2017 alone, the Civil Defence has declared eight state of emergencies, including the Hawke's Bay fires and the Edgecumbe flooding.

When a civil defence emergency strikes, employers are often faced with questions that they have not previously contemplated and pressure can lead to bad decisions. Therefore, it is important that employers prepare for the worst.

When should you send your employees home due to an imminent threat?

Under the Health and Safety at Work Act 2015 (HSWA), employers must take all reasonably practicable steps to ensure the health and safety of their workers while they are at work. However, in most situations an employee is not considered to be at work or working while travelling to and from work. An employer is generally not responsible for them, unless the terms of their employment agreement provide otherwise, or the employee's position requires them to travel as part of their work.

If an employer knows that a disaster is predicted to occur and is likely to render the workplace unsafe, it is likely that requiring employees to stay in the workplace until it becomes unsafe, could be in breach of the HSWA. The Civil Defence may also direct people to evacuate or issue directions to the employer. In these cases, the employer will need to comply with its obligations and send employees home, on pay (subject to their employment agreement, discussed below).

But where it is reasonably unclear whether a disaster is going to occur or not, and the employer does not want to send its employees home from work on pay, the employer could instead offer anxious employees, who want to leave the workplace early, the opportunity to work from home, or allow them to leave work early on leave without pay, or allow them to take annual holidays for the period of work they will miss.

If employees cannot return to the workplace?

Following a disaster, the HSWA requires employers to ensure that the workplace is safe before allowing anyone access. This may require safety inspections or structural checks to ensure the workplace is safe.

If the workplace is deemed unsafe, then the employer may need to direct employees not to come to work. The employer must then determine whether employees are entitled to be paid in these circumstances.

There is no legislation for how time off work following a disaster is to be treated by employers. Therefore, the first port of call is the employment agreement. There may be specific clauses that dictate how an absence from the workplace in the event of a disaster is to be treated. Some employment agreements contain "force majeure" or "business interruption" clauses that state the employer may stop paying employees if their business is shut down for reasons beyond the employer's control.

If the employment agreement is silent, then the employer and employee will need to come to an agreement as to what amount and what type of leave is appropriate or whether alternative work arrangements are appropriate.

If an employer's workplace is so damaged and agreement cannot be reached the employer may have grounds to consider locking out its employees on the grounds of health and safety. In cases where the workplace is so damaged that it is unlikely that the employer will be resuming business in the near future, or at all, the employer may consider redundancies.

Will temporary premises be permissible?

Following the Christchurch earthquakes, many workplaces were closed and businesses operated from temporary premises. The Employment Relations Authority (the Authority) has shown that some leniency will be given to employers in such circumstances.

In *Steadman v Canterbury Employers' Chamber of Commerce Inc.*, temporary premises were set up in a residential house after the employer's office was destroyed by the Christchurch earthquake. An employee claimed that her employer had failed to provide her with a safe workplace, as the home was cramped, contained hazardous power cables, and had no emergency management

plan or structural survey. The Authority determined that while the working conditions were less than ideal, they were not hazardous. The Authority observed that everybody working in post-earthquake Christchurch was working in less than ideal conditions and that it must allow some latitude. This case illustrates that while an employer is required to comply with health and safety obligations immediately following a disaster, the employer will be judged on the circumstances at the time.

What if an employee cannot return to work?

If an employee or their dependent was injured during the emergency, then they will be entitled to take sick leave. However, if they are unable to get to work due to transportation issues, then sick leave will not be appropriate and agreement will need to be reached on how this leave from work will be treated and for how long. This could involve an agreement for the employee to take annual holidays or leave without pay until they are able to return to work.

In *McMurdo v Davie Norris Boatbuilders Limited*, an employee took nine days off work following the Christchurch earthquake to move his son to live with family in Hastings, after their home had no power, running water or sewage. The employee left a voicemail to explain this, but the employer did not receive it. The employer assumed he had abandoned his employment. The Authority held that this assumption was not fair or reasonable, given that the city had just suffered the biggest catastrophe in its history.

Preparing your business for the worst

Being prepared for a civil defence emergency can save lives, prevent injury and limit damage to property. A prepared business is more likely to be able to continue trading during a civil emergency or be better placed to recover. Steps a business can take to prepare itself include:

- Making the workplace as safe as possible. Secure heavy furniture. Provide first aid training and emergency kits
- Create an emergency response plan that sets out what procedures will apply in the event of an emergency, including evacuation procedures and a communication plan for staff
- Prepare a business continuity plan setting out what happens after the emergency
- Keep backup files of essential information, which are accessible in the event the workplace cannot be re-entered following the emergency
- Review employment agreements to ensure that they contain a force majeure or business interruption clause
- Review your insurance to ensure that you have business interruption cover.

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