

How to Justifiably Exercise Discretion

An employer must exercise discretion in a fair and reasonable manner taking relevant factors into account, ignoring irrelevant factors, and acting in good faith to the employee without ulterior motives.

Three cases provide examples of different types of discretion and what it means to be fair and reasonable.

- Mr Gordon's entitlement to monthly commission payments was at his employer Adshel New Zealand Ltd's discretion, both as to the amount and whether any payment would be made, even if he met his targets. Adshel decided not to pay Mr Gordon's commission for April 2013 because he resigned effective 3 May 2013, before payment was due, but Mr Gordon had not been told that he needed to stay on the payroll to receive his commission. Adshel also took into account its view of Mr Gordon's performance which it had never done before and had not discussed with Mr Gordon. Adshel's decision was not fair and reasonable so it was ordered to pay the commission plus interest.
- Mr Sharma asked his employer, Veolia Transport Auckland Ltd, for additional paid sick leave, after exhausting his entitlement. It was relevant for Veolia to take into account that the request was for 20% to top up payments from ACC, and that Mr Sharma had other paid leave entitlements that he could take. Veolia's decision to decline Mr Sharma's request did not result in financial hardship to him and was fair and reasonable.
- Although Mr Moffatt was paid a salary, he could also bank hours of overtime worked and his employer PA & SC Steen Ltd had a discretion to pay him for those banked hours. Mr Moffatt was justifiably dismissed for giving away product without authority or approval. He claimed payment for his banked hours but the Employment Relations Authority held that the hours had been forfeited when his employer exercised its discretion not to pay him for them.

So when an employee next asks you for something he or she is not legally entitled to, make sure you:

- Consider all the relevant circumstances e.g. are you acting consistently with past practice, what would be the effect of your decision on the employee;
- Consult the employee if you are relying on your perceptions e.g. of performance; and
- Have good reasons for saying no.

The way you handle a discretion, as well as the decision you make, must be what a fair and reasonable employer would do in all the circumstances.