Chronicle: February 2010 – May 2010

February 2010

Signals of more proposed changes to employment legislation became apparent in February. Both the *Dominion Post* and the *Press* reported that the Government was considering a 'revamp' of personal grievance legislation. These proposed changes would also see a control of 'frivolous claims' and rules to control advocates who were 'seen to be ramping up claims against employers'. Minister of Labour the Hon Kate Wilkinson stated that she had an 'open mind' on the necessity for change but she announced the release of a discussion document and a questionnaire to survey what changes, if any, were required. Prime Minister John Key also become involved in the discussion and stated that the Government "share]d] concern from many quarters about the fairness and consistency of personal grievance claims". It was claimed that employers were forced to pay out to 'no win no fee' advocates and that some frivolous claims were clogging the system. Wilkinson did concede that industrial relations law was generally working well, and did not need radical change. Combined Trade Union (CTU) President Helen Kelly noted that the no win no fee advocates tended to operate amongst non-unionised workers and that the CTU was not too concerned about moves to regulate them. However, she did express concern over a Government who viewed procedural fairness and natural justice as an impediment when an employee was dismissed and added that the remedies that were won through personal grievances were too low. Business NZ chief executive Phil O'Reilly said that for many years, New Zealand businesses had complained the personal grievance system was too bureaucratic and there was too much emphasis on form over substance.

A later *Independent Financial Review* article quoted Wilkinson as saying that she had anecdotal evidence that the law might not be working. New Zealand Law Society (NZLS) Employment Committee convenor Michael Quigg said that the NZLS would support a system that allowed meritorious personal grievance claims, but discouraged frivolous ones saying that "[w]e do not want a system clogged by frivolous claims made by speculative individuals, or groups, just to claim 'go-away' money." Business New Zealand chief executive Phil O'Reilly even claimed that frivolous claims discouraged companies from hiring new employees, especially those who were unskilled or unqualified. He was quoted as saying that "[w]hat we need to be careful about is that we don't exclude people from the workforce unnecessarily because of fears that if things go wrong they're going to get an ambulance-chasing lawyer or representative after them."

In a timely article on employment disputes taken to the ERA the *Dominion Post* provided a summary of the numbers of cases taken since 2007. In 2007, 295 claims were taken to the ERA, 62 per cent were successful, with an average payout of $5998. In 2008, there were 328 claims, with 58 per cent being successful with an average payout of $5063. In 2009, there were 363 claims, 47 per cent were successful and received an average payout of $5116. The figures showed in fact that although there

was an increase in cases, the success rate was dropping and the average payout was less, contradicting the claims made by employer representatives that there has been a steady increase in the level of personal grievance payouts issued by the ERA to employees.

The *Waikato Times* also reported on the trends in ERA cases and noted that the figures, along with other factors, indicated that there were likely to be changes to the way personal grievance cases were administered by the ERA for a number of reasons. Firstly, Prime Minister John Key, in a speech to the Combined Trade Unions conference, noted the potential for abuse and costly nature of personal grievance processes. He indicated that the Minister of Labour would be looking at the personal grievance processes. Secondly, employers may well be able to recover losses attributable to poor performance from employees. The article cited a case as an example where an employee who was found to be unjustifiably dismissed was awarded over $5,000. On appeal, the Employment Court found that he employee had been responsible for shoddy work that cost the employer a considerable amount of money to rectify and ordered the employee to pay $12,000 in compensation. However, the article did note that while employers often complained about the perceived imbalance in favour of employees, the statistics from a survey (refer to *Dominion Post* article above) showed that the ERA ruled in favour of employees 66 per cent of the time. Also recent case law suggested that the Employment Court was taking a more pragmatic approach and that minor procedural errors did not necessarily undermine an otherwise justifiable dismissal.

The *Sunday Star Times* published an article claiming that employer groups wanted the 90 day probation rule (which originally applied to just small businesses) to be extended to all businesses employing more than 20 persons. The reasoning behind this was that it would stimulate job growth and hasten the country's economic recovery. According to the press release, from an employer's point of view, the ability to hire staff on a trial basis without risk of a personal grievance had proved very successful. Employers and Manufacturers Association (Northern) employment relations manager David Lowe claimed that: "…[the trial period] is something that has eased the mind of employers. This just gives them the confidence and the ability to get on with their business and hire people when they may not have hired at all." The Minister of Labour the Hon Kate Wilkinson said that there were no current plans to extend the legislation but the government was willing to look at anything that encouraged business to give people a chance to succeed. Wilkinson said that anecdotally she had heard good things and that the hysteria surrounding its introduction was unfounded.

The usual procession decisions of the Employment Relations Authority (ERA) during February were reported. The most noteworthy being the case of the former CEO of the Tainui administrative body who claimed that he was unjustifiably dismissed. Reports on this case received extensive coverage in the *Waikato Times* over February. The *NZ Herald* also reported on the case of the ANZ bank which took a complaint to the Employment Relations Authority (ERA) regarding one of its former employees who fled to Australia after authorising a number of over inflated mortgages. The fraud cost the bank over $3.5m and the ERA found that the employee had breached his duty to apply bank credit risk policy in 18 transactions and fined him $54,000.

The dispute between Ministry of Justice Court staff and their employer continued on through the month of February. Provincial papers reported the frustration that Court users were experiencing because of the disruption. For example, the *Southland Times* said that a trial had to be delayed. The *Nelson Mail* reported on chaos in the local Court as 144 cases were affected by a one day walkout by Nelson Court staff. When news of the strike was announced there was an angry outburst in the public gallery of the Court which in turn prompted calls from the staff for increased security at the court to deal with frustrated defendants and supporters in the event of future walkouts

Once again Air NZ was in the news regarding accusations from company management and unions that the Police were making 'unsubstantiated and ill-considered' claims about a drink-drive culture amongst staff. The *Dominion Post* reported that according to Police at least seven Air New Zealand staff had been convicted of drink-driving since 2007. At least two of the employees were caught driving to work with an excess blood alcohol reading. In particular for one pilot it was the fourth time he had been caught drink driving. In a *NZ Herald* article internal Police memos revealed concerns over an Air New Zealand culture that "... accepts alcohol consumption, prior to working, as acceptable". Air NZ CEO responded in a letter to the Police claiming that the claims were 'unsubstantiated and ill-considered' and criticised the 'loose language' of the Police.

March 2010

A *Dominion Post* editorial argued that 'both employers and employees would benefit from a regime that attached more weight to the substance of dismissals and less to legal technicalities'. The current system created a legal minefield for employers who want to dismiss an employee. A case where an employee was dismissed for stealing from his employer but was subsequently found to be unjustifiably dismissed because the employer had not followed a proper process was used as an example. In its ruling the Employment Court ordered the employer to pay $12,000 lost wages and $7,000 costs. While the editorial did concede that there are also poor employers, it welcomed the proposed review by the Minister of Labour of the personal grievance provisions of the Employment Relations Act.

A further *Dominion Post* article reported that unions and the Government were at 'loggerheads' over the review. CTU president Helen Kelly stated that she was also concerned about potential changes to the definition of 'justified dismissal' and the option of reducing the importance of bosses following correct processes when dismissing workers. Kelly was quoted as saying that there were some "... pretty nasty proposals for consideration..." The Minister of Labour the Hon Kate Wilkinson insisted that she was "...open-minded about it. I want to really see what comes out of this discussion, and we'll take it from there." Business New Zealand CEO Phil O'Reilly said that employers regularly complained about the weight given to procedures compared to the substance of complaints. He said that while natural justice mattered, the relative weight given to process was what caused the trouble for employers. Labour party employment relations spokesman Trevor Mallard questioned the need for the review saying that there was no evidence that the present system was not working.

The debate about the proposed changes continued on throughout March. Helen Kelly of the CTU wrote a *Dominion Post* comment starting with the example of 'Andrea' who was a night manager at a hotel in charge of a staff member who inadvertently went into a room where a guest was asleep. The resultant attempt at dismissal by her employer was avoided by the requirement for the employer to follow a fair and proper process and to listen to her version of events. The article surmised that without these protections in place an unscrupulous employer would have dismissed her instantly. Once again statistics were used to show how the current system was working. Only 2500 cases went to the ERA on average with a thousand of these reaching the first stage investigative meeting. These figures were compared to the estimated 800,000 workers who change jobs every year. Arguably the average compensation paid to works at around $2,800 was dismal given the economic and reputational consequences of a dismissal. In a counter to the Government view that payouts for personal grievances are made to make the worker go away, Ms Kelly stated that payments are made before personal grievances escalate because both parties are being pragmatic. In many cases the employee has been treated unfairly and the employer has often breached their rights. She once again confirmed that unions had no problem with the regulation of the 'no win no fee' advocates who typically do not work for unions and are often insufficiently trained to bring about a settlement. In conclusion, she argued that unions would not pursue a personal grievance case purely for monetary reasons where the employee clearly does not have solid evidence. She added that fellow workers often resented their trade union representing workers who clearly were poor performers. As noted previously, Kelly's argued that the current system is working well and that instead of trying to reform the system, New Zealanders should be concerned about the Government's moves to reduce the rights that workers enjoyed for decades.

Left wing commentator Chris Trotter added his view in an commentary written for the *Independent Financial Review* in which he condemned the short sightedness of the proposed changes. Trotter questioned why the Government seemed to be implementing its 'employer driven agenda incrementally' rather than with a 'king hit' Employment Contracts Act type response. The article argued that Government policy was short sighted and had forgotten the crucial role that universal personal grievance mediation played 'in bedding in the Employment Contracts Act and making it work'. Trotter argued that the universal availability of personal grievance mediation played a vital role in the 'de-unionisation of the New Zealand workforce'. Trotter stated that the rationale for de-unionising New Zealand was that individualistic, self-confident workers did not need to join a union as the disputes resolution and mediation procedures outlined in the Employment Contracts Act and strengthened under the Employment Relations Act, 2000, gave employers a strong incentive to act fairly towards their employees. Moreover, such procedures denied the unions horror stories which were needed to maintain and strengthen their membership. Viewed objectively, Trotter claimed that the employers' demands to weaken the legislative guarantees of personal grievance mediation appeared to be self-defeating. He said that it was 'deeply troubling that 20 years after the passage of the Employment Contracts Act' that Business NZ could claim that the elimination of what few protections were left for workers would lead to an improvement in economic performance. It suggested that the business community had learned nothing from the experience of the Employment Contracts Act and that there was a group within the business community who were willing to 'deprive their fellow citizens of their rights' for personal gain.

The article concluded that while short term gains could perhaps be made by adopting a regime where workers 'toil harder for less', an exerted, continuous, downward pressure on wages was not going to achieve the goal of parity with Australia by 2025.

The dispute between the Ministry of Justice and court staff continued with the Employment Court ruling that pay negotiations should resume after they stalled in late 2009. The latest industrial action resulted in staff walking off the job for 23 hours. Public Service Association (PSA) general secretary Richard Wagstaff said that the action stemmed from the Ministry's failure to resume negotiations after the court ruling.

The *Waikato Times* reported on a series of planned strikes at Waikato Hospitals involving radiographers and attendants. The radiographers belonging to the Association of Professional and Executive Employees (Apex) planned to strike for twelve hours. The Waikato District Health Board also received notice from Unite Incorporated that its hospital attendants would strike for 24 hours. According to District Health Boards New Zealand (DHBNZ) spokesperson Phil Cammish, it is estimated the Association of Professional and Executive Employees pay claims would increase the DHBNZ's wage and salary bills for the radiographers by 15 per cent per annum.

The *Nelson Mail* reported on a nationwide strike by community support workers in IHC homes. The community support workers (who normally slept over as part of their job) began a staggered series of strikes. The Service and Food Workers Union had been negotiating on behalf of it members for a 2 per cent pay increase with IHC since October 2009. The IHC management countered offered with a 12-month pay freeze. A Union spokesperson said that the staff supported a vulnerable section of the community and "deserved to be valued for the valuable work that they're doing". The IHC's general manager of human resources, David Timms, stated that: "[w]e simply can't afford to do what the union is asking".

Once again there was a raft of cases from the Employment Relations Authority during March. The more noteworthy ones included two cases reported in an article in the *Waikato Times* that focussed on the change of law surrounding 90 day trial periods introduced in 2009. The first involved a Napier Bar Manager who had a one month trial period. The terms of the probationary period included a chance to respond to any concerns voiced by her employer about her performance and her employment would not be terminated unless she was advised of any required improvements to be made in her performance a week prior to the review. She was later contacted by telephone and informed that she was dismissed. The ERA found that the calculation of the probationary period started when she commenced employment and found that she was dismissed outside of her probationary period and therefore her employer did not meet the obligation under the employment agreement. The ERA concluded that the employee was unjustifiably dismissed and was awarded lost wages and compensation. In a fairly similar fact case an office worker was also dismissed effective immediately by her employer without any reason given and one month into her employment. The ERA found that regardless of a trial period being in place, employers were not exempt from the duty of good faith and should provide an employee with an opportunity to be heard when dismissal was contemplated. In this case, the employer failed to do so and the employee's claim was upheld.

The *Press* ran an article on the case of a highly regarded Christchurch firefighter, who claimed he was dismissed because of his history of mental illness. The former firefighter claimed to the ERA that he was unjustifiably dismissed by the NZ Fire Service in 2008 after an investigation showed he had not disclosed his history of depression and post-traumatic stress disorder on a pre-selection form. The ERA found that the NZ Fire Service was entitled to screen for mental illness and to dismiss an employee who misled it. The man joined the service in 2003 and was an exemplary employee but in 2008 his supervisor became concerned that he was a suicide risk and spoke to police, who visited the man at home. He convinced them they should not intervene, but he later made an attempt on his life and required hospital treatment. Subsequent reports requested by the Fire Service showed a history of mental illness and the failure to declare his previous health issues when he was recruited. The man argued that the questions breached the Human Rights Act prohibition on employers discriminating against candidates with mental health problems but the Fire Service said it used its questionnaire not to discriminate, but to assess whether a candidate's condition was consistent with them safely carrying out all parts of the job. The ERA accepted that mental health was an important consideration in whether a person can properly and safely perform the role of firefighter.

The *Herald on Sunday*, the *Nelson Mail* and the *Press* reported on the Marlborough labour hire company that paid vineyard workers as little as $2 an hour lost a legal battle over unpaid wages. The Department of Labour took a case against New Zealand Vines Ltd to the Employment Relations Authority who awarded them back pay. It was the second time in seven months that the company had been caught paying wages below the legal minimum rate. The manager of the company claimed that most cases were down to misunderstandings and that some of the employees had complained to the Department of Labour before he had a chance to pay them. He claimed that the workers were not fast enough to earn the equivalent of the minimum wage. The Department of Labour had experienced ongoing problems with the company managers who had failed to keep proper employment records and to abide by New Zealand employment law. Marlborough wine grower’s spokesperson said that his organisation was fighting to get rid of rogue operators.

April 2010

The *Nelson Mail* reported that the Employment Relations (Workers' Secret Ballot for Strikes) Amendment Bill passed its first reading and was sent to the industrial relations select committee for public submissions. The private member's bill drafted by National MP Tau Henare was supported by the Labour opposition with MP Trevor Mallard sating that Labour had no problems with it because it largely reflected current practice.

The decision by the ERA to intervene in the dispute between the IHC and its support workers was reported by the *Nelson Mail*, the *Manawatu Standard* and the *Dominion Post*. The ERA granted an application by the Service and Food Workers Union that would allow it to make a non-binding decision on the matters involved in the pay dispute which had lead to five weeks of industrial action.

Some regional papers namely the *Northern Advocate* and the *Marlborough Express* reported on the withdrawal of threatened strike action by radiographers. The removal of the threat did cause logistical problems as plans had been implemented to manage the disruption which left hospital officials struggling to return to normal operating capacity.

The education sector, which had been relatively quite, was back in the media with a threat that teachers would strike within a month. The threatened strike, (reported in the *Dominion Post*) was in reaction to the Minister of Education the Hon Ann Tolley who insisted that Post Primary Teachers Association' demands must reflect the economic climate. The Association voted to push for a 4 per cent rise in the upcoming employment negations with the Ministry of Education. Ms Tolley, the Minister of Education, claimed that every 1 per cent increase for primary, secondary and early childhood teachers would cost taxpayers an extra $50 million a year.

In a noticeable trend a number of articles in the media relating to employment are written by leading employment lawyers using case law to illustrate a particular issue. The following articles illustrated the trend. Susan Hornsby-Geluk from Kensington Swan (voted the best dressed lawyer in 2008) wrote an article in the *Dominion Post* about what to wear at work stating that as companies move further away from the traditional white collar/blue collar moulds, work wear was becoming increasingly contentious. The point was illustrated by the case that went before the ERA about a shop assistant in a fashion store who was told to wear makeup. The ERA found that the requirement to wear makeup was not in the employee's employment agreement therefore the employer had no right to insist that she wore it. The article concluded that if a dress code is necessary on health and safety grounds then it may still be justifiable even though it is potentially discriminatory. A case in point would be hygiene reasons which would require staff in a food factory to be clean shaven could be justifiable even though such a rule arguably discriminates against certain religious groups. Andrew Scott-Howman an employment law specialist at Luke, Cunningham and Clere wrote an article in the *Dominion Post* on employee absenteeism through sickness and argued that a contract of employment prohibits an employer from taking disciplinary action as a result of being frustrated that the employee is unable to work due to illness. Instead an employer must accommodate the employee's illness and incapacity to work and can only terminate the relationship for reasons of 'frustration' when he or she can (in the words of the Arbitration Court) "freely cry halt". The case of the Air NZ flight attendant who was addicted to party pills and eventually was dismissed was cited as an example. In this case the employee's recovery plan went on for two years before Air NZ finally dismissed her. Howman said that the case operated as an indication to employers of the need to indulge medically incapacitated employees prior to reaching a decision to dismiss.

The subject of bullying in the workplace is still a subject of newspaper reporting. The *Dominion Post* published extracts on a report of a joint university research team on bullying in the workplace. The team from the Universities of Auckland, Waikato, Massey and London surveyed more than 1700 workers from the health, education, hospitality and travel sectors. One of the findings was that at least one in five New Zealand workers had at one stage suffered from workplace bullying. The highest incidence occurred in the education and health sectors, and the hospitality industry. The types of bullying included managers harassing employees, workers harassing

colleagues and even employees intimidating their managers. It was estimated that the cost of bullying including absenteeism, high staff turnover, lower staff satisfaction and investigation bullying claims was 'a billion-dollar problem'. The findings of the survey were questioned by David Lowe of the Employers and Manufacturers Association (Northern). Citing one of the self report questions whether respondents felt they were being bullied either 'several times a week' or 'almost daily' yielded the far smaller figure of 3.9 per cent. Lowe claimed that what people would normally describe as bullying and two negative acts in the workplace are not one and the same. He argued that the definition of 'bullying' used in the survey was too wide. The Department of Labour which commissioned the survey accepted the findings and intends to develop resources for employers and staff, to assist workplaces to manage bullying issues as they arose.

The exploitation of foreign workers by a 'minority of employers' was raised in a *Southland Times* article. The report quoted a Citizens Advice Bureau (CAB) worker who said that Queenstown was the main culprit with an increase in employment related problems being recorded. A previous article reported that the CAB had urged foreign workers to make sure they signed employment contracts, after several complaints a day were being received from disgruntled workers. The CAB had seen a number of mainly foreign workers, who had been told by employers in the hospitality industry that they were not entitled to holiday pay because they had not worked for a year. A young Chilean man had informed that New Zealand public holidays did not apply to foreign workers' pay rates.

In yet another article on workplace stress a medical expert was quoted as saying that the onset of workplace stress was like twilight – 'you can't see it coming, or identify at what point it happened - but when evening falls, you know it'. Lawyer Susan Hornsby-Geluk wrote that most employers would struggle to describe workplace stress, and may not be able to recognise it until after the damage has been done. It was a 'massive issue requiring lots of sensitivity'. Two landmark cases which cost employers hundreds of thousands of dollars were cited: (a) the police photographer who suffered post-traumatic stress disorder after taking crime scene photographs; and (b) the probation officer who suffered stress due to the high volume of his work stress was related to volume of work. Business New Zealand's manger of employer relations and policy, Paul Mackay, stated that subsequent employer awareness about stress meant that there had been no other significant awards for work related stress claims. He went on to say that there was awareness that stress itself is not the problem, but 'the harm caused by stress'. The article went on to say that for many staff, overwork became an issue during a recession and quoted a recent PSA survey of almost 2000 public servants that revealed that 40 per cent of those surveyed were working at least an additional three unpaid hours per week. Almost half of those surveyed felt their workload was negatively affecting their family life or other responsibilities. Some of the reasons given for this increased workload included loss of experienced staff, unfilled vacancies, slow staff replacement and lack of administrative support. Employment lawyer Barbara Buckett said the crucial factor in Personal Grievances taken by employees for stress is the way the staff member is managed and the attitude of the employer. She said that people under performance regimes could raise the bully or stress card added that there were "ways of flushing that out" with a medical opinion. Her view was that a lot of employers think that people use stress when it is not genuine and it made it much worse if an employer denied that the employee was

under stress which could be devastating. At the end of the day, Ms Hornsby-Geluk said a stress claim came down to was the damage foreseeable and caused by the employer?

May 2010

The *Daily Post* reported on a speech in Parliament by the local Member of Parliament for the Waiariki electorate Te Ururoa Flavell. In the speech during the first reading of the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill he claimed that one element of the Bill could create a "real, big, enduring problem for New Zealand industrial relations." The Bill had the provision where the duration of rest and meal breaks should be agreed between the employer and the employee. If this does not occur then a stalemate would ensue, thus creating a significant on-going problem. However despite that misgiving the Maori Party gave support to the Bill at its first reading. Flavell did indicate a concern that young workers in particular who were not covered by a collective agreement including those in the hospitality sector, hotels and food outlets would be affected.

The stakes were raised in the education sector with both teacher unions, Post Primary Teachers Association and NZEI, threatening industrial action over their latest pay claims. Two separate items in the *Dominion Post* identified the issues. The first item in the paper stated that the Post Primary Teachers Association, (PPTA) which represented 18,000 secondary teachers, was planning strike action in support of their 4 per cent pay rise. The Government responded that the request was unrealistic. However, the PPTA spokesperson stated that they had a clear mandate from the teachers to take industrial action and indicated that teachers were prepared for the long haul and reiterated that the last long running contract negotiations in 2001/02 included strike action and lasted for 16 months.

At the same time the primary school teacher's union the NZEI which covers 27,000 primary school teachers was to presents its claims to the Government. NZEI Negotiations leader Frances Guy said that teachers were keen to avoid strike action striking was an option if the government played 'hard ball'. The union was still finalising its claim, a figure of 2 per cent pay was discussed at stop work meetings. The response from the Ministry of Education was that the claim was unrealistic and that teachers like other state servants must accept that they are subject to the same constraints as other state servants.

In another *Dominion Post* article, the NZEI lodged a claim before the ERA over the refusal of the Ministry of Education to introduce an agreed pay model. The Ministry claimed that the model was introduced on a trial basis and more work was required before it was implemented. The model was to ensure that 7000 of 27,000 primary teachers with a teaching diploma, rather than a degree, were entitled to higher pay scales. If the legal action was successful it was likely that the top pay scale for a teacher with a diploma would rise from $54,000 to $65,000. The Ministry of Education claimed that evaluation had shown that a more sophisticated system was required and claimed that it was made clear to the NZEI that if the trial was not successful further implementation would not go ahead.

The usual reporting of decisions by the ERA brought up the more sensational and newsworthy cases. The *Herald on Sunday* and the *Sunday News* reported on the 'Shakespearean tragedy' that had become 'high farce' after a Christian high school in Kerikeri dismissed a teacher for using a 'morally defiling' King Lear text in class. The teacher had used a modern text of the play which she failed to check with school officials who found it embarrassing, corrupting and morally defiling. The ERA while expressing sympathy for the teacher was forced to uphold the dismissal. Yet another personal grievance issue involving an Air NZ employee was reported. The *NZ Herald* reported on an Air NZ flight attendant who was dismissed, for mistakenly sending a 'highly derogatory and offensive' about a manager to the man himself. The man was dismissed for serious misconduct and appealed to the ERA on the basis that the dismissal was harsh and failed to consider his length of time working for the company. Although the contents of the email were not revealed the ERA described them as vitriolic and deliberately constructed to be offensive. The employee was seeking urgent reinstatement but the ERA ruled that it was not appropriate the ERA reserved the case for a later substantive hearing.

In another *NZ Herald* article prominent business communication company Ogilvy New Zealand was ordered by the ERA to pay a former deputy managing director nearly $350,000 after it made her redundant. The woman had been employed by Ogilvy and its predecessors since 1993 but was told in July 2008 by the managing director Greg Partington that he had appointed a new deputy managing director. She was offered a seat on the Ogilvy board if she relinquished her job title but some days later she was told through her lawyer that she had never been deputy managing director, and the offer of a directorship was withdrawn. The ERA found that the woman's employment agreement had been seriously breached by a unilateral variation, unreasonably terminating the consultation process, and the claim that she never did the deputy's job, despite her having filled the role for more than three years.

Employment in the viticulture industry featured again in the media. The *Marlborough Express* reported on a vineyard contractor New Zealand Vineyard Estates Limited who was ordered to pay compensation to four employees because of maltreatment. The ERA did not accept the claim that they were full time employees rather than casual but found they had been disadvantaged in their employment as they were not treated fairly and in good faith. The workers were told they were no longer employed as their work performance was not a good as the other casuals but had not been previously informed of the concerns over their performance. Moreover, they were not told how they could have either improved their performance to the standard expected and/or at least not have been left without an understanding as to why work was no longer to be offered to them. In a later *Marlborough Express* article the chairman of the New Zealand Winegrowers Association claimed that 'the good apples will squeeze out the bad in the labour contracting game' but the union representing vineyard workers said that it was the bad employers who have the upper hand. The dispute highlighted the wider issue of the employment of illegal workers in which the Central Amalgamated Workers Union Marlborough organiser Steve MacManus stated that while practices had been tidied up there were still a number of unscrupulous sub-contractors who employed only illegal migrant labour. He added that good contractors were being undercut and could not complete with those non-compliant employers who paid illegal migrant workers very little (if at all).

The *NZ Herald* and the *Dominion Post* reported on a simmering dispute amongst the country's firefighters and the Fire Service with several senior officers facing disciplinary action for refusing to follow orders over the storage of fire appliances in fire stations. The officers claimed the diesel fumes posed a health risk. The Professional Firefighters Union said they had been working for years to get extractor systems to deal with diesel fumes inside fire stations. There was an agreement with the Fire Service under which the extractor systems will be installed but the union was upset at local area managers taking disciplinary action. Fire Service employment relations manager Larry Cocker said the measures were taken after some firefighters refused to take the vehicles inside even after the agreement was reached. He said that the Fire Service had done everything it could to meet the concerns of the union over a health risk and considered it a minimal risk.

In yet another dispute the *Dominion Post* reported that firefighters were defying a new operation procedure that restricted the response of fire appliances to buildings with sprinkler systems. The Fire Service was reported to be implementing disciplinary procedures for employees who failed to follow the orders. Professional Firefighters Union vice-president Peter Hallett claimed that the 'bizarre' new policy was endangering lives. Fire Service assistant national commander Bill Butzbach said 26 officers, had been spoken to about breaking the rules - though opposition had begun to quieten down.

The *NZ Herald* printed a number of articles about the case of an immigrant from South Africa who was offered a job with a $55,000 salary but was asked by her employer to pay her own taxes and wages in order to stay legally in New Zealand. The allegation was made before the Employment Court. The woman claimed the arrangement was in order to deceive Immigration officials into thinking that she was being employed at $55,000, as an associate consultant which was the minimum salary for her to meet skilled migration requirements. The recruitment company claimed that the allegations were false and that the woman had full knowledge and was in agreement of the arrangement between them. The case sparked a wider debate on immigrants who entered these scam agreements with employers to pay their own taxes and wages in order to obtain New Zealand permanent residence. The illegal scheme even had its own name PYO (pay your own). Employment advocates and the National Distribution Union claimed that the practice was rampant and had been going on for years, with possibly hundreds gaining residence by paying their own way to meet immigration requirements for skilled migration. Some suggested the practice was kept quiet because much of the arrangements occurred within migrant communities. The woman who sparked the original media attention lost her case before the ERA and was forced to return to South Africa.

The long running issue which involved Air Nelson employing replacement workers during a strike by its employees reached its zenith with a decision by the Supreme Court. The Court stated that Air Nelson acted within the law to bring in the replacement workers. Engineering, Printing and Manufacturing Union secretary Andrew Little said the decision was significant in that the ruling was the last place the argument could go and secondly the decision was very confusing and it was hard to discern what it would mean in practice. The appeal in the Supreme Court centred on several sections of the Employment Relations Act intended to prevent employers from

using strike-breaking techniques, such as engaging contractors or new employees during industrial action.

Counsel for Air Nelson, Christopher Toogood QC, said the strike-breaking provisions did not apply in instances where striking and non-striking workers routinely carried out similar tasks. The Supreme Court said the approach adopted by the Employment Court, that the contract engineers had not been performing the work of striking employees but had been performing their own work, was correct.

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