

Chronicle: June 2009 – September 2009

June 2009

The impact of the recession and swine flu featured prominently in several media reports in June 2009.

The advent of swine flu raised the issue of payment to healthy workers if a business was forced to close down. The *Dominion Post* highlighted that the Government had sought legal advice on whether businesses, ordered to close because of swine flu, could be forced to pay healthy workers for the duration. Employers argued that there was a lack of clarity in the law and that it would be a financial burden if businesses were forced to continue paying staff while not working. In addition, there was a call for the Government to guarantee that employers would not be left to ‘carry the can’ for the pandemic. Union leaders also stated that workers should not be penalised either by using up sick days. A spokesperson for the Minister of Labour Kate Wilkinson said that while an employee had to be paid if ready and willing to work, but that a forced closedown of a business was a ‘unique’ situation.

The *Dominion Post* also reported that the increasing number of swine flu cases created a catalyst for employers to “get serious” about their employees’ health. Barbara Buckett, an employment lawyer, stated that given that the World Health Organisation was considering declaring a pandemic, employers should look at their obligations and responsibilities to provide a safe work environment and be community sensitive. Ms Buckett went as far as saying that infectious staff could be deemed, for the purposes of health and safety law, hazards in the workplace and employers may be sued for loss and damage if the illness was spread from the workplace.

The Government announced a review of the Holidays Act in which the aim was to examine how to reduce the burden of compliance for business and to make it easier for both employers and employees. The review would be carried out by a working group made up of two business representatives, two union representatives and an independent chairperson. According the *Dominion Post*, Minister of Labour Kate Wilkinson said that she expected the outcome would be a change to the current legislation that would be “comprehensible and fair”. Employer groups were quick to point out the faults of the current legislation, saying that any changes needed to reflect ‘the real world’ and that the current legislation was particularly confusing for certain sectors and occupational groups, such as hospitality and seasonal horticultural workers. One proposed provision was the ability to ‘cash up’ one week of leave which drew concerns from Council of Trade Unions’ Vice-President Richard Wagstaff, who said that it could be abused by some employers. Employment lawyer Peter Cullen summed it up best when he said that it would be a challenge for the working group to satisfactorily address the diverse requirements of all industries and yet at the same time create a simpler piece of legislation.

A Private Members Bill, drafted by Labour MP Darien Fenton, aimed at setting minimum redundancy entitlements for redundant workers during the recession period failed to find favour with the Government. According to the *Nelson Mail*, the Minister of Labour Kate Wilkinson said that it was “not my priority to try to impose minimum statutory redundancy on businesses that are struggling enough to survive and to keep their staff”. However, in the *Sunday Star Times* it was claimed that people were worse off in 2009 than during the 1987 share market crash as the Employment Contracts Act 1991 had reduced the number of employees on collective contracts which meant that fewer employees today were covered by redundancy agreements.

The *Sunday Star Times* also reported that victims of the recession were ‘not only out of work and stressed’ but they were also chasing bigger compensation payouts. An Auckland employment lawyer claimed that during this recessionary period, there was an increase in the number of employees taking stress-related personal grievance cases and also claiming larger amounts for hurt and humiliation. In a summary of cases heard by the Employment Relations Authority in 2008, the *Dominion Post* found that there was a record of 521 cases heard. The average payout for hurt and humiliation in Wellington was \$6,474, in Auckland \$4,851, and in Christchurch \$4,896. In the *Sunday Star Times* a clinical psychologist commented that there was often a “causation contest” in stress-related personal grievances relating to whether the stress was work related or caused by a non work issue.

The *Nelson Mail* reported that an Air Nelson baggage handler who was dismissed for recording false luggage weights had lost his appeal before the Employment Court. The worker falsified the weights as a form of personal industrial action. While trained in a new automated system he had continued to use a manual system which the airline claimed created a potential risk to aircraft safety and was in breach of explicit operational instructions.

A woman who was awarded \$16,000 after she was told her job was no longer available when she wanted to return from parental leave. According to *NZ Herald*, the woman worked as a manager at the Penrose Branch of Allied Work Force Ltd. Early in her parental leave she suffered a miscarriage and met with her human resources manager to discuss returning to work. She was informed that a restructure had occurred and that her old position had been awarded to another employee. She was offered a new position on the same salary but after mentioning that she was planning to have another baby, the offer was withdrawn. The Employment Relations Authority found that the employer had not taken into account the considerable trauma the woman had undergone and awarded her \$8,308 in lost wages and \$8,000 in compensation for hurt and humiliation for the insensitive and unsympathetic treatment she had received.

The *Timaru Herald* reported on a local seven year saga which finally came to an end (refer June 2007 Chronicle) when a former Temuka police officer’s claims of constructive or unjustified dismissal against the Police were dismissed by the Employment Court. The officer resigned in 2003 after he questioned his Sergeant’s ability and challenged the numerous inquiries that followed the stand-off with the manager, including a sexual harassment complaint against him. The officer filed a personal grievance for constructive dismissal and unjustified disadvantage because of

his dissatisfaction with how police dealt with investigations into a complaint he made about his supervising officer. The Employment Court dismissed the claims saying the Police did not breach any express or implied terms of his employment agreement. In relation to the alternative claim for unjustified dismissal the judge found that at all times, the Police had been a fair and reasonable employer, and any disadvantage suffered by the officer were not the responsibility of the Police.

The *Press* reported that a Christchurch company was ordered to pay \$8,000 for wrongful dismissal after the employer dismissed an employee for suspected drug dealing. The company disregarded accounts of the incident by those involved and relied instead on the “profuse sweating” of the employee while he was undergoing questioning. The employee was caught on camera allegedly exchanging a bag containing drugs with another employee. The other staff member maintained he was only paying back some money owed to the employee and denied buying drugs. The Employment Relations Authority found that the company relied almost entirely on the video evidence and gave too little weight to the oral evidence from staff. The worker was awarded compensation of \$2,500 and a contribution for lost wages of \$5,500.

A deal between Work and Income and McDonald’s could see beneficiaries working in McDonalds restaurants. In a select committee hearing, the Minister of Social Development Paula Bennett revealed the agreement and said that up to 7,000 unemployed people could be used for the McDonald’s restaurant expansion plans over the next five years. Under the deal with McDonald’s, Work and Income would assist with the recruitment and training of 7,000 staff to be placed in service roles. Labour Party Employment Spokesperson Ruth Dyson said that while jobs at McDonald’s were better than being on the dole, the plan was ‘not the best example’ of the Government’s commitment to ‘upskilling the economy’. It was also stressed that the deal followed the Government’s decision to cut a tertiary education training allowance for beneficiaries.

According to the *NZ Herald*, many expatriate New Zealanders were returning home as a result of the recession but thousands were returning “to the dole queue and a strong reality check when it comes to finding a new job”. Figures provided by Minister of Social Development Paula Bennett showed that 3,000 people, out of the 26,000 who returned over the past year, were receiving the unemployment benefit. Of those unemployed, many were highly skilled. A Department of Labour spokesperson said that the tightening of immigration rules in other countries in response to the economic downturn was driving New Zealanders to return because it was harder to get work overseas.

July 2009

On 1 March 2009, the *Employment Relations Amendment Act* (also known as the “90 day probation period Act”) came into force and as a result the Department of Labour was inundated with enquiries regarding the changes. According to an article in the *Dominion Post*, nearly 30,000 people sought information through the Department of Labour website and more than 400 employers and 248 workers received telephone advice from the Department. The Minister of Labour Kate Wilkinson stated that she had been informally approached by business representatives about making the scheme

more widely available, but added that any decision was unlikely in 2009. A spokesperson from the Northern Employers and Manufacturers Association said he knew of 25 companies using the new provision and thought that the actual number could be much higher. He also stated that employers not would exploit the law as they invested time and resources to train staff and they would not dismiss them without reason. The Council of Trade Unions claimed that they were aware of at least six workers who had lost their jobs under the new law.

An Employment Court decision to pay on-duty rest home carers while taking a sleep break would result 'in carnage at rest home doors as families drop off their loved ones and run', according to a *Dominion Post* article. It was estimated that costs for providing overnight care would almost double and that the result would be that ACC and District Health Boards would have to reduce the level of care they currently provided.

High profile television reality star, the 'Lion Man' Craig Busch (refer to Chronicle December 2008) claimed unjustified dismissal from Whangarei's Zion Wildlife Park. In a *NZ Herald* article, it was noted that his hearing before the Employment Relations Authority had been postponed until August 2009 due to the fatal mauling of an animal handler by one of the tigers at the park. Mr Busch was dismissed after being accused of serious misconduct, including allegations of safety protocol breaches, inappropriate behaviour and poor performance.

The *Sunday Star Times* reported that Air New Zealand dismissed an employee for apparently sending offensive emails, but the Employment Relations Authority found that the employee has been unjustifiably dismissed. In response the airline sent an email to more than 11,000 staff attacking the employee's actions and provided graphic descriptions of the most offensive messages. One employment lawyer called the actions of Air New Zealand both 'petty' and 'childish' and showed a level of disrespect for the Authority. Air New Zealand responded that the email was sent to ensure that all staff had the relevant facts as an earlier media report had said that the e-mails weren't that bad. Air New Zealand also announced that it would appeal the Authority decision.

In another high profile employment issue involving Air New Zealand, it was reported that a veteran pilot had won his long-running battle against the airline for age discrimination (refer to Chronicle October 2008). The Boeing 747 captain and flight instructor was reduced to a lower rank of first officer when he turned 60 because being under the age of 60 was necessary to do his job. He appealed to the Supreme Court against a Court of Appeal decision that said age discrimination was not the reason he lost rank and was shifted to a lower-paying job. The Supreme Court ruled that Air New Zealand had discriminated against the pilot and awarded him costs of \$15,000. The case will now return to the Employment Court as the pilot intends to seek reimbursement from Air New Zealand over lost pay and damages, which could amount to hundreds of thousands of dollars. At the same time, he announced his intention to retire in September 2009.

A rather bizarre case of a journalist who was dismissed because his editor believed rumours he was selling illicit drugs from office toilets and was linked to criminal gangs was reported in the *Dominion Post* and the *Waikato Times*. The employee was on sick leave when drug squad detectives went to his place of employment wanting to speak with him. His employer was informed by the detectives that as part of their surveillance of an address the employee had been seen five or six times and that 'he was not at the address for work purposes'. A further article in the *Sunday Star Times* reported on other rumours included involvement in a \$5 million P ring out of Paremoremo prison. During the case, there were also allegations of industrial espionage on an unprecedented scale where reporters working for the *Herald on Sunday* were ordered to steal stories out of the *Sunday Star Times* newspaper. The employer, APN Newspapers, claimed the dismissal followed a proper, careful, patient process and that the journalist had failed to obey a reasonable and justified instruction by refusing to provide his notes to his editor. The Employment Relations Authority adjudicator, Rosemary Monaghan, reserved her decision.

The Employment Relations Authority was told that a 'fractious' working relationship between two Massey University managers resulted in the resignation of one and the other going on stress leave. Cheryl Kent, who was employed as a physical resources manager, had accused her employer of failing to investigate complaints that she was constantly being bullied by her manager. However, the university responded that the woman had plenty of opportunities to raise her concerns but she did not, despite being an assertive and forthright person. The woman claimed that the university had a duty of care in protecting her from bullying from a man who had a history of bullying type behaviour. The complaint was considered to be a relationship issue not bullying and the investigation stopped when the manager resigned.

The *Nelson Mail* highlighted local job losses at the Nelson office of the Ministry of Social Development. The Public Service Association (PSA) expressed concern at the cuts during a time of rising unemployment. PSA National Secretary Brenda Pilott stressed that the cuts were being made at a time when 1,100 people a week were signing up for the unemployment benefit.

There were a growing number of unscrupulous Marlborough vineyard labour-hire contractors who were short-changing seasonal employees, according to the *Dominion Post*. Wine Marlborough advised grape growers to take a close look at the labour-hire contractors they use during the pruning season after reports that some of the contractors were illegally paying their workers as little as \$6 an hour (less than half the statutory minimum wage). Winter was one of the busiest times in vineyards, with more than 80 labour-hire contractors, employing 3,500 employees worked in the region, pruning and tying down vines. In previous years, the region had struggled to get enough workers, but this year there was plenty of labour available, creating pressure among the labour-hire contractors to secure contracts with the vineyards owners. As prices for jobs fell, there was pressure on labour-hire contractors to cut wages and costs, which had encouraged some of them to skimp on payments to staff and the Inland Revenue Department. The Department of Labour figures also showed a 125 per cent increase in complaints regarding vineyard labour-hire contractors in which there were 90 complaints made about 30 companies between 2008-09 while in the previous year there were only 40 complaints received about 13 companies. However, a Department of Labour spokesperson attributed the rise to seasonal

workers becoming more aware of their rights, rather than just increased non-compliance by their employers.

August 2009

A number of strikes hit the media headlines during August. The *Nelson Mail* and the *Waikato Times* reported that more than 1,000 telephone line engineers went on strike to fight for redundancy protection. The employees worked for companies which were contracted to Telecom which had announced plans to move to a new owner-operator model.

Meanwhile, the four different unions representing bus drivers and cleaners returned to the negotiations with NZ Bus after a pay offer was rejected. The unions were seeking a 6.8% pay rise, against a company offer of 3.5% for 2009 and 3% for each of the following two years, which would guarantee industrial stability for buses needed for the 2011 Rugby World Cup. One of the unions negotiators stated that the employers offer to their 870 drivers and cleaners was so wide of the mark that there was little point in putting the proposal to a stop work meeting. The unions argued that the current starting rate for drivers was only \$14.05 an hour which was only \$1.55 above the statutory minimum wage.

Other high profile employment disputes received media coverage. NIWA scientist Jim Salinger was given a date for his Employment Relations Authority hearing which will be in Auckland during October 2009 (see May Chronicle). The *Dominion Post* reported that 'Lion Man' Craig Busch had withdrawn his bid to be reinstated to the Zion Wildlife Park (see July Chronicle). Zion had launched numerous counterclaims, including the recovery of thousands of dollars worth of machinery, tools and equipment and the entire park's animal and zoo records which it alleged that Mr Busch had taken.

A dispute over a \$7 discrepancy in a café's takings ended up costing the business owner several thousand dollars. The Rangiora cafe (near Christchurch) was found by the Employment Relations Authority to have unjustifiably dismissed an employee which started with a heated discussion with one of her employee who overlooked a refund worth \$7. As the employee left the café, she told a co-worker that the owners "could stick their job up their" She was told the next day to resign by her employer. The Authority said that the central matter was whether the woman's parting words amounted to a resignation and found that the outburst was an expression of frustration not a resignation. The employer failed to undertake a proper investigation into the background to the dispute. The employee was awarded 13 weeks pay minus 10 days sick leave, a \$120 refund for the return of her cafe uniform and \$6,000 compensation for hurt and humiliation.

A Court of Appeal ruling reported in the *Nelson Mail* found that employers cannot order workers to do the jobs of colleagues lawfully on strike. This decision overturned an earlier Employment Court judgment which ruled that the Employment Relations Act allowed employers to instruct take that action. The Engineering, Printing and Manufacturing Union took the case to the Court of Appeal after the Employment Court rejected their claim. The Court of Appeal's ruling will make it difficult for

employers to hire 'strike-breakers' during lawful strikes, but the Court stressed its ruling had no ramifications for employers faced with illegal strikes. The Court of Appeal ruling stated that the Employment Court's judgement was inconsistent with the words of the legislation and difficult to apply in practice. The Court of Appeal also released its judgment on a case involving striking Air Nelson engineers that centred on the same legal question.

It was major news when Wespac Bank dismissed the employee who had inadvertently transferred \$10 million dollars to a Rotorua garage proprietor who subsequently absconded to China. The *Sunday Star Times* reported that the woman made a second error subsequent to highly publicised error when she again keyed in the wrong loan amount. She was called to a meeting with her bosses, accompanied by a representative of Finsec (the bank workers union) and was subsequently dismissed. The woman vowed to fight her dismissal and take a case to the Employment Relations Authority.

The *NZ Herald* reported that a train conductor, who was dismissed for sexually harassing a female colleague, was reinstated and was awarded 30 weeks of wages and \$5,000 compensation for humiliation, loss of dignity and injury. The conductor employed by Veolia Transport (the company that runs Auckland's trains) was found by the Employment Relations Authority to have been subject to a 'faulty inquiry'. A female colleague claimed that the man twice touched her inappropriately and made a formal complaint to the company. A resultant enquiry found on the balance of probabilities that deliberate sexual harassment had occurred and the employee was subsequently dismissed. The Authority concluded the company had 'failed to conduct an inquiry that was full and fair enough to establish the allegations to the necessary high degree of probability'. It ordered the conductor to be reinstated, despite Veolia Transport saying his return to work was impractical and unsafe.

A psychiatric nurse, who was dismissed after he hit a patient while being attacked, was awarded nearly \$30,000 for unfair dismissal and his employer the Whanganui District Health Board was ordered by the Employment Relations Authority to reinstate him. The nurse was badly injured, when a patient he was trying to restrain, kned him in the stomach. The nurse's hand hit the patient's face in the ensuing struggle making him bleed. The Authority said there was insufficient evidence of assault; yet, in dismissing the employee, the board had relied on allegations.

In a rather extreme case of taking work frustrations out on an employer, a 25-year veteran Inland Revenue Department (IRD) employee drove his car through the foyer his workplace after having been involved in a 3 years long employment dispute. The Christchurch man crashed through two sets of glass doors and smashed a third on the other side of the foyer before coming to a stop, according to the *Dominion Post*. Interestingly, the disgruntled employee claimed that he went to great lengths to avoid any risk to staff hence his actions took place on a Saturday morning. The employee said that he was fed up with concealment of workplace bullying and incompetent management at the IRD. The man appeared in the Christchurch District Court charged with intentional damage and reckless driving.

September 2009

The *Dominion Post* reported that organisations specialising in disability support face an increase of their annual salary payments in the range of \$40 million if the Employment Court upholds a decision for carers on night duty to be paid the minimum adult wage of \$12.50 per hour (see July Chronicle). Carers would also be able to claim back pay for up to six years if the court upheld an earlier decision involving carer Phillip Dickson. A lawyer representing the provider organisations explained to the Court that they were unable to afford the additional \$40 million annual wage bill. The test case involved a carer who overnight looked after five people living in a community house but was paid only the equivalent of \$3.77 per hour. The three judges hearing the case reserved their decision.

A survey of 1500 business enterprises by Business NZ found that the 2005 amendments to the Holidays Act 2003 had increased costs for 74 per cent of the respondents. The increased complexity of the legislation was another major problem, according to the *Bay of Plenty Times*. This was used as background to the review of the Holidays Act 2003 announced in June 2009 by the Minister of Labour Kate Wilkinson (see June Chronicle). The working group reviewing the legislations was to focus on 'vexed issues', including the calculation of relevant daily pay as laid down in the act, trading annual leave for cash, transferring the observance of public holidays and the entitlements of casual employees. The New Zealand Chambers of Commerce argued in their submission that the terms of reference for the review were not broad enough and that the legislation needed a 'fundamental rethink'. New Zealand Chambers of Commerce representatives argued that as the labour market had become more complex, the conventional nine to five, Monday to Friday working week was becoming less common and, thus, the legislation was struggling to adequately deal with the complexities of modern work patterns.

The proposed Auckland Supercity started to have an impact on the 6,800 employees employed by the eight existing local authorities. The *NZ Herald* reported that the Local Government (Tamaki Makaurau Reorganisation) Act 2009 would have significant repercussions for all employees employed by the local authorities as the local authorities will cease to exist on 31 October 2010. The new legislation required the Transition Agency to "...plan and manage all matters in relation to the reorganisation to ensure that the Auckland Council is ready to function on and from 1st November 2010". It must develop an organisational structure for the Auckland Council and a change management plan that had "...regard to the existing employment agreements applying to the staff". Former Alliance Cabinet Minister and trade union leader Laila Harre was appointed to the Transition Agency to manage the human resource and change management aspects of the transition.

Once again, professional firefighters took industrial action over the breakdown in their 14-month negotiation with their employer for a pay rise. The *Southland Times* reported that local firefighters had joined their colleagues nationwide in refusing to perform any administrative duties, including processing jobs. In addition, the firefighters were only going to respond to emergency incidents but were not going to operate the computers. The industrial action was in its second week and would continue until 24 September 2010.

As a sign of the recession's impact on employees, the *Sunday Star Times* reported that an increasing number of people facing redundancy or workplace restructuring were seeking legal assistance from local community law centres. As a result the centres were struggling to cope with the higher demand for their services. The Wellington Community Law Centre used to have one volunteer employment lawyer available during its weekly clinic but as a result of the extra demand, the Centre was forced to roster three lawyers and even then they were unable to keep up with the demand. The Centre's manager Geoffrey Roberts said that he could not recall such a heavy demand on services. Similarly the Canterbury Community Law Centre had 600 employment inquiries in the past year and had also witnessed a growth in consumer and debt issues.

In a reference to the TV comedy series 'The Office', a *NZ Herald* article stated that the real life situation is rarely so amusing. The article was about a recently released book called *Inhuman Resources: A guide to the psychos, misfits and criminally incompetent in every office*, written by Australian author Michael Stanford. While the book is intentionally funny the author said that the humour should not mask the serious message that work colleagues can make working life miserable. According to Stanford, there are a range of characters in the workplace from the simply annoying to the toxic. Factors that have increased workplace friction are e-mail (it can be used in a manipulative way) and the recession (people becoming fearful and misbehave). One expert interviewed said that unlike Australia, conflict in New Zealand workplaces was not necessarily aggressive as New Zealanders on the whole displayed stoicism and a desire to avoid conflict at all costs.

Another article related to psychopathic workers in the workplace. A *Dominion Post* article claimed that up to one in ten workplaces "harbour a psychopathically oriented worker", according to research by Dr Giles Burch a senior lecturer in management at University of Auckland. A psychopath worker was one who displayed antisocial behaviour and a chronic disregard for ethical principles. Dr Burch pointed to character traits such as superficial charm, an inflated sense of self-worth, pathological lying, cunning, manipulation, lack of remorse or empathy and a sense of impulsive non-conformism. He said that these workers create 'toxic' workplaces, rife with bullying, manipulation, sexual harassment, lying and fiddling the books. They also made those who work with them ill through insomnia and depression. The worrying aspect was that individuals with these personalities were increasingly being employed by highly competitive organisations for their aggressive behaviour, thus rewarding and reinforcing their behaviour. The banking, finance and media sectors were particularly prone to psychopaths and they generally rose to management based on their superficial charm and apparent decisiveness – which were mistaken for leadership qualities. The best way to avoid hiring psychopaths was to use behavioural questions in staff interviews such as asking for examples of teamwork and following up with referee checks.

In an article on workplace bullying, the *Sunday Star Times* quoted research which said that one in ten workers had been bullied by a work colleague in the past six months. The two year project, which was conducted by three universities, surveyed 20 organisations in the hospitality, health and education sectors. 1,600 employees completed a questionnaire and preliminary results showed that a significant number had been victims of workplace bullying, with many still suffering the effects.

Bullying was defined by the researchers as a situation in which a person feels they have been repeatedly on the receiving end of negative actions from another worker, in an environment where it is difficult to defend themselves. Some of the worst places for bullying appeared to be restaurant kitchens and there was reference to the 'Gordon Ramsay effect'. Hospital staff reported bullying from relatives of patients and teachers recorded instances of bullying from pupils. Other findings were that bullying not only occurred from the top down but could also occur in reverse. Many organisations, while they have harassment and stress policies, do not actually know how to handle workplace bullying. The article went on to say that it was incumbent on management to be proactive and develop a work culture that promotes collaboration, respect and an environment that treats people with dignity.

The *Dominion Post* featured a *Harvard Business Review* paper which claimed that there was solid evidence that office cubicle culture does not work. The claim by researchers Laura Sherbin and Karen Sumberg was that cubicles reduced the opportunity for people to get together and share information. Cube farms discouraged collaboration, stifled employee engagement and, as a result, strangled innovation. According to the research, both baby boomers and generation Y workers resented barriers that would hinder networking and that workers were looking for more efficient ways to work collaboratively.

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