

Chronicle: October, 2008 – January 2009

October 2008

The upcoming November election provided a platform for political parties to trumpet their employment policies. The *Press* reported an announcement by Minister of Labour Trevor Mallard that the Government planned to introduce requirements for businesses to give staff minimum notice periods and payouts if they propose to lay off workers. Mr Mallard said that options for a statutory minimum for compensation and notice would go out for public consultation in early 2009. This announcement came amongst predictions of a sharp rise in unemployment due to the world financial crisis.

The *NZ Herald* reported on the National Party's proposal to introduce a 90-day trial period for new employees in firms that employed fewer than 20 people. The National Party's Employment Relations Spokesperson Kate Wilkinson claimed that New Zealand was the only country in the OECD (apart from Finland) that did not have a trial period for new staff. She said that a trial period would give smaller employers confidence to take on new employees with the knowledge that if they did not work out, they could be dismissed. The article went on to note that the proposal would affect most of the country's companies as 350,000 (96.8% of all firms) employed 19 or fewer full-time staff. Wilkinson also suggested that Small Medium Enterprises (SME) lacked the human resource capacity to make good employment decisions and that the policy would give them the confidence to take on people. She concluded that the policy included enough safety mechanisms to protect people from being exploited by bad employers.

In a response to this announcement, Minister of Labour Trevor Mallard called on the National Party to clarify its position on whether new teachers would face 90-day trial periods or not after conflicting comments from two spokespersons. The National Party's Education Spokesperson Anne Tolley had previously said that teachers would not be included in the policy but subsequently, at a Council of Trade Unions election forum, Employment Relations Spokesperson Kate Wilkinson said that teachers would be included.

The celebration of Labour Day was foreshadowed by a *Dominion Post* article which said that more New Zealander's than ever were working in excess of 50 hour' a week. This level was exceeded only by South Korea in the developed world. Reasons given for working longer included changing economic conditions meant that households could not survive on one income. Business NZ's chief Executive Phil O'Reilly said that workers could not continue "slogging away day after day" but until they started thinking smarter and productivity increased, the 40-hour week would be a dream for many. Council of Trade Unions' President Helen Kelly cited research that stipulated that those working in excess of 50 hours fell into two categories. The first group of workers worked long hours to make ends meet, and the second group of workers earned a good wage but were part of a work culture that caused them to work long hours.

The *Press* reported that junior doctors had finally ratified their collective employment agreement which featured an 8.68% pay rise. This brought to an end a protracted dispute that had lasted for 15 months and led to doctors to take strike action in May and June 2008 (see May and July Chronicles).

The *Dominion Post* reported in early October that Wellington bus drivers were again threatening strike action. After another round of negotiations, a new offer was made by the employers which included a cash payment of \$300 plus a new pay offer of a 7.5% rise, and this new offer was accepted by the drivers. The *Taranaki Daily News* reported that workers at Fitzroy Engineering in New Plymouth threatened to strike if their pay negotiations did not reach a satisfactory outcome. However, they accepted a 6.5% pay increase over 12 months, which constituted a significant cut on their initial demand of up to 15%.

Fast-food giant McDonald's featured prominently in the media during October. The *Timaru Herald* reported that union employees at all five McDonald's outlets at Auckland Airport took industrial action in an attempt to gain pay equity with their union colleagues at KFC, Starbucks and Pizza Hut. The Secretary of the Unite union Matt McCarten claimed that members who went on strike and protested at the airport were harassed by security staff and police, and the union's organiser was threatened with a trespass notice. The *Waikato Times* suggested that McDonald's employees in Hamilton had asked their customers not to eat at McDonald's at all. The workers wanted McDonald's to lift its minimum pay rate from \$12 per hour to at least \$12.80 per hour with allowances to pay for length of service. A McDonald's spokesperson was quoted as saying that the company supported the right to strike but there were many ways workers could earn more money and the company preferred to give pay increases on performance rather than service.

McDonald's featured again in a *Press* article with a report that the Kaiapoi outlet was going to appeal an Employment Relations Authority decision that awarded \$15,000 to a teenage worker (see September Chronicle). The Authority ruling found that the employee had been constructively dismissed after joining a union. The same franchise received further publicity in the *Press* when the union representing another employee claimed that the employee was forced to finish her shift despite her foot being run over in the restaurant car park. A Unite union organiser Joe Davis said the 17-year-old girl was working on the drive-through when her foot was run over as she delivered food to a parked car. She suffered a swollen foot but her manager told her she still had half an hour until her shift finished and made her carry on.

A *Dominion Post* article claimed that high staff turnover at the Accident Compensation Corporation was attributed to a "bullying culture" and a massive workload. This was despite a Department of Labour investigation in 2004 into complaints of overwork, stress and bullying at ACC. Figures showed that since May 2007, 630 staff had resigned (out of 2600) and that since 2003, 56 personal grievance cases had been taken by staff members. The turnover rate of around 25% per annum did not compare favourably with comparable government agencies such as Housing New Zealand and Auckland District Health Board who had around 15% staff turnover. In the article, a former employee was quoted as saying that there was definitely a "bullying culture" and the management approach was "dictatorial".

According to the *Dominion Post*, the Supreme Court had agreed that it would hear the case of unlawful discrimination of a senior Air New Zealand pilot who was automatically demoted when he turned 60. The pilot went from being a Boeing 747 captain and flight instructor to the lower rank of first officer when he turned 60 in September 2004. The appeal would be against a Court of Appeal decision that age discrimination was not the reason the man lost rank and was moved to a lower-paying job (see July Chronicle). The appeal was seen as having the potential to clarify the way discrimination issues are defined and decided.

The *NZ Herald* reported that an Auckland school teacher, who took a case to the Employment Relations Authority claiming he was repeatedly bullied by other staff, was so difficult to work with that his dismissal was entirely justified. The teacher claimed that his workload was intolerable and maintained that he was bullied by other staff. It was also asserted that his dismissal was in retaliation for having complained to the Ministry of Education about college management. The Authority found that the teacher's workload was not "out of sync" with other teachers and that he was given adequate support which included an extra day off a month. It was also found that he was not bullied by his colleagues, but rather that they acted in an "entirely predictable" way in frustration at the way he behaved towards them. The Authority added that the teacher appeared to have little insight into the effects of his behaviour on those with whom he interrelated with.

The *NZ Herald* featured an article detailing the impact of casualisation on sectors of the workforce and gave the example of a Middlemore Hospital kitchenhand employed by Spotless Services. The employee worked on average 20 to 30 hours a week for four years but was still a casual worker. The worker said that although she was working 40 hours at the moment, it was 'off and on' and that she needed secure work to support herself, her sick husband and four children. The article went on to say that despite nine years of Labour-led governments, her experience was commonplace. The Service and Food Workers Union suggested that the trend toward using casual workers had become a serious problem. In response, the Minister of Labour Trevor Mallard had drafted legislation which would give Labour Department inspectors the power to determine whether 'casual' employees were, in fact, really permanent employees (see June Chronicle). The bill would also provide a code of employment practice for casual workers, and would require that unionised workers in labour hire companies to be paid at least as well as unionised workers employed directly by an employer that hires the labour hire company.

November 2008

The *Herald on Sunday* reported that small and medium business owners welcomed the news that the 90-day probation period policy was likely to be implemented by the newly elected National government (see September Chronicle). Employment Relations Spokesperson Kate Wilkinson indicated that the new government had not set a time for implementing the policy but an indication would be given once parliamentary roles had been announced.

Both the *NZ Herald* and the *Waikato Times* reported that The Dairy Workers' Union had given Fonterra notice of a strike planned to begin on 17 November 2008. The

union was seeking an 8% increase but the employer had offered 5% plus a 2.5% lump sum payment. The National Secretary of the New Zealand Dairy Workers' Union James Ritchie said the collective bargaining agreement, which covered about 4,500 people, was historically the most serious negotiating situation the union had with Fonterra. It was later reported in the *Waikato Times* that the parties had reached a settlement after two days of negotiations. The agreement still required ratification by the members before the strike notice would be withdrawn. Fonterra claimed that the offer was a fair and appropriate agreement that would give security for both sides in the current turbulent economic and financial climate.

An ongoing dispute at Ports of Auckland flared up again with the *NZ Herald* reporting that the Ports of Auckland Company had received notice only an hour before its annual Christmas party of a one-day strike by members of the Maritime Union. The union withdrew the notice after a technical error, but Branch President Denis Carlisle said another strike notice would be issued. Predictably, the reaction from Ports of Auckland management was that the strike notice was "disappointing, unnecessary and provocative" in difficult economic times. The Maritime Union claimed that it was the company that was being provocative by making it increasingly difficult for the union to hold meetings for its members.

There was further unrest at McDonald's with a report that unionised workers were planning to burn an effigy of Ronald McDonald at a meeting in Auckland (see October Chronicle). Unite union members were taking part in a meeting to mark both Guy Fawkes day and to emphasise anger over work and pay conditions. Unite's National Director Mike Treen was quoted as saying that "...young, angry workers are telling the world's biggest fast food company that we're not lovin' low pay and unfair rostering..." According to Mr Treen, low pay and irregular work hours were among the main concerns but McDonald's Communications Manager Kate Porter claimed that McDonald's had already agreed to the demands for secure work hours and that the planned strikes were an attempt at "news grabbing".

The *Waikato Times* reported that Hamilton bus services were disrupted by a 24-hour drivers strike after a breakdown in pay talks between bus company Go Bus and drivers who were members of the Northern Distribution Workers Union (see September Chronicle). Drivers indicated to Go Bus that they would not accept cash fares but, in turn, Go Bus responded that this refusal was not acceptable and that it would lock out the union drivers. However, within a week the drivers ended the five-day strike and accepted a 5.6% pay increase. Union Secretary Karl Andersen said the bus drivers had to settle for an offer of \$14.27 per hour but would have preferred \$15.50 an hour.

The ongoing case of the leading medical specialist wrongly dismissed after trying to e-mail photographs of his genitals to a female friend remained in the news with *Dominion Post* recorded his successful appeal in his battle for a costs award in the Court of Appeal. The Court determined that he could remit his appeal for costs back to the Employment Court, after a previous judgment that awarded no costs. The doctor was dismissed after pictures of his penis were found on his work computer. He was reinstated to his \$200,000 position by the Employment Court in November 2005 after a ruling that he had been unjustifiably dismissed. Subsequently, the doctor claimed more than \$195,000 in costs which was rejected by the Employment Court.

The Court of Appeal concluded that the judge failed to deal separately with the issues of remedies and costs.

In a sign of the times, the *Dominion Post* suggested that corporate chiefs and businesses were hiring bodyguards and extra security to protect themselves from disgruntled employees who had lost their jobs. The article claimed that the fallout from the financial crisis had made several chief executives hire round-the-clock protection as sacked or redundant workers threatened both them and their families. In one case, a bodyguard maintained protection of a chief executive for several weeks, while another monitored the movement of a former employee.

Although there was an economic downturn it was highlighted in media reports that a number of initiatives were being used to prevent staff layoffs. Helene Higbee, director of a specialist remuneration consultancy, informed that while most of her clients were looking at making staff redundant, some were doing their best to retain and redeploy people. These actions included redeployment of staff into other areas, a freeze on hiring new staff, not replacing staff as they leave as companies try to do more with less. Budget reviews also looked at ways to trim spending such as calling travel halts. However, the reality for unions was that redundancies were increasing at a great rate. The President of the National Distribution Union claimed that the union had been “right up to our necks” in redundancies.

December 2008

There was extensive coverage in the mainstream media regarding the introduction of the 90-day probation period amendment to the Employment Relations Act. The *Dominion Post* informed in early December that the National-led Government looked set to introduce a 90-day probation period for new employees into Parliament under urgency. The introduction of the Bill was predicted to run into “stiff opposition” and was seen as a test of the relationship between the National Party and the Maori Party. There was no select committee hearing required because the changes were signalled in the election campaign and the Bill introduced in 2006 by Wayne Mapp went before a select committee. This lack of “public debate” drew criticism from the union movement who called it an attack on worker’s rights. Former MP Laila Harre claimed that this was “the first step to wind back workers’ rights and protections”. She further criticised the push to pass the bill before Christmas as “ideological” and that it was “unashamedly backing bad bosses against vulnerable workers”.

Later in the month, the *Dominion Post* and the *Press* published articles suggesting that the Government could extend legislation which would allow the 90-day probation period to cover all employers. The explanatory notes to the Bill stated that “[c]onsideration could be given to evaluating the outcomes of this legislative change with a view to extending it to cover all employers in future.” Minister of Labour Kate Wilkinson was quoted as saying that the Government was open to such an extension.

There were further media reports on the operation of the Employment Relations Authority when an article appeared in the *NZ Herald* which criticised the operation of the Authority. The article cited the Parentline / Maxine Hodgson case (see September

Chronicle) and added that reform of the Authority was high on the government's agenda. The article suggested that the Minister of Labour Kate Wilkinson was planning to make the Authority keep records of its proceedings, allow the cross-examination of witnesses and make it act more "judicially". One senior employment law practitioner commented that legal costs had crept up and that taking a case to the Authority could be more expensive than taking a similar case to the Employment Court. The Head of the Authority James Wilson said that the increased costs were partly due to a 2004 amendment to the Employment Relations Act allowing dismissal on the grounds of what "a fair and reasonable employer would have done in all the circumstances". According to Mr Wilson, hearings that lasted more than a day had increased 50% since the law change. Unions and employers generally felt that the system was working well but just needed "tweaking" with Tony Wilton, of the Engineering, Printing and Manufacturing Union (EPMU), claiming that compulsory mediation and the use of the Authority had made resolving employment disputes much less costly.

A further *NZ Herald* article on the Auckland waterfront dispute which began in late 2006 after the collective agreement expired claimed that it was "lumbering into another year" (see October Chronicle). An Employment Relations Authority investigation into claims breaches of good faith by both parties had been adjourned until 2009. The article stated that that the port company appeared "unenthusiastic" about the Maritime Union's latest proposal and that prospects of a settlement looked shaky.

The *Nelson Mail* highlighted that an Auckland bar manager was awarded nearly \$36,000 in compensation and lost wages. The woman was demoted from her job as a bar manager one week after she informed her employer that she was pregnant. She was then dismissed a month later after she was accused of lying about her work hours.

A high profile television personality Craig Busch, also known the "Lion Man", lost his claim for temporary reinstatement at the Zion Wildlife Park in Whangarei, according to the *NZ Herald* and the *Dominion Post*. The articles reported that Mr Busch had been dismissed for alleged serious misconduct, including allegations of major breaches of safety protocols, inappropriate behaviour in the workplace, performance issues, failing to keep proper training records and causing loss of revenue through cancelling tours. What made the case more sensational was that he had been dismissed by his mother and that some of his fellow staff members had threatened to resign if he was reinstated.

The Unite union received further media coverage after accusing research company Digipoll of victimising union members at its Hamilton call centre. The *Waikato Times* reported that the union has instructed its lawyers to file a claim in the Employment Relations Authority citing bullying, intimidation and workplace segregation. The union attacked Digipoll owner Dr Gabriel Dekel, calling him "psychopathically anti-union". The article featured Dr Dekel's response where he denied that he was anti-union, but he also argued that his line of work was not suited to unionism, with client demand erratic and with many of his workers "otherwise unemployable". Dr Dekel said the union did not acknowledge "the uniqueness" of his operations and, if forced, he would outsource all his jobs to call centres overseas.

In yet another case of workplace bullying, the *NZ Herald* recorded the unsuccessful claim of an employee dismissed for bullying a fellow worker. The man claimed that he was dismissed because his employer wanted to avoid the cost of making him redundant. The Employment Relations Authority found that his employer Auckland firm Buckley Systems (BSL) was justified in sacking the man because of his abusive and aggressive behaviour towards his fellow worker. The behaviour included pouring yellow or brown coloured primer paint on the man's overalls to make it appear he had soiled himself, making loud and sudden noises to cause fright and filling his gloves and facemask with tuna, as well as smearing it on some of his equipment. The harassment escalated to physical assault and the employee eventually resigned. An exit interview revealed the extent of the victimisation. The company investigated and the perpetrator was dismissed for serious misconduct. The Authority concluded that "an employer acting in a fair and reasonable manner" would have dismissed the man.

A *Dominion Post* article published an analysis of the Employment Relations Authority and its decisions which had been conducted by the Employers and Manufacturers Association (EMA). The analysis of awards over the past five years showed that complainants in Wellington were consistently awarded the highest compensation for the hurt and humiliation involved in unjustified dismissals. The Wellington payouts averaged \$8,536 in 2007 while Christchurch averaged \$6,630 and Auckland \$5,526. The analysis identified Wellington member Denis Asher, as making the highest average awards of all the 17 members in 2004, 2005 and 2006, although he was eclipsed in 2007 by Maria Urlich of Auckland. Auckland lawyer Eska Hartdegen was quoted as saying that the variations showed that authority members were "a law unto themselves". The EMA had said in previous annual surveys that compensation claims were "a gravy train still picking up speed", with the number of personal grievance claims taken to the authority rising from 340 in 2004 to 436 in 2005 and 515 in 2006. However, the latest analysis showed that the number of claims had dropped to 416 in 2007.

January 2009

There was a dearth of reporting on employment relations in January 2008. Apart from the focus on further changes to employment relations legislation, most reporting concerned disputes before the Employment Relations Act.

Reform of employment relations legislation remained on the agenda. A *NZ Herald* article suggested that the Government needed to go further in overhauling the Employment Relations Act if New Zealand was to survive the recession. Once again, there were claims that restrictive employment law was one of the major hurdles for small to medium enterprises (SMEs). A survey conducted by a coaching company, the Results Group, claimed that 94% of all the businesses surveyed stated that "unworkable employment law" was the primary issue they faced. The announcement of an employment summit by Prime Minister John Key was seen by the Minister of Labour Kate Wilkinson as a forum which could "offer a good opportunity for businesses and unions to raise their primary concerns and promote any initiatives, particularly with respect to productivity and employment opportunities".

The *NZ Herald* suggested that the primary school teachers' union, the NZ Educational Institute, was taking its "first shot" at the recently passed 90-day employment trial period. The union wanted to omit the trial period provisions from the kindergarten teachers' collective agreement with the Ministry of Education. The union sought an agreement from the Ministry of Education and various kindergarten associations that a 90-day trial period was "neither necessary nor desirable". The National Secretary of the NZEI Paul Goulter stated that the Ministry of Education needed "to realise that law change did not just deprive workers of personal grievance rights, but had a significant effect on the labour market".

In yet another employment issue involving McDonald's (see November Chronicle), the *Sunday Star Times* reported that a disagreement over payment of \$10 worth of McDonald's burgers had escalated into a year-long employment dispute costing thousands of dollars. Daniel Gledhill, an employee at McDonald's branch in Mana (Porirua), won his case for unjustifiable dismissal before the Employment Relations Authority. However, the Authority told both parties that they should have been able to settle the dispute themselves. Gledhill, who had worked at the McDonald's branch for three years and had a clean work record, was dismissed in October 2007 for giving away \$10 worth of fast food to friends. He took a personal grievance, claiming that he felt pressured to give the food away, but intended to settle the bill after his shift finished. However, he only paid the staff discount rate of \$4 and accepted that he should have paid the full amount. Gledhill was not awarded any remedies as his actions had contributed to the employment dispute. It was found that the McDonald's branch did not conduct a reasonable inquiry into the incident and did not have heard evidence before dismissing Mr Gledhill.

Both the *NZ Herald* and the *Waikato Times* reported on the case of a breakfast radio announcer from Tokoroa who claimed unjustifiable dismissal after a public "bust-up" with his manager. The employee was unsuccessful in his claim for reinstatement and compensation. The man was dismissed after he loudly challenged the mayor of Tokoroa at a public meeting while dressed in clothing that identified his employer. The man's manager said she was embarrassed by his actions as local people recognised him and associated him with working at the radio station. The Employment Relations Authority found that the man's conduct outside of working hours did impact on his employment and his behaviour was "manifestly injurious to the interests of the employer" and could bring his employer into disrepute.

The *Dominion Post* reported that the Defence Force was ordered to pay \$100,000 to a doctor who was dismissed after raising concerns about her ability to treat patients in a naval decompression chamber. The treatment of the doctor was labelled as "callous, hasty and rash" by the Employment Relations Authority. The Doctor had met with her then manager to express concerns about her own work in the hyperbaric unit, stating that she believed it was not safe for her to continue working as she was not adequately trained nor qualified. Hours later she was dismissed on the grounds that her duties could be altered only by mutual agreement. Additionally, it was claimed that the doctor was not an employee because she worked under an independent contractor agreement. However, the Authority ruled that, although the doctor worked under an independent agreement, the nature of the employment meant that an employment relationship existed. The Defence Force was ordered to pay her \$81,072

in lost wages, plus a further \$20,000 compensation for “emotional trauma and distress”.

Another employment dispute involving a high profile personality reached the media. Real-estate agent and former television star Michael Boulgaris was ordered by the Employment Relations Authority to pay back \$163,635 in unearned commission. An Authority ruling determined that Mr Boulgaris, who had a major role in the ‘Location, Location, Location’ TV series, had to pay back the money to Wensley Developments Ltd who had employed him as a salesman in Queenstown. The dispute focussed on a \$535,000 commission paid in advance. Mr Boulgaris had only earned \$339,990 when he resigned. Boulgaris claimed that he did not owe on the pre-paid commission as his employer had misrepresented what he would earn. The Authority found no merit in his argument.

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