Chronicle: October 2010 – January 2011

October 2010

The Industrial Relations Select Committee continued to hear submissions on the Employment Relations Amendment Bill (No 2). The *NZ Herald* ran a report on the submission by Business NZ. Business NZ submitted that unions should not have unrestricted access to the workplace. Spokesperson Paul Mackay claimed that "unions used access as a form of marketing to gain membership and, therefore, cashflow". Mackay argued that unions should face penalties for breaches of the Bill and that the Bill before Parliament could be simplified so that written permission to enter a workplace could be substituted for a phone call. Predictably, the Labour Party members of the select committee disagreed with the submission with Carol Beaumont claiming that, with bad employers already restricting access to the workplace, the Bill would make it worse. Another Labour Party MP Darien Fenton claimed that lawyers would get hours of work when companies refused access and unions took them to court.

The 'Hobbit movie' issue, which emerged in late September seemed to reach fever pitch during October. Throughout the month, colourful headlines such as 'Why hobbits threaten to dwarf Key' (*Dominion Post*), 'It's still our precious' (*Dominion Post*) and 'A hobbits tale revised' (*NZ Herald*) played on the movie theme of the dispute. Early in the month, newspaper reports were optimistic that a resolution was in sight as first the NZ Council of Trade Unions and then Government Ministers became involved. The Minister for Economic Development Gerry Brownlee met with all the parties involved. They seemed to agree that it would be disastrous if the movie production moved offshore. Conflicting legal opinions predictably backed up the views of each side. Crown Law advice was that New Zealand actors were contractors and were not allowed coverage under the Employment Relations Act. The unions claimed that they had legal advice that said they were employees. Employment lawyer Peter Cullen took a helicopter view of the dispute in a *Dominion Post* article and pointed out that New Zealand operated in an international marketplace and then focussed on the issue of workers as employees or contractors.

In late October, the prospect of amendments to the Employment Relations Act loomed. Even this was confusing as various Government Ministers had differing views. While Minister of Finance Bill English appeared to rule out a change to employment relations, the Prime Minister and Minister for Economic Development Gerry Brownlee were ruling them in. A visit from senior executives from Warner Brothers seems to have put extra pressure on the Government to resolve the issue. A *Dominion Post* article stated that Mr English's attitude appeared as if the Hollywood studios were practising a bit of "old-fashioned arm-twisting and extortion" to get a more generous subsidy from the NZ Taxpayer.

The union movement and specifically the CTU were criticised for their performance during the whole affair. One article in the *Dominion Post* suggested that "regardless of the rights and wrongs of their argument", the unions played "into Government hands through an extraordinary series of misjudgements and bad calls". The article went on to suggest that the movie was always going to be made in New Zealand but the Government had been given a convenient whipping boy – the union movement. Iconic New Zealand movie personalities, Sir Peter Jackson and Sir Richard Taylor, were scathing in their criticism of the unions' involvement, with CTU President Helen Kelly retorting that Sir Peter Jackson was acting like a 'spoilt brat'.

The *Press* reported in late October that the powerful American movie moguls were playing hardball in order to maximise their returns. While it was accepted that the threats by the unions were lifted in a

tacit acknowledgement that the unions had overplayed their hand, Warner Bros wanted a guarantee that filming in New Zealand would not be disrupted by future expensive industrial action.

Finally, the Prime Minister announced that legislation would be introduced to clarify the precise employment status of film workers. This prompted extensive media debate; the Government and its supporters argued that, if there had been general uncertainty in the current legislation over the status of employees and contractors, then a law change could be accepted. The Opposition and the unions warned that a law change at the behest of the studios would set a dangerous precedent. What was also transpiring, however, was that financial considerations had played a considerable part in the impasse over The Hobbit movie, with Warner Bros wanting a bigger filming incentive than the current New Zealand 15% tax break. This tax break would amount to $65 million but, as pointed out in some media report, this appeared to be about half of that offered in some other nations. The Prime Minister had agreed to spend further taxpayer money as he had offered further subsidies, with another $10 million rebate for each of the two films, plus offsetting Warner Bros' marketing costs to the tune of $13.5 million.

Hundreds of South Canterbury students had to stay home after the Post Primary Teachers' Association (PPTA) rejected the Government's latest offer during pay negotiations. PPTA members had already had a nationwide strike, with further industrial action planned during December. After three days of bargaining, the union's national executive voted unanimously to reject the Education Ministry's offer of 0.5% and a $1,000 (before tax) one-off payment for the first year, and 1.9% for the second year. The previous offer was 0% and $1,000 for the first year, and 1.8% for the second year.

Junior doctors rejected the District Health Boards' (DHB) offer of a 2% pay rise and requested better shift rosters instead. The Resident Doctors' Association also had talks with the DHBs over their collective agreement but so far the negotiations were in the preliminary stage.

The *Dominion Post* reported that the Public Service Association (PSA) had filed legal proceedings against more than 30 employers of disability support workers. The PSA was seeking payment of the minimum hourly rate for staff who work on sleepovers. The proceedings were a backdrop to the decision expected from the Court of Appeal where the IHC had appealed the decision of the Employment Court that employees on sleepover duties were due to be paid the minimum wage (see March Chronicle).

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The Government was accused of introducing populist legislation to ensure that it would be re-elected. Specifically, the part-time work-testing for sickness beneficiaries due to come into force in May 2011 was targeted by Labour Party Employment Spokesperson Grant Robinson. Mr Robertson said that there were no jobs for people and that the Government should be focused on expanding the economy to create jobs and up-skilling beneficiaries so they could take advantage of jobs created. He also criticised other proposals such as the extension of the 90 day probation period and the requirement for unions to get permission to gain access to the workplace.

In early November, the *NZ Herald* reported that the Transport and Industrial Relations Select Committee reported back on the Employment Relations Amendment Bill and the Holidays Amendment Bill. The Select Committee recommended that both Bills be passed as written with minor changes. Some of the changes recommend by the Select Committee included a recommendation that if a union requested consent to enter a workplace an employer had to respond within one working day. If the employer still withheld consent, this had to be in writing by the next working day. Other changes included the removal of the terms 'voluntary' and 'informed' from the clause of the Holidays

Act Amendment Bill that would allow workers to cash up a week of annual leave, and transferring public holiday holidays; this would reduce the onus on employer, according to the reporting back from the Select Committee. The Labour Party and the Green party pointed to the regulatory impact statement, which said cashing up a week of annual leave would have a disproportionately negative impact on workers who were already disadvantaged in the labour market.

A *Dominion Post* article on a KPMG 'Mood of the Market' survey said that the 'fire-at-will' legislation was giving small businesses the 'confidence to rebuild their depleted workforce'. The survey claimed that while about a quarter of businesses were planning to employ more staff, current employees had concerns about job security. According to the report, on-line job seeking sites were experiencing an increase in job advertisements.

In a *NZ Herald* article, the Maritime Union of New Zealand vowed to go on the "offensive against employment law changes". The Secretary of the Maritime Union Joe Fleetwood said the passing of the Employment Relations Act and the Holidays Act Amendment Bills spelled the 'beginning of the end' for the Key Government, stating that the changes were "making life harder and sucking more profit out of hard-pressed working people". Mr Fleetwood described Prime Minister John Key as a multi-millionaire with "no interest in the wellbeing of the majority of New Zealanders".

Opinion pieces on the 'Hobbit saga' still appeared during November. Business NZ's CEO Phil O'Reilly said in a *Dominion Post* article that the whole saga showed up how the Employment Relations Act promoted uncertainty about whether someone is an employee or a contractor. Once again the case of *Bryson v Three Foot Six* was quoted as the catalyst, which sent 'alarm bells ringing' for Warner Brothers. Mr O'Reilly accused the unions of reopening the contractor-employee problem on a 'massive scale' saying their actions were 'provocative and naive'. While Mr O'Reilly said that the urgent change in legislation had fixed the problem for the film industry the contractor-employee was still a problem elsewhere blaming the Employment Relations Act for creating the uncertainty. In conclusion, he recommended a systematic review of the Employment Relations Act but "not a complete reversal or upheaval", saying that the Act needed to be improved to better service New Zealand's productivity and economy.

Once again, the large state sector groups featured in the media as various employment negotiations hit problems. The *Dominion Post* and the *Marlborough Express* reported that collective agreement negotiations between junior doctors and their District Health Board employers hit a snag after the union complained to the Employment Relations Authority. The reports said a threat of strike action looked likely. In another part of the health sector, a settlement between District Health Boards and medical laboratory workers was reached but an article in the *Press* suggested that the settlement would not resolve critical issues within the sector. Union President Stewart Smith said the agreement "...was a pragmatic decision by the members..." and that the pay gap between laboratory workers and other scientific and technical groups was growing and people were not training in the field. Furthermore, his members were earning considerably less than nurses despite having to complete a degree which took four and a half years. Meanwhile, unionised radiographers went on a full strike for 48 hours throughout the country after the DHBs withdrew their collective agreement offer.

The education sector also recorded industrial action during November. The *Press* reported that the secondary school teachers were returning to the bargaining table but the planned strike action was still due to go ahead. The PPTA and the Ministry of Education were due to resume negotiations. Limited action including a ban on attending professional development, meetings and events continued. The main issues for teachers included conditions such as class-sizes and allocation of time to do work required as well as working towards a secure collective agreement "not eroded by clawbacks" and a pay increase. The PPTA turned down the latest offer of a 0.5% pay increase, a $1000 payment and a

further 1.9% increase in September 2011. The PPTA was seeking a 4% salary increase plus improved conditions such as more professional development.

The union for primary school teachers – the New Zealand Educational Institute (NZEI) – announced that it had rejected an offer of a $1000 lump sum payment and a 1.8% pay increase. The offer was rejected by 93% of teachers and the NZEI gave notice that teachers would vote on possible industrial action in early 2011. Primary school teachers were also seeking a 4% pay increase.

A report on a survey of Police found that nearly 70% were ambivalent about their jobs. A *Dominion Post* article said that 37% of the respondents believed that the Police management did not adequately deal with harassment, bullying or discrimination complaints and 35% of respondents feared reprisal if they raised complaints about such behaviour with management.

A Treasury research paper found that employees who carried on working while sick cost the economy billions of dollars every year. It said that proposed changes to sick leave were unlikely to reduce the cost. The annual indirect costs of ill-health were estimated to be between $5.4 billion and $13 billion. Most of the estimated cost was through lost work hours because of sick days and 'presenteeism', where people attempted to work through their illness but who were ultimately unproductive.

December 2010

There was still some reporting on the 'Hobbit case' during December with the *NZ Herald* running a report which alleged that a top United States union leader had "climbed on The Hobbit bandwagon", suggesting that the amendment to the Employment Relations Act could affect American union support for the proposed Trans-Pacific Partnership trade negotiations between the US and New Zealand. In a letter to the Minister of Trade Hon Tim Grosser, Richard Trumka stated that "[t]he Government's move to eliminate the fundamental rights of workers in order to attract investment would violate the labour provisions of any future trade agreement between our two countries that we could support." Mr Trumka also said that "[t]he misclassification of workers in the film production industry is a serious problem that not only robs workers of decent wages, working conditions and benefits but also deprives workers of the right to organise, form a union and bargain collectively." NZ Council of Trade Union President Helen Kelly was quoted as saying the issue had been a 'hot topic' at a recent International Labour Organisation meeting.

Meanwhile, a *Dominion Post* article stated that an official information request revealed emails between Sir Peter Jackson and Hon Gerry Brownlee's office stated that the blacklist threat from the Actors Equity union was not the main threat to moving the Hobbit movie offshore but the "grey areas in our employment law" were threatening the filming. Sir Peter maintained that Warner Brothers had lost all confidence in filming in New Zealand "because they had just witnessed how a tiny and capricious union, manipulated by an offshore agency, could bring a multimillion production to its knees – for no legitimate reason." He said the Government's law change "gave the studio confidence that the film could made in New Zealand without the threat of unjustified ongoing industrial action". CTU President Helen Kelly expressed disbelief at Jackson's latest statement. She believed he knew The Hobbit boycott was not a big issue because producers wanted to come to New Zealand "to force law changes and money".

The *Dominion Post* reported on a survey of employers which revealed only a partial implementation of the 90-day trial period implemented by the changes to the Employment Relations Act. The Employers & Manufacturers Association's (Northern) annual employment round-up survey found that 50% of the 375 of those surveyed would use the 90-day trial period. A further 8% said they were uncertain. CTU President Helen Kelly said the survey showed that despite the Government saying

workers would have a choice about whether or not to accept the 90-day no rights period, employers considered that the choice was theirs. She said that "[i]t is our view that those that don't use it are likely to have better attitudes to their workers and better systems for employing people and are likely to be more successful because of this".

The *Press* reported that, after almost two years of negotiations, employees at Nelson's Sealord fish processing plant had ratified a collective employment agreement. The workers who were represented by the Service and Food Workers' Union gained a wage increase of 8% over a two-year period and a $500 lump-sum payment.

The *Dominion Post* reported that primary school teachers and principals had voted in favour of a pay proposal agreed to by the primary teachers' union in November after months of bargaining with the Ministry of Education (see November Chronicle). The agreement provided a 2.75% pay rise and $300 lump sum payment.

With the Christmas party season approaching, the usual warnings about over the top behaviour by inebriated employees full of Christmas cheer and the responsibilities of employers at these functions were published. A *Dominion Post* article reminded employers that they were liable for sexual harassment committed by one employee to another in the course of employment. An employer could defend the claim by proving that it had taken all reasonable and practical steps to provide a safe workplace. A recent case before the Human Rights Tribunal provided a sobering warning where a cafe proprietor was ordered to pay the sum of $19,000 to a former employee who had been sexually harassed by a fellow staff member. The Human Rights Review Tribunal said the case highlighted the dangers of running a business without any understanding of the provisions of the Human Rights Act relating to sexual harassment and without any understanding that such behaviour can be unwelcome to others.

Other noteworthy personal grievance cases highlighted in the media included a former chief executive of the Plumbers, Gasfitters and Drainlayers Board who used 'guerrilla tactics' against his former employer but had failed to get reinstatement in his job after being dismissed. The employee had taken over 4,000 documents from his office in order to prove his claims of serious irregularities about faulty gas certifications. The Employment Relations Authority found that the decision to dismiss the man was one that any fair and reasonable employer would have reached.

In another *Dominion Post* article, a former employee of the Ministry of Social Development had posted a Facebook description of herself as a "very expensive paperweight" who was "highly competent in the art of time wastage, blame-shifting and stationary [sic] theft". The employee was dismissed from her position as a prison reintegration case manager and failed in her bid for unfair dismissal. Employment Relations Authority member Dzintra King said in her judgment that the online comments "endorsed a stereotyped view of slothful and exploitative public servants". The Facebook postings would not in themselves have warranted the person's dismissal but, combined with her past behaviour, the Ministry was justified in its actions because management could not trust her, Ms King said.

An article in the *Waikato Times* highlighted the vulnerability of companies to employees using offensive websites during working hours. An Employers and Manufacturers survey revealed that only 9% blocked offensive websites that carried pornography with business owners saying they would deal with issues as they arose, but nearly a third of companies blocked potentially time-wasting sites including Trade Me and Facebook. Waikato-based Computer Troubleshooters' Director Dennis Jones said employers who trusted staff to only use the internet for work purposes were normally sadly mistaken. He was quoted as saying that "[a] lot of employers are baby boomers and a lot of employees

are Generation X and Y who are so experienced at hiding Facebook from mum that employers are a doddle".

January 2011

The end of the Christmas holiday season brought further calls for a change in the Holidays Act. In a *Dominion Post* article, business leader Cameron Brewer was quoted as saying that though the Holidays Act was intended to boost the pay packets of those working on public holidays, it was, instead, forcing many businesses to shut down in the holiday season. Mr Brewer, who chairs Auckland Council's Business Advisory Panel, called for the Act to be repealed. He was quoted as saying that "[t]he intentions of the 2003 legislation were honourable, but now we're seeing one big unintended consequence. That is, it's actually forcing businesses shut and workers to cut back their hours when they probably need extra money the most."

Yet more commentary on the Hobbit issue emerged as the *Timaru Herald* and the *Southland Times* reported that union leaders were considering laying a complaint with the United Nations over the Employment Relations (Film Production Work) Amendment Bill. The NZ CTU said that the new law breached international conventions on employment rights. CTU President Helen Kelly said the union was looking at laying a complaint with the International Labour Organisation (ILO). The ILO upheld a similar complaint against the New Zealand Government over the Employment Contracts Act 1991, she said. To be found in breach of the conventions again would embarrass the Government.

In further news on the implementation of the 90-day trial period reported in both the *NZ Herald* and the *Dominion Post*, the Government was accused of making empty promises after saying the 90-day trial period for new workers would be voluntary, and then asking all public sector employers to include it in all contracts. The State Services Commission defended an email which said that Government employers were expected to implement Government policy, including the 90-day trial. State Services Commission's Spokesperson Jason Ryan said that the email was nothing more than guidance for public sector chief executives to "act lawfully and implement government policy", but the Labour Spokesperson for State Services Grant Robertson said the email made a mockery of the claim that the trial period would be optional. A spokesperson for The Hon Kate Wilkinson said that "Workers are free to negotiate whether it applies." The Service and Food Workers Union had about 3000 members in collective agreements which did not have the trial period while the Tertiary Education Union had similar agreements.

Both the *Timaru Herald* and the *Dominion Post* reported that industrial action by health workers cost DHBs at least $2 million – 10 times more than it would have cost to settle pay claims, according to a spokesperson for the radiographers. Both radiographers and hospital lab workers participated in four months of rolling go-slows and work-to-rule action last year during protracted and bitter collective agreement negotiations with their health board employers. The radiographers' union, Apex, said at the time that the difference between what their members were asking for and what District Health Boards were offering was just $200,000. Wellington's Capital & Coast DHB – which spent $678,000 during the most recent strike – allegedly paid nearly $50,000 to senior doctors to act as gate-keepers to determine whether a patient needed life saving treatment.

The Unite union's National Director Mike Treen was escorted from SkyCity Auckland after a workplace access dispute. Unite, which represented about 1000 of SkyCity's 3000 employees, was protesting over wage and employment conditions. Management and security at SkyCity followed Mr Treen as he spoke to workers despite a trespass order.

Amongst the personal grievance cases reported in January was the case of a worker, who was refused reinstatement by the Employment Relations Authority after it was found that she incited violence against a fellow worker when an argument got out of hand. A dispute between the two workmates reached its climax in late October 2010 when the woman's husband visited her workplace during his lunch break and beat up her fellow worker. The attack on the employee was described as "a disgraceful episode" by Authority member James Crichton. Bad blood had existed between the two workers since August 2009 when the victim complained about offensive racial remarks made against him by the employee. Interestingly, in another case, the *Dominion Post* reported on one of its own reporters who was appealing her dismissal for allegedly plagiarising an article by columnist Deborah Coddington. The journalist maintained that although she had read the article any similarities between the two were inadvertent.

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