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## EMPLOYMENT

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## EMPLOYER JUSTIFIED IN REFUSING TO INDEMNIFY EMPLOYEE

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The Court of Appeal has recently confirmed that the duty of indemnification does not apply in a situation where the employee's conduct fell outside the reasonable performance of her duties (*Katz v Mana Coach Services*).

The decision highlights the significance of the duty of indemnification, and the fact that an employee cannot breach their employment obligations and then expect to be able to rely on the duty in order to recover from their employer any costs and liabilities that arise as a result of their actions.

### Indemnification - what the law says

An employer has an implied duty to indemnify employees for liabilities that arise during the course of the reasonable performance of their duties. The duty of indemnification has existed in employment relationships since 1866 when a ship owner was ordered to indemnify the ship's master following allegations of murder that arose during the course of the master's performance of his duties.<sup>1</sup> The duty of indemnification is implied into the employment relationship by the common law, and exists even if it is not explicitly provided for in the employee's employment agreement.

However, if the employee has failed to take reasonable skill and care in carrying out their duties, the duty of indemnification may be "extinguished".<sup>2</sup> The courts have frequently limited the duty of indemnification in situations where the employee has been negligent in carrying out the requirements of their position, breached a duty or has failed to take all reasonable skill and care. In such a situation, the courts have held that the employee must repay their employer for any losses caused to the employer as a result of the employee's actions.

The most well known New Zealand case on indemnification is *Christchurch City Council v Davidson* (1997). This case arose out of the prosecution of employees who worked in the Christchurch City Council's crèche and were accused of the alleged sexual abuse of children while at work. Four employees were acquitted of the charges and sought to have their employer pay their legal expenses in accordance with the duty of indemnification. Based on the interpretation of the collective agreement, the Court of Appeal held that the employees were covered by the duty of indemnification.

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The Court of Appeal commented in that case that “*the indemnification of agents at common law does not extend to expenses incurred in defending an allegation that the person charged did something which he or she did not in fact do and which it was not his or her duty to do. The reason is that such expenses were not incurred by the worker as an agent of the employer in the reasonable performance of the worker’s duties.*”

### The facts of the Katz case

Ms Katz worked for Mana Coach Services as a bus driver. In June 2009 Ms Katz was driving one of Mana’s buses when she struck a stationary car which was waiting to cross an intersection. Ms Katz admitted responsibility for the accident on an insurance claim form, stating she simply did not see the car.

Ms Katz pleaded guilty to a charge of operating a vehicle carelessly, and was discharged without conviction under the Sentencing Act 2002. The effect of Ms Katz’ discharge without conviction was that she was deemed to have been acquitted of the charges. The test for a discharge without conviction is that the direct and indirect consequences of a conviction would be out of proportion to the gravity of the offence. It does not detract from the fact that an offence has been committed, and that Ms Katz pleaded guilty to the charges.

After receiving an invoice for legal services of \$562.50, Ms Katz sought to recover this sum from Mana, claiming that there was a “general rule of law that an employee is to have an indemnity acting in the execution and reasonable performance of duty.” Mana refused to indemnify her.

The Court of Appeal agreed with Mana and declined Ms Katz’ application for leave to appeal (against an adverse decision of the Employment Court). While the Court

accepted that the scope of the common law indemnity owed by an employer to an employee does have general importance, it said that it “could not see how it can sensibly be argued that Ms Katz’ conduct fell within the reasonable performance of her duties.”

It also stated that Ms Katz’ acquittal did not preclude the Employment Court from considering the evidence in order to reach a view about the cause of her accident. Ms Katz had admitted to conduct that constituted the offence.

### When might the duty of indemnification arise in your workplace?

There are many situations that arise every day that could result in an employer being required to indemnify an employee:

- An employee being required to defend themselves from criminal charges that arose while the employee was performing their duties (i.e. a bouncer being charged with assault).
- An employee receiving a parking or speeding ticket that is issued while the employee is undertaking their duties.
- An employee being penalised with a fine as a result of an employee carrying out an employer’s instructions (i.e. the employer instructing the employee to undertake an action that is unlawful).

If you do receive a request to cover an employee’s expenses or liabilities, you should check whether the actions that led to those expenses or liabilities took place during the course of the employee performing their duties, and that the employee was performing their duties using reasonable skill and care. But you may not be obliged to indemnify an employee that acted carelessly.

<sup>1</sup> *The James Seddon* (1866) LR (A&EC) 62

<sup>2</sup> *Lister v Romford Ice and Cold Storage Co Limited* [1957] 1 All ER 125

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