Around the traps
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Reflections from Chris Rowe on dealing with employment matters.
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Possibly the last thing you need at this time of year is a newsletter about employment misadventures to be avoided, or more things you need to do to keep your self 'safe' as an employer. So I'll start this newsletter with some gratitude. Thank you to my clients and others in my professional networks for our various contact and work together during the year. I hope you all have an opportunity to refresh, review, and possibly renew during any holiday break you might have coming up.

I'm aware, of course, that for many of you the upcoming festive season is your busiest time of year. So it is not a time to relax! For you, I wish you many customers with bulging wallets. As my favourite poet and cartoonist Michael Leunig says in "A Christmas Carol":

Frankinsence is very fine
It elevates the soul
And myrrh will soothe a broken heart
And make the spirit whole
And though we like these gentle things
We're not entirely sold
The man who steals our heart away
Is the one who brings us heaps and heaps
And heaps and heaps of gold.

Now to my selection of interesting developments in the employment arena……..

Court overturns an ERA finding of constructive dismissal resulting from bullying

In my July newsletter I discussed a case involving Spotless Facility Services in which the ERA had found Spotless failed to protect an employee from workplace bullying.
Spotless challenged this decision and in October 2016 the Employment Court[1] has found that the ERA did not reach "a correct factual conclusion" and has set the remedy of compensation aside.

[1] *Spotless Facility Services NZ Limited v Anne Mackay* [2016]NZEmpC 153

The Court's focus was on a particular alleged communication between employer and employee which had been the 'final straw' for the employee.

The Court said in its judgment:
"[85] I find….. that the employee genuinely, and subjectively but mistakenly, interpreted the employer's response as destructive of the necessary trust and confidence; but that was a response to an innocuous act: an honest statement was made which could have been better expressed; it did not justify an immediate decision to resign.

[86] I cannot conclude that there was a relevant breach of duty by Spotless of such seriousness as to make it reasonably foreseeable that Ms Mackay would not be prepared to continue to work for it." (my emphasis).

I have included the above excerpts because they encapsulate a situation which is not uncommon in disputes following an employee's resignation and later allegation of constructive dismissal. The passage I have underlined is the relevant legal test for constructive dismissal, and it is a high threshold.

This particular case is not over. The Court has required further submissions from the parties in order to assess whether the employee has a different type of personal grievance: for unjustified disadvantage, rather than unjustified (constructive) dismissal.

Big increases in penalties for breaches of employment legislation

There has always been a range of penalties available in the Employment Relations Act 2000 for breaches of employment legislation, and penalties are often part of determinations of the Employment Relations Authority (ERA) and the Employment Court.

What has changed recently is the level of penalties actually awarded, largely as a result of recent guidance from the Court to the ERA and the Labour Inspectorate when considering serious breaches of what are known as "minimum code" employment law statutes.

In a judgment of the full Employment Court released on 4 November 2016[2], a Labour Inspector's challenge to a finding of the ERA was upheld, the determination of the ERA set aside, and the two related employer companies were ordered to pay a total of $100,000 for multiple and serious breaches of the Employment Relations Act, Holidays Act and Minimum Wage Act.

The employer companies which both had the same directors, operated a number of retail liquor stores and retail dairies in the South Island. Each of the companies engaged principally young Indian nationals on temporary work visas to staff the shops and outlets. The employees were paid substantially less than the minimum wage, worked on public holidays for no additional remuneration, and their holiday pay entitlements were less than the minimum in part because of the way their wages were calculated and paid. The companies kept no, or inadequate, wage and time records relating to employment. The employees' immigration visas were tied to employment so that the employers wielded a

[2] *Jeanie May Borsboom (Labour Inspector) v Preet Pvt Limited* NZEmpC Chch [2016]143

significant degree of control over whether the employees were able to remain in New Zealand lawfully.

The Court said in its judgment that staff endured these substandard and unlawful terms and conditions of employment largely in the hope that they would eventually move on to better employment and the prospect of permanent residence in New Zealand for themselves and possibly their families.

The Labour Inspectorate initiated an investigation following complaints from some of the employees.

I will not detail here the deplorable facts described in the 59 page judgment. The salient point is that the ERA and Inspectorate have now taken on board the guidance from above. Since that Employment Court judgment, the ERA has already handed down a determination with a $40,000 penalty for an employer's failure (albeit much less serious) to pay the minimum wage, holiday pay, or keep adequate records.

I hasten to say that I have not personally seen offending as serious as that described in the Employment Court judgment, but I have on a number of occasions been approached for assistance by employees who were working for less than the minimum wage. And there are certainly employers out there who are not keeping proper wage, time and leave records. Not only is this illegal practice. It creates problems if you need to provide this information at short notice.

Employers can claim penalties too!

In the case of *Pure New Zealand Foods Limited v Sharma*[3] the employer claimed penalties in the ERA against a cook for failing to give the agreed 3 months' notice when he resigned. The ERA ordered the employee to pay a penalty of $750 for breaching his duty of good faith by failing to give the required three months' notice. The penalty could have been much higher but for some mitigating factors.

Secret digital recordings declared admissible in ERA

The ERA has recently confirmed[4] that covert or 'secret' recordings made by employees may be used against employers in ERA proceedings. In *Firman v Insyn Limited* the first secret recording the employee made was during a meeting with her employer where she had been notified of a disciplinary process and possible suspension from her employment. The ERA found the recording to be relevant to her claim and admissible.

The second recording made by the employee was between other staff members while she was not present, and was intended to prove that there was gossiping and bullying undertaken toward her by other staff. This was also found to be admissible in the

[3] [2016]NZERA Welllington 129, 18 October 2016
[4] *Firman v Insyn Limited* **[1]** [2016] NZERA Christchurch 156.

proceedings, even though it was essentially a breach of the privacy of the staff members involved and regarded by the ERA as "not an action in good faith".

It is good practice to always ask whether anyone is intending to digitally record a meeting. In the light of the above divergence from accepted practice, employers may decide to preempt the risk of secret recording during disciplinary processes by recording meetings themselves. I have found that making a statement about recording (or not) at the outset of a meeting does invite the parties to be open about any intentions to record without consent from all present. Whatever you decide it is sensible to assume a meeting is being recorded and be precise and careful what you say.

What causes most disputes?

I was thinking about this recently as I prepared to speak to a group about my professional practice and about current employment issues. From my experience the most common cause of disputes – in employment and in other matters – is poor communication and lack of clarity. It's worth the effort to ensure your employment agreements and policies are clear, coordinated, and capable of being implemented. And if an employee expresses concern about something, it's good practice to ask them to write it down before you discuss it further. Committing something to writing usually assists in the process of clarifying what the potential problem is.

Earlier in this newsletter I've referred to the subject of constructive dismissal. This is a fertile field for confusion. "Did s/he leave or was s/he pushed?" is a common question dealt with in mediations and ERA hearings. I have seen many employers dumbfounded when a former employee tells them s/he has been forced to leave his/her employment. It's all about perspective and often selective hearing. It is a fact of life that people see things differently, so it's wise to try to achieve clarity before confusion evolves into a dispute.

The most remarkable concept I see in my mediation work is the power of apology. We all know it's hard to apologise, which means it's a rare event to witness. But invariably distress and expensive claims fall away when apologies are offered, and especially when they are reciprocated.

On that note I wish you a stress-free festive season, and look forward to our resumed contact in 2017. I'm taking a break from 23 December to 16 January 2017.

Cheers
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