

Around the traps

December 2015



Season's greetings from Chris Rowe

The way the Christmas and New Year holidays fall this year, this week will be the last full week of the year for some, so this newsletter is a chance for me to connect with my clients and colleagues with my end-of-year "wrap"; and to wish you all the very best for the season, whether that involves a closedown and reopening in the New Year, or a busy round of services for your lucky customers who are on holiday.

Public holidays and holiday pay

It's at this time of year that I receive lots of calls about holiday pay over Christmas and New Year. If you are in any doubt I strongly recommend you look at the following link on the MBIE website: <http://www.employment.govt.nz/er/holidaysandleave/publicolidays/mondayisation.asp> The narrative is very comprehensive and gives a number of scenarios for you and/or your employees to consider.

The 'Wrap'

It's a cliché to say you wouldn't read about some of the situations people manage to get themselves into. Truth is definitely stranger than fiction. As a mediator trying to help parties sort out their differences, and as an employment relations practitioner acting for either employer or employee, I get to see the best and worst of human behaviour.

Here's a summary of some of my observations and learning for the year:

- When you find yourself at odds with an employee or employer, it's often helpful to remember that there was a time when you got on well, and saw a real future for the employment relationship. Helping people focus on the positives, like how they used to relate, and the mutual goals you had, can assist in getting things back on track.
- What went wrong is almost always some kind of communication breakdown. Keeping communication open and clear is the key, and that requires energy and focus from all sides. It does not happen on its own. We all get busy and stressed at times, and we may say things we don't mean, or misinterpret what we hear. Learn to listen actively, help your employees to learn the same, and be alert to changes around you which signify that things may not be going well. Sometimes it's just a matter of asking an employee how things are going.....their response may tell you what you need to know. Keeping communication open is actually enshrined in legislation as the mutual obligations of "good faith". (Section 4 Employment Relations Act 2000).

- Once things start to turn septic, it is usually a downward spiral to a complete lack of trust in the relationship. Parties take positions and in some cases launch a crusade against the other party. If that occurs, there are no winners. It is always best to deal with potential problems early, before they degenerate into destructive and costly battles.
- If one of your employees turns 'feral' and starts believing he or she can get the better of you, be patient and firm, take advice if you are in doubt, and do what is fair and reasonable. That approach usually wins through. It's astonishing how stupid employees can be when they decide to behave like 'bush lawyers'.
- This approach certainly won through in a **recent case** in the Employment Relations Authority (ERA)¹ where an employee (Ahmed) brought a personal grievance claim alleging unjustified dismissal, bullying, harassment and intimidation. The ERA found no evidence to support the claim and instead praised the employer's "patience, measured approach to the process and willingness to go the extra distance to give the employee the benefit of the doubt." Ultimately the ERA found that the employee was justifiably dismissed as the employer acted in a fair and reasonable way and that it was entitled to conclude that it no longer had trust and confidence in an employee in Ahmad's position and therefore that dismissal was the only course available.
- In another **recent case**,² the employer was not so fortunate. The employer was slammed for a flawed process which resulted in a large payout to the employee: six months' lost salary plus \$20,000 compensation for humiliation, loss of dignity and injury to feelings as a result of the dismissal. The employee (Mr Key) had been suspended and then dismissed for serious misconduct after the employer concluded (without proper investigation) that the employee had sexually harassed a female work colleague. The ERA determined that the employer breached the good faith obligations it had to its employee because the manager who made the decision to dismiss the employee did not have accurate or direct information about the actual complaint, and was also influenced by his own perception of the female complainant and did not give Mr Key an opportunity to address his specific concerns. The company did not commission or conduct a proper investigation of its concerns, and Mr Key was not given all relevant information he needed to provide his response.
- There is a lot of bullying behaviour in workplaces, and it is very important for employers and employees to be alert to the signs and deal with matters promptly. I frequently investigate bullying allegations on behalf of employers, and have this year experienced being bullied myself while conducting an independent investigation. The employer in that case was trying to protect a bully. This was institutional bullying.
- It is also true that some of what is labelled bullying is not bullying. It is something called management and supervision. I have previously recommended the very useful *Worksafe* publication *Preventing and responding to workplace bullying*. It's a free publication available from Worksafe. I always keep copies of this publication and would be happy to share them with you if you ask. It's a great publication to make available in your workplace for employees to read.

¹ *Ahmad v Connect Supporting Recovery Inc* [2015] NZERA Auckland 354

² *Key v Programmed Facility Management NZ Ltd* [2015] NZERA Auckland 344

- Good recruitment is the key. Put your effort in at the front end. Try to find the best possible person for any vacancy in your business. If you inherit another person's recruitment mistakes, it is important that you clarify your standards and requirements, and do not allow poor performance or misconduct to become entrenched. Take professional advice if you need help with this.
- Think carefully before employing family members of another employee, or friends of friends. So often this causes problems, even with the best will in the world to avoid it. Sometimes it seems the easy option to employ another employee's relative, but that is not necessarily so.
- Being a caring and friendly employer should not extend to lending money, vehicles, or tools. It often comes back to bite you. You are not a charity, and your employees will not necessarily respect you for behaving like one.
- Receiving a personal grievance does not necessarily mean you will end up in Court. Personal grievances can often be resolved through meeting with or without mediation. They must not be ignored. They do require a response. Taking advice at an early stage can save further emotional and financial cost down the track.

Thanks

Many thanks for the dealings I have had with you during the year; for referrals to new clients; for sharing your challenging issues with me; for providing wise counsel to me; for discussion about potential work; and for trusting me to assist you.

I look forward to our future connections. Meanwhile I hope you enjoy time over the Christmas and New Year period to reflect, refresh and revive for the new year.

I'm around until Christmas and have Court work scheduled in the early new year so am expecting to be back on deck by the week of 11 January 2016. If you have urgent matters to discuss during the holiday period it will be best to email me in the first instance.

Best wishes for a safe, healthy and prosperous holiday season and new year.

Cheers until next time

Chris Rowe

Disclaimer: the information in this newsletter is to the best of the author's knowledge true and accurate, but does not constitute professional advice, and should not be relied on as such. The author will be pleased to comment on specific issues of concern to readers, and to offer appropriate, specific advice.

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