Chronicle: June 2010 – September 2010

June 2010

The *Dominion Post* reported on the plight of around 200 meat workers at the AFFCO works in Wairoa. June did not start well for these meat workers as they were laid off following a stand-off with their employer following employer threats that they needed to work faster and agree to not being paid overtime. The workers were told that they would be out of work for up to five months. The meat workers union representing the workers lodged a claim in the Employment Relations Authority alleging that the ultimatum given to the workers was a breach of their employment agreement.

The normal round of the 'weird and unusual' personal grievance cases appeared in the media in June. Both the *Sunday News* and the *Sunday Star Times* reported on David Page who worked for a Japanese-owned language school and was awarded $170,000 by the Employment Relations Authority after he was subject to the "Japanese way" of management. This included his boss ranting, berating and humiliating people. The *Dominion Post* also reported on the ambulance paramedic who was dismissed for posting derogatory comments on Facebook after an altercation with a fellow officer. Although this was an early example of this phenomenon the article highlighted that the Employers and Manufacturers' Association had already released a report showing that employers should not fear disciplining staff for online indiscretions. The Council of Trade Unions (CTU) responded with the comment that employers needed to differentiate between their workers grumbling to friends and running a defamatory website. Finally, the *NZ Herald* reported on the woman who unleashed a "torrent of drunken abuse" at her employer but was found to have been unjustifiably dismissed. The language sprinkled liberally with the F word was used at an office barbecue but the employee concerned could not remember the altercation the next day. The resultant disciplinary meeting and dismissal was found to be unfair because not all the statements from other employees, who witnessed the outburst, had been put to her.

The *NZ Herald* and the *Dominion Post* both reported on the payout awarded to a former employee of Ogilvy New Zealand Limited. The senior advertising executive was asked to relinquish her title in exchange for a directorship on the Board. Before she could make up her mind she found that her colleagues had been informed of her replacement and that it had also been announced in the media. The aggressive nature of the employer was criticised by the Employment Relations Authority who said the actions of the Managing Director as "discourteous, disruptive and uncooperative". The executive was awarded $350,000, plus $27,000 costs and $15,000 for distress.

The use of social networking media by public servants was highlighted in an investigative article in the *Dominion Post*. The article estimated that public servants spend at least 8,482 hours a year on Twitter. The figure was extrapolated from a one month snapshot which was obtained by the newspaper under the Official Information Act. It was not known how much Twitter browsing was for legitimate work, including maintaining the official Twitter accounts operated by five government agencies. One of the study quoted estimated Facebook reduced work output by 1.5%.

Interestingly, the article mentioned that some companies were blocking "time sucking" sites while other saw social networking as a good way of tuning in to public opinion, without commissioning expensive surveys or focus groups. For example Westpac Bank was formulating a "how to" social media policy and was encouraging staff to use the technology to network.

In fact, there appears to be some confusion amongst employers regarding the risks and benefits of staff using social media such as Twitter and Facebook. Some private companies such as Westpac and Telecom encourage staff to use social media as a means of gathering feedback on the company. A spokesperson for the Department of Conservation Department said that Twitter could be a useful tool for public servants to connect with their counterparts overseas and discover new trends. A later article in the *Dominion Post*

claimed that in 2006 public servants workers spent at least 35,000 hours a year on the Trademe auction website.

Regular legal commentator in the *Dominion Post* Susan Hornsby-Gulek, a partner at law firm Kensington Swan, commented on the dilemma facing employers when employees strike. Although strikes have become less common there are still 'strategic strike actions' such as working to rule or taking breaks at the same time. While she acknowledged employees' right to strike, the employer's argument was that types of strategic strike action "now has become the norm". The Hornsby-Gulek article argued that a decision in the Supreme Court in May 2010 redressed that imbalance by giving employers greater power to require non-striking employees to perform the work of striking employees. The Supreme Court decision related to a six-week strike by Air Nelson's line maintenance engineers in May 2007. Air Nelson brought in contractors to cover for the striking employees, sparking a legal battle that spanned three years which ended with the Supreme Court decision.

Prominent employment lawyer Peter Cullen wrote on the issue of 'incompatibility' and the right of an employer to dismiss a staff member who does not get on with other staff members. Mr Cullen stated that dismissal for incompatibility is unusual. For a dismissal on these grounds to be justified, the incompatibility must be largely the fault of the employee and that the worker is reluctant to attempt to resolve the situation, such as undertaking counselling or changing behaviour. Conversely, where the employer does little to resolve the problem then the onus falls on the employer. If serious incompatibility remains in the workplace despite the identified employee being assisted and even warned of the dangers to his or her employment, then the employer may be entitled to dismiss.

July 2010

The announcement that the Government intended to review the Employment Relations Act created a wave of media reports during July. A number of newspapers predicted that the proposed changes were to be announced during a speech by the Prime Minister at the annual National Party conference. The proposed reforms would probably not be a surprise as many of them were signalled in a discussion document issued in March 2010 by the Department of Labour.

Predictably, the proposed reform that created the most controversy was the extension of the 90 day trial period from firms employing 20 or fewer staff to *all* employers. Both supporters and detractors voiced their views on this significant change to the personal grievance entitlement. A *NZ Herald* article said that unions claimed the proposals were 'outrageous and an attack on workers rights'. The unions also promised to fight the changes and Labour Leader Phil Goff threatened to 'scrap the 90-day scheme altogether if Labour regained power.' The article quoted the Prime Minister as saying that the results of the 90-day trial scheme launched in April 2009 had been stunning and that it had ensured "that a lot more New Zealanders had the opportunity to engage in work" and the "[e]mployers have been willing to take the risk".

To further raise the ire of unions, it was also rumoured that union access to the workplace would be restricted to situations "with the employer's consent which cannot be unreasonably held". In a *Southland Times* article, CTU President Helen Kelly was outraged by the plan to restrict union access to the workplace. Ms Kelly said that, although it was part of National's election manifesto, the Prime Minister had promised to consult with unions before moving to implement the policy.

As the date of the formal announcement at the annual National Party conference got closer, the debate still raged. The *Dominion Post* wrote that John Key was likely to face a fiery reception at the conference as "unions kick off a campaign against employment changes". The article suggested that extending the 90 day trial period could be "the most divisive change since National took office". In the article, the CTU

estimated that around 700,000 people started a new job every year which meant that there would be at least 300,000 people who would be in their first 90 days of employment at any one time.

Employer groups hit back at the unions claiming that they were over-reacting. David Lowe, Employment Services Manager of the Employers and Manufacturers Association (Northern), was quoted as saying that the claim that the provision would be used to exploit workers was scaremongering and did not fit with the reality of employers looking for workers. A *Dominion Post* article quoted figures from a survey of employers with fewer than 20 staff. Of the 414 employers covered by the survey, 72% used the 90-day provision. Of those, 48 employers – 16% of those using the 90-day provision – had used the provision to dismiss workers. In line with this, employment lawyer Ross Crotty from Lowndes Associates said that, if the probation period was extended, it would expose a huge number of low-paid and young staff members. His view was that small employers did not have the resources to train people and tended to take the "easy way out."

The *Herald on Sunday* took a more pro-government line in its article where it quoted Prime Minister John Key saying that Labour leader Phil Goff was keen to use the issue to "lubricate his party's rusty links with Labour". The article also argued that the Employers and Manufacturers Association had figures which showed that three out of four employers who used the scheme had kept almost 90% of the workers they initially employed. Further, the article argued that anything that encouraged an employer to take a punt on a new worker who shows promise but lacks credentials was worth trying.

As predicted, the announcement of the reforms was made at the annual National Party conference. Although the 90 day trial period grabbed, as expected, most of the media attention, other implications of the proposed changes started to be highlighted. Among these was the measure to deal with the so-called 'mental health day'. The *Dominion Post* reported that under the package that proposed changes to the Holidays Act 2003 would allow employers "who suspect a worker of pulling sickies" to require proof after only one day of sickness. Under the proposal, the employer would have to pay for the cost of a doctor's visit. Additionally, the proposals include the ability of allowing workers to cash up one week's annual leave. Once again, CTU President Helen Kelly said that it would erode the hard-fought for entitlement of four weeks' annual leave and that "[w]orkers short of money will be tempted to cash in such leave when what they really need is a decent pay rise."

The articles in the newspapers were followed up by numerous opinion pieces from each of the protagonists in the debate. Helen Kelly of the CTU argued in a *Dominion Post* opinion piece that the problem was not the trial period but the removal of all appeal rights along with it. She added that the changes "legislate for unfair dismissal" and proceed to list some real examples where unfair application of the existing law had occurred. However, Phil O'Reilly of Business NZ argued that the proposed changes were "reasonably sensible, middle-of- the-road adjustments that will increase productivity and opportunity". He added that this was not a return to the Employment Contracts Act. O'Reilly's view was that the extension of the trial periods was sensible and brought NZ employment law into line with other countries. He also stated that requiring the agreement of the employer to union access was "a better demonstration of good faith than the present rules".

The practicality of employees being able to get a medical certificate was highlighted in another *Dominion Post* article. In the article, GPs warned that the proposal would be problematic as most GP clinics were unable to offer same day appointments. Medical Association GP council chairman Mark Peterson said forcing workers to get certificates for a single sick day was likely to see doctors being asked to provide retrospective diagnoses.

As the month dragged on, the opinion pieces became more and more vociferous. Writing in the *NZ Herald*, Garth George almost celebrated the re-emergence of the unions to fight the changes and, surprisingly, he then proceeded to praise the Employment Contracts Act as one of "the most significant and far-reaching pieces of legislation ever to be passed by the New Zealand Parliament". George argued

that the changes were long overdue and expressed his surprise at how long it took to address '"personal grievance dispute procedures which have become dangerously skewed in favour of employees". Likewise, Wellington lawyer Susan Hornsby-Gulek compared union access to the workplace with an uninvited visit by a mother-in-law and suggested that the change to union access was reasonable.

Meanwhile, the *Dominion Post* reported that collective agreement talks between the Ministry of Education and the PPTA had broken down. The PPTA walked away from talks after 13 'fruitless' sessions. The PPTA was seeking a 4% pay increase but the employer was offering a 1.5% pay rise for the first year and 1% the year after. A Ministry spokesperson said the offer was realistic in the current economic climate.

There was only one stoppage in the March quarter which was the lowest figure for seven years, according to Statistics NZ. This followed an unusually high number of stoppages – 17 stoppages – in the December 2009 quarter.

More claims of exploitation of seasonal fruit pickers in the Bay of Plenty were reported by the *Dominion Post*. Workers were claiming they were not being paid their wages and holiday allowances. This followed the imprisonment of three men, whose company employed 500 seasonal workers nationwide, on charges of conspiring to keep workers in New Zealand in breach of the Immigration Act.

August 2010

The controversy over the proposed changes to employment legislation announced in July 2010 continued. A comprehensive article published in both the *Press* and the *Dominion Post* foreshadowed that unions were mobilising for a major campaign but it also asked the question whether the labour movement could still 'pack a punch' or had it "lost the power and influence to put up a decent fight". Union leader Matt McCarten promised a 'name and shame campaign' to target fast food businesses that had dismissed workers under the 90 day clause with 'very noisy and unwelcome visitors' armed with placards. The article said that although there was a raft of changes proposed by the Prime Minister most of the focus had been on the extension to the 90 day trial period to all employees. Professor Erling Rasmussen, Professor of Work and Employment at Auckland University of Technology, argued that although the reduced numbers of union membership meant that unions were less powerful it did not mean that they had no influence. The key issue for him was whether the Government can actually 'sell' the extension to the 90 day trial period to the NZ public which came down to influencing the hearts and minds of the New Zealand public. CTU President Helen Kelly said that the failure to come up with any convincing cases before the Prime Minister announced the extension of the scheme was affected by that employees were reluctant to come forward. However, cases were beginning to come through and she was confident that the campaign would be "loud and strong".

One case before the Employment Court attracted a lot of attention; this was due to its currency as it was about a worker at a Pharmacy in Stokes Valley in Upper Hutt who was found to have been unjustifiably dismissed and unjustifiably disadvantaged. The employee was employed under a 90 day trial period when the new owners of the Pharmacy took over. The Employment Court found that the employers had breached their obligations because they had not provided the regular appraisal meetings specified in the employment agreement and that the employee "had no inkling that her employment was in jeopardy". Predictably, the union movement was quick to utilise the case as an example of employers abusing the 90 day trial legislation.

The *Press* reported that engineers at Orion subsidy Connetics rejected their 1.6% offer as paltry and unfair. The Engineering, Printing and Manufacturers' Union President Andrew Little said that the offer was below the rate of inflation and was in effect a pay cut. Orion's CEO Roger Sutton claimed that Orion had only made a small profit and was losing money and that the company was trying to find a "balance among everyone's interests".

The threat of industrial action by Junior Doctors featured again in the media following an impasse in their collective agreement negotiations. A series of stopwork meetings had been called by the Resident Doctors Union to enable members to discuss their options before negotiations began, according to union spokesperson Deborah Powell.

Ongoing problems in the Health Sector were highlighted by the Press reporting that ten Canterbury Health medical laboratory workers were suspended after eight weeks of strike action. Half of the laboratory staff (totalling about 100 people) had been on rolling strike action since late June and were not performing certain tasks. Canterbury Health Laboratories' General Manager Trevor English said that while staff had the right to take strike action employers had the right to suspend people. The article also stressed that medical staff at the Auckland, Counties Manukau and Waitemata District Health Boards had been suspended. A spokesperson for the District Health Boards said that New Zealand's District Health Boards operated under "extremely tight budgets" and that 75% per cent of all staff had already accepted a pay offer under the National Terms of Service agreement.

Once again, there were a number of personal grievance cases being reported. These cases appeared to be straight summaries of the determinations issued by the Employment Relations Authority. The more sensational of the cases included that of a dispatcher, who worked for Wellington Free Ambulance, found to be unjustifiably dismissed and was awarded the sum of $4,000. The employee had an argument with a male colleague which 'turned nasty' when it was continued on Facebook. After a complaint of abusive comments being posted on Facebook over what appeared to be a relatively minor dispute over rest breaks, the employer dismissed her after finding that she had behaved in a similar manner in the past. While she received monetary compensation the Authority declined reinstatement because of the "subsequently discovered misconduct and her serious contribution to the situation".

In another case, two customs officers, who were dismissed because they allegedly leaked concerns about a gay officer at Christchurch International Airport, were reinstated after a ruling by the Employment Relations Authority. The officers' claim for hurt and humiliation was declined but they received an order for lost salary. The officers allegedly leaked details of their concerns about a gay customs officer who they alleged was performing more than "his share of strip searches and was making lewd comments about the body parts of male passengers". The officers were opposed to a Customs policy that stated that passengers were not entitled to know the sexual orientation of officers conducting strip searches at airports and ports on the grounds of unlawful discrimination if the officers were required to declare their sexuality. The Department of Customs indicated that it would appeal against the decision.

September 2010

The debate on the controversial 90 day trial period legislation continued. Some of the media reporting focussed on submissions made before the Transport and Industrial Relations Select Committee.

In an opinion piece in the *Dominion Post*, CTU President Helen Kelly responded to an earlier article by CEO of the Business Roundtable Roger Kerr. Kerr had argued that countries such as the US were examples of where either party to an employment contract were free to terminate at any time. Kelly criticised Kerr for his promotion of the US as a place with low worker exploitation. She supported this argument with figures saying that the Federal Minimum Wage had fallen 9.3% in the past ten years and that the top ten per cent of Americans have 70% per cent of the wealth while the bottom 50% shared just 2.5% of the national wealth.

Dr Judy McGregor, Equal Employment Opportunities Commissioner of the Human Rights Commission, wrote that "the proposed legislation to extend the 90-day-trial period to all businesses and New Zealand risks regressing both in terms of its commitment to, and the reality of, equal employment opportunities".

Dr McGregor stated that it was unusual for Parliament to take away rights, particularly the right of access to a hearing. The denial of this right in something as basic as employment had human rights implications. The implementation of the new law would disadvantage, in Dr McGregor's view, various groups with the young, Maori, Pacific and disabled people most at risk. Additionally, the idea that the proposal would rest on agreement between the two parties was unrealistic as a new employee desperate for work was in no position to opt out and had no real choice in the matter. She also argued that the new law would increase casualisation of the workplace at a time where there was increased concern about the low productivity of the New Zealand workforce.

In a response, David Lowe, Manager of the Employment Relations Service of the Employers and Manufacturers Association, argued that the new legislation would increase workers chances of finding work. Lowe claimed that if New Zealand wanted business, the public service and voluntary organisations to be internationally competitive then employers would "need all the confidence they can get, to hire people in the first place". It was his view that the present system discouraged employers from hiring people because of the constrictions on an employer to redeploy or dismiss staff. He expressed surprise that Dr McGregor made no mention of the costs of employing people and the fact that it often took more than 90 days for a new employee to "learn the ropes" which was an incentive for an employer not to start the process of employment lightly.

Dr Judy McGregor repeated her views in her submission to the Transport and Industrial Relations Select Committee. In her submission, she claimed that women were often more at risk under the proposed legislation as they were often in "precarious work" such as domestic work, care work, retail or service positions. She said the 90-day trial period should be dumped because it offended against the "fabled sense of a fair go" and was unnecessary given that probationary period provisions already existed in the Employment Relations Act. However, National Party members of the Select Committee questioned Dr McGregor on her views with National MP Tau Henare quipping that the Human Rights Commission was "a branch of the Labour Party".

The *Dominion Post* published an opinion piece by James Ritchie, Secretary of the Dairy Workers Union, where Ritchie claimed that the proposals were "so small-minded as to miss the point completely". He argued that sustainable economic development through greater productivity was derived from greater worker engagement in the goals of the enterprise and industry growth. To achieve this engagement would require an environment of trust, inclusion and ownership. He cited the example of the workplace programme between Fonterra and the Dairy Workers union over the past decade which had transformed the workplace into a high performance system similar to what was achieved by Toyota. As a result, Fonterra had made huge gains in process and logistical efficiency and waste reduction. Ritchie quoted US research that said that productivity gains were greatest when there was a "unionised workforce with constructive engagement between union and employer'.

The Unite Union claimed that some of Vodafone's lowest-paid call centre workers in Auckland have gone three years without a pay rise and it planned to 'shame' the company. About 50 of Vodafone's 405 call centre staff belonged to the union and the action was a response for Vodafone's refusal to increase pay. A Vodafone spokesperson countered that the company offered a competitive package with call centre staff starting on between $37,000 and $47,000. They also received benefits including four weeks' holiday, free health and life insurance, free cellphones with calls paid for, 4% superannuation contributions and a day off on their birthdays.

In a somewhat unusual move, Senior Doctors and their District Health Board employers decided to approach the Government with a joint bid for funding in next year's Budget to cover contract negotiations. Both sides agreed to suspend pay negotiations while they worked on the business case to be presented to the Government in time for the 2011 Budget cycle.

Meanwhile Junior Doctors voted to strike if their prolonged pay negotiations were not resolved (see August Chronicle). The *Sunday Star Times* reported that a ballot last week returned a 'strong mandate' for action but a spokesperson said that despite this, doctors were a long way from walking off the job. A further two days negotiation on the Multi-Employer Collective Agreement (MECA) was set down for the end of September. The article continued that the dispute was set against a backdrop of mounting pressure in the health sector, which faced the challenge of an aging population and an increased demand for health care. The District Health Boards were seeking more flexibility in the roster system, which was based on average expected hours of work which often resulted in doctors being paid for more hours than they actually work. The Junior Doctors were seeking rostering changes, including a maximum of 10 consecutive days on followed by four off as well as only one in three rostered weekends. One commentator, Auckland University of Technology's Health Faculty Dean Professor Max Abbott, called for public debate over whether compulsory arbitration should be introduced to prevent industrial action because of the public safety issues when health professionals went on strike.

Meanwhile, another part of the Health Sector was being subject to strike action when radiographers went on strike at Auckland City and Starship hospitals for three days. Furthermore, a nationwide strike for 24 hours was called for. A senior doctor claimed that the strike action could result in deaths to some patients which was criticised by the Apex union (representing radiographers) as a very inappropriate thing to say.

In late September, a simmering dispute involving Sir Peter Jackson (director of the Hobbit movie) and the union representing actors flared into life. Headlines included 'Jackson fights 'Aussie bully' to save Hobbit' (*Dominion Post*), 'Movie Madness' (*Press*) and 'Hobbit in Danger from Dark Forces' (*Bay of Plenty Times*) were published. The dispute centred on a call from the Australia Media, Entertainment and Arts Alliance union for a boycott of the Hobbit film after Sir Peter Jackson refused to negotiate with the union. The stakes were raised when New Line Warner Brothers Pictures said that their "general policy was to avoid filming in locations with potential for 'workforce uncertainty'." Consequently, Sir Peter Jackson threatened to move filming offshore to Eastern Europe. The Government became involved when the Attorney-General Chris Finlayson wrote to Sir Peter Jackson's Hollywood backers to reassure them New Zealand employment law ruled out an expensive union-negotiated collective agreement for actors working on the Hobbit.

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