CHRONICLE: FEBRUARY 2012 – MAY 2012

FEBRUARY 2012

The NZ Institute of Economic Research reported on their analysis of the controversial '90-day Trial Period', covering the period April and September which was straight after the new 90-day trial period regulation for new workers in small firms was introduced (see January Chronicle). Their Chief Economist Bill Kaye-Black told the *Dominion Post* that the Institute's analysis suggested the new reform has prompted a significant jump in hiring and job numbers, even though overall employment figures were down. The Institute believed that the policy would have a positive impact though with so limited data it was too early to establish this firmly. In response, Council of Trade Unions' President, Helen Kelly, said that a firm's economic situation was the real influence in a hiring decision.

Unsurprisingly, the *Dominion Post* reported on a survey that found that more than 65 per cent of New Zealanders think that public holidays that fall on a weekend should be transferred to a Monday ("Mondayising"). A Labour MP intends to introduce a Bill to Parliament to ensure that "Mondayising" holidays such as Waitangi Day and Anzac Day can take place.

Two employment law specialists reminded employers of their responsibility to carefully look for re-development opportunities when restructuring staff who otherwise might be made redundant, in preference over advertising new positions. Several recent employment cases confirmed that a "re-structured" employee with the necessary skills to carry out a new role, even if some up-skilling is required, places an obligation upon the employer to appoint them.

A long-term NZ Customs Service employee, who suffered from major depressive illness and alcohol abuse, was his case of unfair dismissal. He was dismissed from his off-shore posting as a Customs Liaison Office. During his service, he had been exposed to traumatic scenes and experiences during the 2008 tsunami relief effort. The officer claimed that events, that gave rise to his dismissal, would not have occurred if the service had provided appropriate and necessary support after his deployment. The Employment Relations Authority found that the officer's dismissal was unjustified on procedural grounds as Customs had not undertaken a proper investigation into the individual's circumstances. One commentator suggested that this was a very sharp reminder to employers to handle dismissals with great care, particularly when employees are working with material or in situations which are likely to damage their health.

The Christchurch earthquake aftermath poses many thorny employment law problems for both employers and workers, according to lawyer Peter Cullen in the *Dominion Post*. Staff will want to know how long they are going to be paid wages and employers will want to know how long they will have to pay workers who are not working. In some cases, employees are unable or unwilling to start working. Workers, who are suffering psychologically, should be able to use their sick leave entitlements but this could only be a temporary measure. Those who are unable to work because they are not allowed into the workplace for safety reasons may have to be carried by the employer. Where the business is not destroyed but trading is unlikely to begin soon or as before, the employer may look at making workers redundant. Whilst these issues appear relevant only to Christchurch they do illustrate the need for a balance between employer and employee needs and rights.

Employers were reminded to have proper checks and balances in place when employees are members of the family. When family employment issues go wrong the damage is likely to be worse than in a normal employment relationship. Kapiti Diesel lost $443,000 when a family member helped herself to cheques and funds.

A case bought before the full Employment Court raised the question of whether or not an employee of a labour hire company is in fact an employee of the end user of their labour. The Court stressed that this was, to their knowledge, the first time such a case had been bought against the end user of a labour contract. According to the *Southland Times*, the case has been referred from the full court back to a sole Employment Court judge.

In a rather bizarre case, a long-term employee sought to have his dismissal overturned at the Employment Court. The employee had accidently dialled his manager from a mobile phone in his trouser pocket while he was making critical comments about his employers and discredited his company's products to a business colleague. He had worked for the company for 39 years and sought to overturn his dismissal after the accidental phone call. The Employment Court reserved its decision about the dismissal based on the caller's "completely disloyal and inappropriate comments".

MARCH 2012

Throughout March the media carried information and articles concerning changes to the Employment Relations Act, due for introduction on April 1st. While most media reports focused on the '90-day Trial Period there were also reports about changes to the Holidays Act and to the Employment Institutions and how unions' right to access to workplaces was being limited (see February Chronicle).

The *Waikato Times* reported that a local educator expressed concern that the changes meant that young graduates would be unfairly treated under the new 90-day trial period. She warned that the young graduates were ill-equipped to negotiate with management leaving them vulnerable to mismanagement. However, some students suggested that the trial period was a disincentive while others thought that it might provide more opportunities and make them work harder.

CTU leader Helen Kelly wrote in the *Dominion Post* that the changes would impact on vulnerable workers in a period with high unemployment and negative public policy changes. There was already a strong perception in the workforce that this Government favoured business interests over those of workers. It was deferential to business but dismissive of unions. In difficult times, the Government had opted for large tax cuts for those on high incomes.

According to the *Bay of Plenty Times*, confidence was expressed by local employers that the trial period would offer a boost in business confidence in recruiting staff and impact positively on job growth. Employers also felt that the implementation of a robust system, which ensured that a signed employment contract was in place prior to work starting, was vital if a trial period was implemented.

Another key change would allow employees to request to “cash up” a week of their annual leave, though the pay-out could only happen if the employer agrees to it. There were media reports suggesting that employers could pressure employees to “cash up” while it was also pointed out that surveys had found that some employees were interested in “cashing up”.

Changes to the powers of the Mediator were discussed in the *Southland Times*. From April, they would be able to make recommendations that, when accepted by both parties, would be enforceable. This new role was seen as a quicker and more efficient way to deal with low level disputes and effectively reduce the number of matters going to the Employment Relations Authority.

Furthermore, a new penalty provision would be available to punish those that "without sufficient cause, obstruct or delay an authority investigation". Where the ER Authority had determined that a matter was frivolous and/or vexatious and had dismissed it, the party can appeal to the Employment Court which can then direct the matter back to the ER Authority. The Employment Court was also given additional power to dismiss any case they see as frivolous or vexatious. The maximum penalty for this infraction would be $10,000 for individuals and $20,000 for companies. An action for a penalty can be initiated by the ER Authority itself or by one of the parties involved.

Tourists and other visitors could not access Auckland’s Sky City Casino for a time as a bitter dispute over pay and working hours spilled on to the streets (see January Chronicle). The two unions involved, Unite and the Service and Food Workers, eventually agreed with police and Sky City management to move away from the main doors to allow negotiations to resume. Unite’s Director Mike Treen said unions were also seeking regular shifts with secure hours for part-time staff: “They have started hiring mainly part-time staff for table games dealers. There are almost no rights for part-time staff except for a guaranteed eight hours a week.” The unions also asked for a 5 per cent pay rise, reduced to 4 per cent during the negotiations. Sky City was offering 3 per cent a year for the next three years. Sky City’s Spokesperson Scott Campbell said the unions had been calling brief strike actions on and off since negotiations started last November.

An Asian baker was ordered to pay more than $220,993 to a trio of illegal immigrant workers he "grossly exploited". The Employment Relations Authority ruled that Taumarunui Bakery owner Hon Ly had exploited the workers and neglected to pay them the minimum wage. The men had arrived on visitor permits and had worked at the bakery illegally for about six years before they were deported back to Thailand. Their employer had relied on that they were unlikely to complain about their predicament because of their immigration status. The only days they got off were during statutory holidays when the bakery was closed and over the Christmas-New Year period. Mr Ly provided them with a house "with very little in the way of chattels", they were paid under the minimum wage, tax forms were not signed and no time records of their work were kept.

The Employment Relations Authority found that a woman was justifiably dismissed for using her employer’s adult website to advertise photos of her daughter. The woman was dismissed as a business account manager for Apollo Marketing Advertising in Auckland (which operates sexual services website *Adultspace*), when she was caught using the website to advertise her own sexual email service, *Fantasemail.* She had also posted photos of her daughter in the hope she would gain promotional and modelling work.

A long-running issue to be given plenty of media space during March was the matter of staff required to "sleep over" while on the job (see October 2010 Chronicle). IHC's Spokesperson Philippa Sellens said the organisation could not afford the estimated liability in back pay of $176m, on top of wage costs which would rise by about $30 million a year: "We're looking to Government for a solution to this because we simply cannot pay that money." The IHC had appealed again, despite three court rulings against their interpretation. An application was lodged with the Supreme Court to grant leave to appeal against a Court of Appeal decision which ruled last month that overnight "sleeping over" fitted the legal definition of "work", and that workers should be paid the minimum hourly wage for those overnight stays. Otago University's constitutional law expert Andrew Geddis said he did not think the Supreme Court would reach a different finding: "[The Court of Appeal has] made a sound judgment in law. It just so happens it has pretty unpalatable consequences for the Government."

APRIL 2012

The media reported on a raft of changes to benefits, tax, statutory minima and employment relations legislation which came into effect on 1 April. There was an increase to superannuation with a married couple getting $522.96, up by just over $10 from $511.06. A single student, under 24 years of age, would now get a gross weekly allowance of $187.52. The adult minimum wage was increased by 25 cents to $13.00. Company tax was decreased to 28 per cent from 30 per cent.

Most of these increases were mainly linked to the rise in inflation – except the company tax reduction – and they proved rather uncontroversial. The changes to employment relations regulations, on the other hand, still created considerable media debate (see March Chronicle). The 90-day trial period was hotly debated and unions warned that this could become a major issue for many new employees. However, newspapers reported that many employers had already adjusted their employment agreements to take advantage of the 90-day rule. There was less debate about the changes to the Holidays Act and to the role and processes of the Employment Institutions.

More than 500 soldiers, sailors and air force staff could soon face big pay cuts or lose their jobs under a plan to take them out of uniform and rehire them as civilians. Staff at Trentham was told that the Defence Force had so far identified 135 positions in the navy, 220 in the army and 155 in the air force that will be "civilianised". But many more could follow. According to a statement obtained by *The Dominion Post*, Defence Chief Rhys Jones said that 500 people would be affected in "this initial phase" and "we will be considering further civilianisation". The Government said in its Defence White Paper, published in November 2010, it was estimated that up to 1,400 jobs would be affected.

The long running negotiations between government and teachers were finally over. According to the *Dominion Post*, unionised secondary teachers will get a pay rise of up to 3 per cent after ratifying the collective agreement. Post Primary Teachers' Association's President Robin Duff said that teachers would get a pay increase of up to 3 per cent, a one-off payment of $300, extra time for heads of departments to support new teachers, additional relief days for kapa haka and Auckland Polynesian festival *Polyfest*, and the introduction of sabbatical leave.

A United Nations' expert on human trafficking has called for New Zealand to act over allegations of slavery on foreign charter boats. This came at the same time as both Labour Minister Kate Wilkinson and Fishing Minister Phil Heatley denied that there was any problems with the approximately 2,500 men working on 21 ageing Asian boats. The *Sunday Star-Times* reported that there were 'sweatshop conditions' on the boats: sailors were beaten and forced to work for many days without rest, earning between $260 and $460 a month. Their catch, worth about $300 million a year, is marketed to the world as "Produce of New Zealand". However, Cabinet Minister Phil Heatley told Parliament there was not a problem and said the previous Labour government had made changes to the law that were "entirely adequate". Mrs Wilkinson said the Labour Department had a regular audit programme of labour standards on fishing boats. "These workers aren't New Zealand citizens, aren't employed on New Zealand-operated vessels, they often don't speak English and leave our waters once fishing is finished."

When is the use-by date for a disciplinary warning? Many employers specify use-by dates on disciplinary warnings issued to employees. In other words, when the warning is issued it is stated to expire on a particular date - typically in six months' time after the incidence. However, in a grievance case, the Employment Relations Authority found that the warning was current from the date it was issued, not the date the misconduct occurred. According to the *Dominion Post*, the ER Authority's reasoning was that if the warning was backdated to the date of the incident, the employer's process of investigation would become "somewhat perfunctory" in that the decision would be "retrospective" and open to an allegation of bias. Instead the authority found that the whole process leading up to the issuing of the warning was relevant to the process. The warning started when it was issued not when the incident occurred that led to it.

According to an article in the *Dominion Post*, many employers would love to get rid of some of their 'baby boomer' employees but they are often unsure how to go about it. Thus, employers will be watching with interest the case of the Air New Zealand pilots, forced to retire at 60, scheduled for the Employment Court later this year. Paul Roth, an Otago University employment law specialist, said that employers were often struggling with ways to get older employees to retire without discriminating against them.

The *NZ Herald* advised that the Minister of Labour Kate Wilkinson had told Employment Relations Authority's Chief that his warrant would not be renewed when it expired on May 18. The former employment relations manager of the Auckland District Health Board had been a member of the ER Authority since it was created 11 years ago and had been its chief for seven years. But he is not a trained lawyer. He said the Government wanted legally trained people in the ER Authority. The move came two weeks after legal changes came into force, requiring the ER Authority to allow legal cross-examination of witnesses and gave the Authority's Chief powers to issue instructions to Authority members to ensure the Authority acts more "judicially" (See March Chronicle). Three other members of the 17-member Authority were not reappointed when their terms expired last year. All their replacements had law degrees. Eight other Authority members' warrants will expire this year. An advertisement for their jobs published in May said preference would be given to candidates with a legal degree. Secretary of the Engineers' Union Andrew Little said the changes were disturbing. "The Government has had pressure from employers they want lawyers running the thing. It makes the authority process far more complex and intimidating."

According to media reports, the Meat Workers Union had secured a “victory” against Affco New Zealand. Following a complaint from the union, an Employment Court decision would force the meat processing company to reconsider how it recruited and dismissed seasonal workers after a complaint by the union. The union said Affco had breached a historical “seniority clause” by laying off experienced union members nationwide, ahead of newer recruits. In the decision, Judge Anthony Ford ruled that Affco was required to use the seniority clause and employ and lay off seasonal workers in accordance with their initial start date, regardless of their contract. The union’s General Secretary said the decision justified its concerns: “That’s the way people have been laid off and rehired in the industry for a long time, and because it's a seasonal industry, it's one of the most practical ways you can do it." He confirmed the union would seek damages over the issue, which another union’s spokesperson said had affected at least 400 workers this season.

Sex reared its head during a case reported in both the *NZ Herald* and *Nelson Post*. Air New Zealand is fighting the return to work of a pilot who slept with a flight attendant and drank the night before a flight. The Employment Court ordered the airline’s subsidiary Air Nelson to give the man, who has name suppression, his job back. The court also ordered he be paid $10,000 compensation and $51,000 for lost wages. The employment investigation also focused on whether the pilot had breached company alcohol policy. According to the *NZ Herald*, Air New Zealand’s grounds for appeal included whether the Employment Court had applied sections of the Employment Relations Act correctly, and whether it took into account the airline’s aviation statutory and regulatory responsibilities.

The great words of the Bard attracted the attention of the *Northern Advocate*. An Exclusive Brethren school had to pay nearly $28,000 compensation to a teacher it dismissed for handing her students a contemporary interpretation of text from Shakespeare’s King Lear without approval from the school committee. Kerikeri’s Westmount School dismissed English teacher Suzette Martin in July 2009, two years after she was employed, for “corruptly and morally defiling her students” in Year 13 through use of the text. Ms Martin had used a modern version of King Lear she had found on the internet to fulfil NCEA requirements. She went to the Employment Relations Authority, claiming unfair dismissal, but lost and subsequently argued her case in the Employment Court, which ruled in her favour. Westmount School is run by the Northland Education Trust and although all students at the school are members of the Exclusive Brethren, none of the teachers are.

MAY 2012

Unsuccessful candidates in redundancy or disciplinary matters may now be able to get sensitive information, including details about other applicants. Lawyers said about a recent Employment Court decision involving Massey University that it could change the way employers dismissed staff because information which had been previously considered “off limits” may now need to be disclosed. The case arose after Massey staff, forced to compete for fewer jobs in an organisational restructuring, sought information about the selection process to help their case. Lawyer Scott Wilson said in the *Dominion Post* that the ruling could include board minutes, internal memos and emails, guidance and advice from human resource managers, interview notes and details about other candidates. It could make bosses more careful about what they put on paper and job applicants could become "a lot more circumspect about what they say". Interestingly, the Privacy Commissioner declined to

comment, but the Council of Trade Unions did not believe the ruling would lead to widespread breaches of privacy.

According to an article in the *Dominion Post*, Australians may have higher salaries than New Zealanders, but that does not necessarily correlate to more satisfaction at work. Workplace assessor SHL, active in more than 50 countries, did New Zealand and Australian research on factors that impact on employees' efforts at work and what attributes they wanted in a boss - and the results were similar. The most important factor for both Kiwis and Australians impacting on the amount of effort they put in at work was lack of recognition (59 per cent and 55 per cent respectively). When it came to pay, 39 per cent of Australians cited it as an issue compared to 34 per cent of Kiwis. Other significant concerns included boredom for 42 per cent of Kiwis surveyed and 43 per cent of Australians, lack of motivation for 38 per cent of Kiwis and 44 per cent of Australians, and criticism from bosses - 35 per cent of Kiwis and 31 per cent of Australians.

Criminal lawyers say they are considering strike action in protest against Government legal aid reforms. Strike action would mean lawyers would not turn up in court for cases. Wellington barrister Noel Sainsbury, who organised a meeting of lawyers yesterday, said there was a high turnout. He said about 50 lawyers were interested, including some who were unable to get to the meeting. Wellington's independent criminal bar had set up a steering committee that was concerned about the destruction of private legal representation and its replacement by a nationalised public service model, he said. The Public Defence Service opened its office in Wellington in February. Initially, the PDS was to take up to 33 per cent of criminal legal aid cases. In April, Justice Minister Simon Power announced that PDS would take up to 50 per cent. The key concerns were that the Government was removing any independence of advice and that having a state-run legal service prohibited criticism of the Government. There were worries about people being pressured to plead guilty and having their right to choose a lawyer taken away.

In McDonald v Porse In-Home Childcare (NZ) Ltd, Justine McDonald challenged her dismissal for serious misconduct, which arose from Porse receiving complaints about her behaviour while at a camping ground on annual leave. It transpired that, while on a camping holiday with friends, Ms McDonald had been involved in several altercations with other campers, primarily about noise and significantly, about noise made by children and the actions of children. She was identified as a Porse employee by the company-branded vehicle she was driving. The campers complained to the company that her actions were inappropriate, including a "propensity for swearing and being loud and aggressive", as well as reacting to incidents by yelling at children and frightening them. Porse concluded that there was a sufficient relationship between her conduct while on holiday and the nature of the business, for the matter potentially to damage the company. On that basis, the behaviour was considered serious misconduct and she was dismissed. That decision was challenged and in an interim decision, the Employment Relations Authority declined her application for temporary reinstatement.

The Herald on Sunday told us about a truck driver who received a $40,000 payout in a workplace bullying dispute where the victim said that she thought she was going crazy when no one would help her: "It was a nightmare beyond anything I've ever had to face." In an echo of the film *North Country*, starring Charlize Theron and directed by Kiwi Niki Caro, the Employment Relations Authority found she had suffered psychological damage and was constructively dismissed.

The *Dominion Post* had an article concerning the Wellington International Airport using "illegally obtained" evidence to deny a man, caught in a workplace "sex act", his job back. The Employment Relations Authority found that the dispute between the airport management and former employee was back to "square one" after ruling in the company's favour at an earlier hearing. The man was fired in December after twice being caught on a covert camera in a clothed sex act with a female colleague while at work. The company said he was fired for wasting company time, accessing a banned area, acting inappropriately during work hours, and maintained overall that he could no longer be trusted. He admitted "groping" the female employee with whom he was in a relationship. In March, he lost a bid to be temporarily reinstated pending an investigation. The employee still wanted his job of 20 years back and sought to have the investigation reopened, based on the fact that the original ER Authority decision relied on inadmissible evidence. The ER Authority rules that the video evidence was collected by a private investigator, not by another employee (as the airport had indicated) and was therefore "illegally obtained". It ruled there had been a miscarriage of justice, ruled out the use of the inadmissible evidence and said the investigation would start at "square one" without it.

The Supreme Court granted IHC leave to appeal against a court ruling requiring staff to be paid the minimum wage for sleep-over shifts. The sleep-over claim was previous won in the Employment Relations Authority, the Employment Court and the Court of Appeal and it could have wide-ranging back-pay implications for many firms, with IHC estimated to be faced with around 176 million in back-pay claims (see March Chronicle).

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