

Chronicle: June, 2008 – September, 2008

June 2008

The *Sunday Star Times* featured an article which claimed that thousands of casual workers will get a better deal, including improved access to benefits such as sick and bereavement leave, under proposed changes to the Employment Relations Act. The changes proposed by the Minister of Labour Minister Trevor Mallard included a new code of practice designed to make it easier for casual workers and their employers to know their rights and obligations. It will also identify employers who are labelling employees as casual when the nature of their employment means they are really permanent or part-time workers. National Distribution Union's Retail Secretary Maxine Gay was quoted as saying that "...it's really good news to even begin to clean up this area", and that it would help a growing number of vulnerable workers in industries such as hospitality, cleaning, retail and tourism who have irregular hours.

The article cited Department of Labour research, which confirmed that many casual workers were unaware of their rights. These same workers had limited access to holiday, sick leave, training and skill development. The irregular hours also played havoc with family life, and made it difficult to plan ahead or budget. Under the proposed changes, Department of Labour inspectors would be given the power to decide if a worker was employed on a temporary or permanent basis. A *Dominion Post* article published soon after the announcement suggested that Business NZ had argued that although the proposal was well-intentioned, the changes were out of step with the commercial world and would blow the budgets of events like the Rugby World Cup.

Proposed strike action by 750 Department of Labour employees was lifted at the last minute as progress was made in negotiations between the Department and the Public Service Association (PSA). The workers were seeking a pay increase of 4% and the abolition of their current pay setting system, which they claimed was confusing, inconsistent and unfair. However, notices remained in place for two two-hour strikes, scheduled for the 12th and 16th of June. Negotiations over the collective agreement began in August 2007.

It was found that Wellington's hospital actually ran more smoothly when junior doctors were on strike. Findings published in a British journal *Clinical Medicine*, suggested that a senior doctor could cover the workload of at least two junior colleagues. Patient waiting times and their length of stay in the Emergency Department were halved during a five-day strike by junior doctors in June 2006, when senior doctors carried out extra tasks on top of their normal work. For the first time, the Emergency Department met its recommended target times for treating emergency patients.

The *Press* reported that SkyCity Entertainment Group faced a series of 'popcorn strikes' by film attendants. The strikers waved banners saying 'Un-sexy Pay in the City' and asked film patrons to boycott drinks and confectionery. The Unite Union, which represents about 400 cinema workers around the country, was seeking at SkyCity to increase the pay for cinema attendants from \$12 an hour to \$12.20 an hour, rising to \$13.10 after two years of service. The *Dominion Post* reported on the troubles at a publicly funded Wellington community radio station, which was being investigated for workplace bullying after high staff turnover. The Labour Department began the investigation into Access Radio after the Public Service

Association (PSA) raised 'serious' concerns. Most of the station's core staff had either left or taken extended periods of leave, and five council members had resigned. Another article reported that the Department of Labour inspector had found that the staff may be unhappy but they were not being bullied. There was no find specific evidence of repeated and systematic bullying and nor were staff exhibiting 'mental harm'.

The *Southland Times* reported on a decision of the Employment Relations Authority that looked at a situation where an employee had resigned and then withdrew that resignation. The case demonstrated that in certain circumstances a resignation made in haste can be withdrawn and, if the withdrawal was not accepted, then the employer could get into trouble. A woman, who was employed as a manager of a clothing store, was counselled over the phone by her manager about a number of complaints made by customers about her. She became upset and told her manager that she could 'stick the job' and that she wasn't 'putting up with this any more, she wasn't paid enough for this crap'. The manager took these comments as a resignation and the employee was told to hand over her keys and leave the store. The employee later tried to retract her resignation. The authority found that the resignation was made in the heat of the moment. Although the language used was inappropriate and unacceptable she had then attempted to retract her resignation, which a fair and reasonable employer would have permitted her to do. The ERA also found that it was wrong to have had discussions regarding serious allegations over the telephone.

Progressive Meats lost a three-year legal battle to provide a smoking room for its workers. A judgment released by the Court of Appeal found that a smoking room built by the Hastings company was part of the workplace as defined by the Smokefree Environments Act. In a *Dominion Post* article, Progressive Meats' Managing Director Craig Hickson said the ruling defied common sense, but did not surprise him. Progressive Meats had built the smoking room as part of a \$1 million upgrade in 2003. Strict food safety regulations had come into force the year before, prohibiting workers from leaving the building when they were wearing their work cloth.

An *Independent* article illustrated that sometimes, despite an employer's failings, the acts of the employee can cause the scales to be tipped back in favour of the employer. It cited a recent case where a home insulation contractor employed a worker through his local Work and Income office. The worker, despite being told not to attend particular jobs, took it upon himself to install insulation material into a customer's house. As a result of his actions, a fire broke out in the ceiling of the house and this caused significant costs to the employer as under his licence agreement he could not have untrained staff installing the product. The employer called the employee into a meeting the next day and handed him a dismissal letter which prompted the employee to take a personal grievance case. In the Employment Relations Authority, the employer was found to have failed to abide by the requirements of procedural fairness. But the Authority also found that the employee's actions in undertaking work, which he had been told not to do, jeopardised property and life. The Authority determined that the fair and reasonable outcome was to deny the employee any award of compensation but required that the employer contributed to his legal costs.

July 2008

The long awaited amendment to the Employment Relations Act finally became law on 1 July meaning that employees with caring responsibilities would have the right to ask their employers for flexible working arrangements (see May Chronicle). A *NZ Herald* article compared the experience of Great Britain where similar legislation had been in place for several years. In Britain, a popular choice was condensed hours, where people worked four 10-hour days and had the fifth day off. Two years ago, a survey found that 80% of requests for flexible work arrangements had been granted, 10% were modified and 10% had been rejected. The emphasis was that it was 'early days' in New Zealand. Phil O'Reilly, Chief Executive of Business New Zealand was quoted as saying that "it was always a good idea to have as flexible a workplace as possible" and that "companies that do this well make it part of the company culture". He concluded that there would not be an overnight transformation as management first had to get over some long-entrenched ideas.

There was further discussion in the *Dominion Post* on the proposed changes to the Employment Relations Act announced in June, which would give some contractors more rights. The IT industry was likely to be affected as the proposed changes would mean that contractors belonging to a union would be entitled to at least the same pay and conditions as unionised staff who were employed by clients to which the contractors were seconded. As Indian outsourcing companies started to win major contracts from large New Zealand companies, the proposals could make hiring contractors less attractive. Campbell Hepburn, a manager at recruitment firm Hudson, said the plans would probably not cut demand for contractors, but would increase awareness about their rights. He said that another proposed amendment to the Act, which would allow contractors and their primary employer to pursue grievances against a secondary employer, could lead to some interesting legal questions, such as who was responsible for the conditions of an employee's dismissal.

Minister of Labour Trevor Mallard announced that the KiwiSaver legislation would be altered to ensure there was no conflict with employment law when employees and their employers negotiate remuneration packages. The Minister moved to make it unlawful for employers to pay different amounts to KiwiSaver members and non-members amid concerns that a minority of employers were deducting employees' wages but retaining the tax credits. To stop this, the Government would change the Employment Relations Act to make it unlawful to offer lesser terms to a KiwiSaver employee on the basis of membership. The KiwiSaver Act will also be amended.

The National Party's plan to allow small businesses the right to dismiss workers within a 90-day probationary period re-emerged as a policy platform for this year's election. The policy, which would apply to businesses with fewer than 20 workers, would allow employers to dismiss staff in the first three months without risking a personal grievance claim for unjustified dismissal. The National Party stated that the policy would give small businesses some insurance so they could take a risk on workers they might otherwise be reluctant to employ, such as former prisoners or people with little work experience. An article in the *Daily Post* argued that small businesses should have greater flexibility to hire and fire within a probationary period but there also needed to be some independent oversight to protect workers, in order to prevent abuse of individual employment rights.

In another significant revelation of the National Party's employment relations policy, leader John Key said that if it was elected to power it would largely retain the Employment Relations Act. Good-faith provisions would still apply, as well as rights to sick leave, holidays, and health and safety provisions. Additionally, workers would be allowed to bargain collectively without having to belong to a union. Mr Key said that a National Government would also keep four weeks annual leave, but would allow employees to trade the fourth week for cash.

The proposal to allow workers to cash up the fourth week of pay was labelled an effective abolition of the across-the-board four weeks' annual holidays, according to Council of Trade Unions' President Helen Kelly. She went on to say in the *Dominion Post* that, "people value their leave. I think employees who are pressured will end up selling their leave and three weeks leave will once again become the norm". Ms Kelly also envisaged situations where employees would be forced to trade their leave for less than its monetary value. Mr Key said that a National Party would appoint a working party to review the Holidays Act, with particular emphasis on the issue of 'relevant daily pay'.

A *NZ Herald* editorial supported the 90-day probationary period proposed by the National Party suggesting the proposal should be welcomed not only by employers but the many people who stand to have a better chance of gaining a job, such as the likes of new immigrants without good English, former prisoners, those wishing to change careers, young people without qualifications, and those with no recent work experience. The editorial argued that the National Party's proposal would allow employers to take a chance knowing there will not be the prospect of complex and costly personal grievance procedures. This freedom has long been sought by small businesses. The Small Business Advisory Group, set up by the Government in 2003, pinpointed it as the single most important change needed in employment law.

However, another *NZ Herald* article suggested that the 90-day probationary period proposal should concern everyone who supported the building of a high value, high productivity economy. High standards in the labour market were synonymous with high performance. Equally, low standards promoted the opposite such as high labour use, longer working hours, poor investment in training, lower capital intensity, lower wages and, eventually, reduced competitiveness. Removing employment protection from new employees was a fundamental weakening of those incentives to pursue high labour standards and thus, would erode an important building block of a high- performing economy.

The spectre of yet more strikes by junior doctor looked increasingly likely after, what the union labelled, a 'provocative' pay offer was tabled for new employees and non-unionised doctors. The beginning of July marked the one-year anniversary of the expiry of the national collective agreement covering more than 2,000 junior doctors. The DHBs said they would offer non-union and new employees pay rises of just over 8.5% for one year. Deborah Powell, the National Secretary of the junior doctors' union said that "[t]hey are inviting [junior doctors] to resign to get the pay rise and abandon the MECA [multi-employer collective agreement]. It's a very provocative action on their part".

The Government came under pressure from the Health and Disability Commissioner to ensure that patients were better looked after during health worker strikes, following a 'near miss' at Dunedin Hospital. The health board at the centre of two investigations warned that health strikes would inevitably lead to patient deaths.

A three-day strike planned by Air Nelson pilots ahead of the start of collective bargaining was labelled in the *Nelson Mail* as being “rigid, adversarial and litigious” by the company's General Manager John Hambleton. Mr Hambleton further claimed that the action was purely an “attempt to target the company and the customers”. New Zealand Airline Pilots' Association's Executive Director Rick Mirkin said the pilots' strike had been timed to underline their concerns about not getting enough time off with their families. Air Nelson pilots had not had a pay rise in two years and were seeking a wage rise of up to 4.5% over the next three years, but their main obstacle in reaching a settlement was the company's refusal to consider changes to the pilots' roster that would allow them to have more family time and attend activities at home more often. The *NZ Herald* reported that the stand-off was ‘growing increasingly bitter’ as the strike got underway.

Another public sector industrial dispute flared up as the Ministry of Fisheries staff said they were prepared to strike if the negotiation process to renew a collective agreement. Staff threatened two-weeks of rolling strikes if two days of negotiations for a new employment agreement failed. The unions and the Ministry had been negotiating since September 2007, but had reached an impasse over issues surrounding pay, travel allowances, annual leave and fitness testing.

The National Distribution Union launched a campaign to sign up staff at The Warehouse, claiming that workers were coming under increasing pressure as the retailer reduced staff by attrition. The Warehouse's General Manager Human Resources Paul Walsh confirmed that some staff were not being replaced at some stores when they left or, were being replaced by workers on fewer hours.

The *Press* reported on a Christchurch company who was ordered by the Employment Relations Authority to implement a robust policy against sexual harassment after an ‘outrageous’ case involving a 14-year-old girl. The company was ordered to pay \$12,750 in compensation for the ‘...hurt, humiliation and injury to her feelings’ suffered by the girl after her employer failed to deal with her complaint of sexual harassment. Her lawyer said that while he had never seen a similar case, young workers were susceptible to sexual harassment in the workplace. The girl had worked at the company full-time for about six months when she made the complaint against a middle-aged male co-worker. After making the accusation, the girl was questioned by senior management staff for two hours, during which she had no support person. She claimed that the man had engaged her in a string of inappropriate conversations and had offered to drive her home several times. The employer decided there had been no harassment and warned the man and the girl about their conduct.

Under the headline ‘Fired thief gets compo for her suffering’, a *Southland Times* article described the case of ‘a convicted thief’ who was awarded compensation for ‘hurt, humiliation and injury to feelings’ after she was dismissed for failing to disclose her ‘extensive criminal history’. The woman pleaded guilty to three charges while employed by the Alliance meat processing company but the offences were committed before she started with the company. Because the offences were committed before her employment with Alliance, it was found that the woman had acted ‘unethically, rather than illegally’ when she failed to tell management about her situation. The Employment Relations Authority found that although she was charged with and convicted of dishonesty offences, they would not have impacted on her duties.

The Court of Appeal told a senior Air New Zealand pilot who was demoted when he reached 60 that it was not age discrimination that had led to his loss of seniority. The Court said that the pilot, who had added responsibilities for flight instruction, was demoted to first officer because being less than 60 years of age was a qualification to do his job. His case was sent back to the Employment Court to decide if he was disadvantaged because of the way Air New Zealand dealt with his grievance. The Court of Appeal ordered the man to pay \$8,000 costs to Air New Zealand for the lost appeal.

August 2008

A *Sunday Star Times* article claimed that nearly two-thirds of the country's restaurants had stated that they would close on public holidays because the cost of opening was too high. This was cited as one of the reasons for the National Party's proposal to review the Holidays Act, which was blamed for restaurants' rocketing labour costs. A survey by the Restaurant Association of about 400 members nationwide showed the number of restaurants opting to close on public holidays had increased from 36% in 2007 to 64% this year. But the National Party's Labour and Industrial Relations Spokeswoman Kate Wilkinson says that although she sympathised with restaurant owners, changes to penal rates were not high on National's list of priorities if elected. The party was committed to setting up a working party to look at the Holidays Act, which it believed was too complex, but had given no undertakings beyond that.

The *Press* reported that Westpac had removed sales targets linked to staff pay and given staff a 5% pay rise. Banking union Finsec had been waging a campaign against banks who were putting debt sales ahead of customer service. ANZ National Bank employees were reported to be preparing to strike for two hours after the bank refused to accept staff demands of changing debt sales targets and a 4% increase in pay. Mediation talks failed to make any headway and the strike went ahead with workers at a picket line claiming that they wanted more staff to ease work pressures and significant changes to sales targets.

Later in the month, the *Southland Times* reported that ANZ National Bank workers accepted a 4% pay increase after a narrow voting result. Bank union Finsec's Campaign Director Andrew Campbell said the offer was accepted reluctantly, as members considered it too difficult to continue the campaign. Sales targets for credit had been a second stumbling block during the negotiations.

The *Press* reported on the potential impact on disabled people as protracted pay talks between NZ Care and staff culminated in nationwide industrial action. About 1,200 staff banned non-essential paperwork and van driving. Warwick Jones, Assistant National Secretary of the Public Service Association (PSA), which represented the workers, said staff sought a pay rise of between 20% and 30%. Escalating industrial action was planned over the next three weeks if mediation, scheduled with NZ Care in Wellington, was unsuccessful.

SkyCity Entertainment Group faced a 24-hour strike from 1,000 of its Auckland staff after negotiations broke down with the two unions, Unite union and the Service and Food Workers Union, who represented SkyCity workers. The unions claimed that SkyCity's Chief Executive Nigel Morrison had been tasked with making a \$110 million annual profit, which was the equivalent of \$44,000 for each employee. However, the unions claimed that SkyCity had offered a 'derisory' 4% wage rise to staff this year and 3.5% in 2009, the equivalent of less than \$20 in-the-hand to most workers. The unions were asking for a 5% increase and recognition of service for longer serving staff.

District nurses from Canterbury and Otago went on strike for two days after pay talks with their employer broke down. The nurses wanted a pay rise of between 3% and 4%, which the New Zealand Nurses' Organisation (NZNO) said would put them on par with other district nurses around the country. The NZNO rejected Healthcare New Zealand's offer of a 2.1% increase each year over two years and filed strike notice for 14 and 15 August. In the next stage of their industrial action, nurses threatened that, although they would turn up for work on 21 and 22 August, they would not supply their own vehicles.

Sailings of the Interislander ferries were at risk as negotiations between Toll New Zealand and the Merchant Service Guild (representing ferry captains and deck officers) broke down. The union withdrew further strike notices for sailings after two Cook Strait sailings were cancelled when officers refused to work. Both were predominantly freight sailings, with only minor disruptions to passengers. The union was seeking an 11% wage rise, which was lodged before the Government announced it would purchase Toll New Zealand's rail and ferry assets. The union claimed that the wage claim was 'modest and pragmatic'.

The tenth ranked ACT party list candidate Shawn Tan said in a *Dominion Post* article that he was told to tender his resignation by the Engineering, Printing and Manufacturing Union on the same day he informed them that he wanted to stand as an ACT list candidate. Mr Tan said he was advised to tender his resignation if he intended to stand for ACT. He remained in his position, as an organiser in the union's call centre, before being suspended on full pay after formally announcing his candidacy. The parties to the dispute were due to meet to begin the disciplinary procedure process, with Mr Tan adamant he wanted to retain his job and not give up his candidacy. A *NZ Herald* editorial described the case as curious saying the action said much about the EPMU, not least its unwillingness to brook dissension.

The *NZ Herald* reported that an Auckland publishing company employee who was teased about his sexuality was awarded more than \$7000 for hurt and humiliation following his unjustifiable dismissal. The worker had worked at Ponsonby based Action Media for only a month before resigning. He planned to work out his notice of four weeks but was suspended four days later. An investigation found that his manager had taunted him about being gay. On one occasion his partner left a voice message at the office, which was passed by his manager in a voice mimicking the caller. The employee's partner took exception to the manager's behaviour and phoned and threatened him. The incident sparked a decision by the manager to suspend the employee. The authority ordered Action Media to pay wage arrears of \$3,461 with interest of 9% from 10th of October 2007 (until paid in full), plus \$3,800 for hurt and humiliation.

A report on a workplace study in the *NZ Herald* noted that public servants do just as much work as employees in the private sector but had greater job satisfaction and much bigger pay packets. The survey, published by Professor John Gibson of Waikato University in the *New Zealand Journal of Employment Relations*, showed the gap in pay between the public and private sector was between 17% and 21%. The study also found that many public sector workers, who were likely to be female, highly-educated and living in Wellington, had a 'warm glow' feeling of contributing to society. Professor Gibson said the higher pay levels in government jobs had little to do with needing to compensate but more to do with needing to attract highly skilled workers.

September 2008

The *Dominion Post* reported on the tabling in Parliament of the Employment Relations Amendment Bill (No3). The Bill would give labour inspectors increased powers to determine whether workers are fixed-term or permanent employees and to test whether an employee has progressed from casual to permanent employment. The Council of Trade Unions' Economist Peter Conway stated that far too many New Zealand workers were in casual and temporary work and had to deal with the resulting work and income insecurity and the impact on family life and that "protection for casual workers [was] long overdue". The Bill would allow employees to make personal grievance claims and would ensure that terms of employment were comparable to collective agreements for other staff.

A Families Commission study found that many working parents were too scared to ask for flexible working arrangements, with many fearing that changing their normal hours would be bad for their careers. The study, reported in the *Dominion Post*, found that a quarter of the people surveyed said they would be concerned about their employer's reaction if they asked for a flexible working arrangement. Of those who dared to ask, 11% reported receiving a negative reaction. The report concluded by saying that, in encouraging flexible work schedules, organisations needed to make staff feel valued and appreciated. The increased loyalty of valued staff was seen as one of the key benefits for employers of offering flexible work arrangements.

An employment relations specialist claimed that a surge in workplace strikes would hit New Zealand because of impending tough economic conditions. In the *NZ Herald*, the consultant Fred Adelhelm, a director of Auckland-based Adelhelm & Associates, said the trade unions would be under pressure to seek 5% plus pay rises for members struggling with rising food and fuel costs. He said that high-profile unions such as the PSA and the EPMU had few options but to attend to the needs of their members whose expectations may be unrealistic in the current climate. This would ensure that the pressure on collective bargaining would continue and may even increase in the short and medium term.

A cross-Tasman industrial dispute between journalists and their employer Fairfax Media continued with the firm's Chief Executive, David Kirk, remaining unapologetic about the publisher's cost-cutting strategy and his handling of the high-profile industrial dispute. Journalists on the *NZ Herald* and Melbourne paper *The Age* returned to work after a four-day strike over a pay dispute and concern about the plans to cut 550 jobs in both Australia and New Zealand.

Wellington Tramways Union members rejected a new collective agreement offered by bus operator Go Wellington and issued a notice of strike. The strike notice followed three months of negotiations, which crumbled when the drivers turned down the firm's latest offer. The *Dominion Post* said that money was at the heart of the dispute; with drivers rejecting a 7% pay increase in the first year and a \$250 cash incentive. The dispute turned bitter as the drivers held their promise to strike, which caused commuter chaos. The drivers returned to work but the threat of further action remained.

A widely publicised employment dispute in Hamilton came to an end when the *Waikato Times* reporting that 'the protracted two-year legal stoush' between Parentline and its former chief executive Maxine Hodgson was finally over. All matters were resolved at a Judicial Settlement Conference, conducted by the chief employment judge Graeme Colgan. Both

parties were restricted in what they could say about the settlement. In February, the Employment Relations Authority had rejected Ms Hodgson's claim for constructive dismissal saying that the dismissal was largely due to her own actions (see February Chronicle).

The *Press* reported on a teenage McDonald's worker who received what it headlined as a 'super sized payout' after she was forced to resign her job when she joined a union. The Employment Relations Authority found that Chantelle Coup, aged 19, was constructively dismissed, and ordered McDonald's to pay her \$15,000. The Authority found the actions of McDonald's Kaiapoi were a "very serious interference of Ms Coup's freedom of choice about union membership", breaching the Employment Relations Act and its employer duties. Coup said that after joining the Unite union, she was pressured to resign from it and after refusing, had her hours cut while being bullied in other ways.

The case of political scientist Paul Buchanan dismissed by the University of Auckland for sending an abusive email to a student received further publicity (see April Chronicle). The *NZ Herald* and the *Dominion Post* revealed that he had been quietly reinstated to his old position. The university confirmed that Dr Buchanan had been reinstated after an agreement was reached between the parties.

A Business New Zealand survey found that even with an economic slowdown and a softening labour market, skill shortages remain the number one concern of businesses going into the election. According to the *NZ Herald*, Business New Zealand's Chief Executive Phil O'Reilly told the organisation's election conference that 71% of those who responded said the education system was not meeting their needs. Earlier Prime Minister Helen Clark had told the conference that "near full employment disguised the unpleasant truth that nearly half the existing workforce does not have the skills to function adequately in the knowledge economy".

It was revealed in the *Dominion Post* that MPs have been investigated three times over allegations that they bullied parliamentary staff. Claims of bullying by MPs were also raised by staff during a confidential in-house survey by Parliamentary Services. The Public Service Association's National Secretary Brenda Pilott confirmed in the article that she was aware of the allegations and her staff had had 'a quiet word' with the relevant political party whips. She said workplace problems at Parliament were "no better or no worse" than other workplaces her association dealt with. Ms Wilson also said 11 MPs had invoked 'special breakdown in relationship' contract clauses in the past three years to get rid of 12 employees.

A *Dominion Post* article said that, according to proposed Labour Department guidelines, employers with transgender staff should assist them as they changed sex. Such assistance would include helping them to decide which toilets to use and ensuring the person's new name was used. The draft plan said that employers should meet an employee intending to change sex and establish a 'written action plan' to ensure their workplace transition was smooth. Employees needed to feel welcome and should be encouraged to use facilities applicable to their new identity. The article gave the example of Sarah Lurajud, a Christchurch police officer who made the transition as an example of how attitudes with organisations could quickly change. Lurajud said that "[t]he police were incredibly supportive. In the past they would have made it impossible . . . It really changed the culture of the police. They used to be very blokey".

Erling Rasmussen & Colin Ross, Auckland University of Technology