# Around the traps September 2015

**Reflections from Chris Rowe on dealing with employment matters.**
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Welcome to Spring. I haven't written a newsletter for a while, so this one is a little longer than usual. I hope you find it interesting. Please feel free to suggest matters of particular interest to you, and I'll be pleased to cover them in a future newsletter.

In my last newsletter I noted that a number of employment law changes were due this year. Significant changes have since come into effect and I have summarized some of those later in this newsletter. In due course a number of these amendments will be tested through the Employment Relations Authority (ERA) which is itself experiencing change.

I recently attended a briefing from the ERA about the immediate effects of their being required to provide oral determinations or oral indications of preliminary findings at ERA hearings, wherever practicable. Those of you who have experienced proceedings in the ERA will know that previously it was often a very long wait for a decision following a hearing – sometimes up to 9 months. Well now you should have a good idea before leaving the hearing, with a written determination to follow within prescribed timeframes.

The major implication of this for the parties and their advisors in any such proceedings is that the ERA will be expecting far more preparation up front, which will include submissions provided in advance of the hearing rather than afterwards. The ERA will also be expecting evidence to be comprehensive and relevant, as it always should be of course! In my opinion the opportunity to have an oral decision on the day of the hearing is welcome, and the consequential requirements of parties and their advisors should be beneficial, particularly to genuine applicants and respondents. Because much of the time-consuming work required for ERA proceedings will now be required at the front end, parties can expect costs to come early, and in a large chunk. Going to the ERA is not cheap. That's one good reason to try to be aware of and resolve any problems at an early stage. I am increasingly impressed with many of you already doing this.

I never cease to be amazed at the range of issues which arise in the employment arena. I trawl through hundreds of cases going though the Employment Court and ERA to bring you cases of potential interest which provide good learning for us all.

**SELECTED CASE LAW OF INTEREST: Recent Case 1: Misrepresentation**

In ***Hart v Printlounge Limited*** **[2014**][1] a new employee had not disclosed his full criminal history (including murder) to his prospective employer.

The employee, Mr Hart, was dismissed by Mr Sheppard, the General Manager of Printlounge Limited after working seven weeks, and following a telephone call to Mr Sheppard from someone he knew in the industry, to the effect that Mr Hart had a conviction for murder. While Mr Hart had disclosed during his job interview that he had recently served two years in prison for assault in 2011, he had not disclosed his conviction for murder of a woman in Browns Bay some thirty years earlier which resulted in a seven year prison sentence. The Ministry of Justice (MOJ) criminal convictions obtained for the purposes of the ERA investigation, also disclosed other robbery and assault charges.

After Mr Sheppard received the telephone call and then read a *Metro* article about the murder, he called Mr Hart into his office and asked him if the murder conviction was true. When the answer to that was yes, Mr Sheppard asked Mr Hart why he had not disclosed this to his future employer. Mr Hart replied that he would not have been employed if he had done so. Mr Sheppard told Mr Hart he could no longer work in the business and he left the premises immediately. Mr Hart subsequently raised a personal grievance about the termination of his employment.

The ERA held that the employer was entitled to cancel the employment agreement on the basis of the misrepresentations Mr Hart had made at his job interview. The determination concluded that[2]:

> *"the trust and confidence Mr Sheppard had in Mr Hart was fundamentally fractured by the discovery that he had not answered fully or truthfully when asked about having other convictions. Mr Sheppard had thought he was giving a "second chance" to a former prisoner with a 'one off' conviction, but his discovery of the truth revealed risks to his business for which he (literally) had not bargained*."

But the matter did not end there. The employer still had obligations under s103 of the Employment Relations Act 2000 (known as the Test of Justification) to follow a fair process. The ERA found the employer had not done so. Mr Hart had been called to a meeting without notice of it or the right to bring a representative. Mr Sheppard had not taken professional advice before the dismissal meeting, nor done anything to further investigate the information he had received from the printing industry source and the *Metro* article. The ERA said:[3]

> *"While it was highly unlikely that Mr Sheppard's decision would have been any different if he had provided more opportunity to Mr Hart to engage a representative and to take time to think about what he might say in response, the process may have made some difference to the timing and terms on which Mr Hart's employment ended."*

[1] NZERA Auckland 494

[2] *Printlounge [28]*

[3] Ibid [30]

The good news is that the ERA found Mr Hart entirely responsible for the state of affairs in which his employer made a job offer to him based on incomplete information as Mr Hart had withheld the full information when asked. This resulted in a finding that the appropriate reduction in any remedies available was 100%, and awarded him nothing.

There is significant learning from this case, including:

- Be careful with your selection
- Pre-employment declarations are useful
- Ask questions about criminal convictions, ensure you get answers, and consider requesting MOJ checks if in doubt
- Remember there are two parts to the test of justification: substantive and process. Both are important.
- In weighing all the circumstances based on information available to it, the ERA will consider matters such as whether the employer took appropriate advice before any dismissal.

**Recent Case 2: Trial Periods**

You will be aware from my previous newsletters that this topic is front of mind because of the potential for problems if the trial period is deemed to be invalid. Here's another example.

In ***Phillips v Modern Transport Engineers (2002) Ltd (MTE)***[4] the employee claimed that he was unjustifiably dismissed from his employment on 16 February 2015 by MTE. The employer denied that Mr Phillips was unjustifiably dismissed, and claimed that he was justifiably dismissed in accordance with a trial period provision in a written employment agreement. The ERA had to deal first with the preliminary issue of whether Mr Phillips' employment with MTE was subject to a valid trial period pursuant to s67A of the Employment Relations Act (the Act).

Mr Phillips had been offered an employment agreement at his final interview for the job, and had asked to take it away with him to read it. It was agreed that he would return it in a timely manner. Mr Phillips was not told that the agreement had a trial period in it, and Mr Phillips does not recall seeing a trial period in the agreement. It ensues that the company's standard agreement included the trial period in a section with no heading, so it was not conspicuous. Nor was the employee told he was entitled to take advice on the agreement, and the agreement itself did not specify that, as it should. When Mr Phillips returned the signed agreement, he asked for a copy and was told it would be posted to him. This never happened. After commencing employment Mr Phillips experienced difficulties in his relationship with his boss. He again requested a copy of his employment agreement, and again it was not provided.

In due course MTE decided to terminate Mr Phillips' employment in reliance on the 90 day trial period. Mr Phillips asked to see his employment agreement. The employer apparently could not locate Mr Phillips' signed agreement and printed one with another employee's name on it. That agreement contained a trial period, which the employer said was

[4] [2015]NZERA Auckland 254

standard for all employees. The ERA found that this did not confirm that the employment agreement provided to Mr Phillips contained a 90 day trial period provision.

Employers have a legal duty (s63A of the Act) to provide employees at the time of engagement with:

- A copy of the intended employment agreement;
- Advice that they are entitled to seek independent advice on the agreement;
- An opportunity to seek advice.

The employer must then retain a signed copy of the employee's individual employment agreement or the current terms and conditions of employment that make up the employee's individual terms and conditions of employment.(s64 of the Act).

If there is to be a trial period in accordance with s67A and 67B of the Act, that trial provision must be agreed and in the employment agreement. In a 2011 Employment Court case the Chief Judge noted as follows[5]:

> *"[70]What this means in practice is that employers wishing to avail themselves of the opportunities afforded by ss67A and 67B must ensure that trial periods are mutually agreed in writing before the prospective employee becomes an employee."*

The end result of the above is that Mr Phillips is able to progress his unjustifiable dismissal grievance.

I've discussed this with many of you but I'll repeat it: a trial period must be agreed and signed off by both parties before ANY work is done for the employer (even one hour). And as indicated above, proper record-keeping is essential.

**Recent Case 3: Parental Leave**

In ***Dillon v Impact Marketing Solutions Limited t/a Club Premier Pacific***[6] the ERA determined that Ms Dillon was unjustifiably disadvantaged by her employer's delay in signing her application to the IRD for paid parental leave, and awarded her $2,500 in compensation for this aspect of her personal grievance.

Ms Dillon was advised by her lead maternity carer that she should give serious consideration to finishing work earlier than planned, and provided a supporting medical certificate which Ms Dillon gave to her employer. While her employer agreed in a meeting with Ms Dillon that she could finish work immediately, the employer expressed some frustration about Ms Dillon having " dropped this on us without any notice." Ms Dillon gave her employer the IRD application (IR880) that Impact needed to complete for Ms Dillon to receive paid parental leave. The employer did not complete the form at the meeting because they wanted to discuss this with Impact's accountant.

There followed a series of increasingly fractious communications in which the employer suggested (incorrectly) that Ms Dillon had not followed correct procedure, but not

[5] *Blackmore v Honick Properties Ltd* [2011]NZEmpC 152, cited in *Phillips*
[6] *[2014]NZERA Christchurch 51*

specifying what additional information was required. Ms Dillon engaged the assistance of a Labour Inspector (Ms Baldwin) who made it very clear to Impact twice that:

> *"The Parental Leave and Employment Protection Act 1987 provides that any employer must not refuse to allow an employee to exercise any rights and benefits in respect of parental leave or a parental leave payment due to any irregularity in the formal requirements under the Act (section 68). The Act also provides that an employer must fill in its portion of the form relating to paid Parental Leave (IR880) irrespective of whether it believes an employee is eligible."*

It took Impact almost another month to complete the forms. The ERA determined that, in failing to complete the form at least a month earlier on instruction from Ms Baldwin, Impact unreasonably failed to allow Ms Dillon to exercise her right to be receiving parental leave payments earlier. The ERA added:

> *"I consider that this action disadvantaged a statutorily granted condition of Ms Dillon's employment during a period when Ms Dillon's pregnancy and associated health meant she should have been secure in the knowledge that her parental leave payments would be made. Therefore Ms Dillon suffered a personal grievance of unjustified disadvantage which gives rise to a consideration of remedies."*

The key learning from this case is that, no matter how frustrated or busy we may be, or what our view of the law might be, employers are not entitled to prevaricate about complying with employees' legal entitlements.

**STANDARD OF PROOF and NATURAL JUSTICE**

Sometimes we read about employment cases in the media and think it all seems so unfair to one party or the other. It's helpful to remember that matters in the ERA are determined not on the standard of proof beyond reasonable doubt (used in the criminal courts) but rather to the civil level of the balance of probabilities – that is, not what certainly or definitely happened, but what was more likely than not to have happened. And the ERA (unlike the media) looks at all the evidence before it decides.

This is the same standard of proof which determines the employment investigation work I do. This is when employers commission me to conduct an independent investigation into what is going on in their workplace. There might, for example, be allegations of bullying, or simply symptoms of dysfunction like serial resignations with no obvious cause. I get to interview persons who are likely to be able to assist with the investigation, review all relevant documentation, and come up with conclusions on the balance of probabilities. Then it is up to the employer to decide what to do about the problem. Sometimes employers don't like what I tell them, but as an independent reviewer it is not my job to tell them what they want to hear.

The other overriding principle in dealing with employment matters is natural justice which in the employment context requires:

- Notice to an employee of a specific allegation (say) of misconduct to which the employee must answer and the likely consequences if the allegation is established, e.g. disciplinary action including possible termination of employment; and
- An opportunity, which must be real as opposed to a nominal one, for the employee to attempt to refute the allegation or to explain or mitigate his/her conduct; and
- An unbiased consideration of the employee's explanation in the sense that consideration must be free from predetermination and uninfluenced by irrelevant considerations.[7]

**EMPLOYMENT LAW CHANGES –summary of selected changes**

**Rest and Meal breaks**
With effect from 6 March 2015 there are no longer specific rules for how long, or when, rest and meal breaks should be. The Employment Relations Amendment Act 2014 replaces those strict rules with a more general right for employees to have rest and meal breaks to give them a reasonable opportunity to rest, eat, drink, and deal with personal matters. The new provisions encourage employers and employees to negotiate, in good faith, rest and meal breaks which meet the legislation, without compromising business continuity and flexibility. If you already have meal and rest break provisions in your employment agreements, I recommend you retain them, unless they are causing disruption to your business.

As noted in my previous newsletter, the new rules do not override any requirements under other legislation, for example the specific regulations governing hours of work for drivers of passenger transport services; and the general duties on employers under health and safety legislation to take all practicable steps to ensure the safety of employees at work.

**Flexible working arrangements**
From 6 March 2015 all employees (not only caregivers) have the right to request flexible working arrangements. Employers must respond in writing within one month, giving reasons if the request is refused. Such requests can be made at the outset of employment (not after 6 months as the law previously required).

**Minimum Wage Order**
The minimum wage rate for adults 16 years and over increased to $14.75 per hour from 1 April 2015. Please take care that hours recorded by your employees on timesheets are consistent with the contracted hours in their employment agreements and with what they are paid.

**Parental Leave**
With effect from 1 April 2015, the entitlement for paid parental leave increased from 14 to 16 weeks. The Bill which proposed extension of parental leave from 14 weeks to 26 weeks was defeated on its 3rd reading in Parliament on 25 February 2015.

Cheers until next time
Chris Rowe

[7] *NZ Food Processing Union v Unilever NZ Limited* [1990] 1 NZILR 35

**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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