Around the traps
September 2016

Reflections from Chris Rowe on dealing with employment matters.
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Welcome to Spring. And welcome to new readers of this newsletter.
It's always exciting to meet new clients who are setting up businesses locally, or who are expanding operations. Thank you for choosing my services, and please feel free to share this newsletter with others who might be interested in these topics.

In this newsletter I share a mix of employment law updates, tips from my work with clients, and items of media interest.

How not to do an independent investigation

I'm fairly sure you would have been riveted by the news surrounding the antics of members of the Chiefs Rugby franchise at their end of season frolic.

My interest has been in the bizarre decision of the New Zealand Rugby Union (NZRU) to use its own in-house Legal Counsel to conduct an investigation into this matter. Whatever the competence and good intentions of this senior employee of NZRU, there was no way his review could be seen to be independent. CEO Steve Tew defended this decision in part by referring to the employment relationships with the players, which would seem to be even more reason his organisation should have known what is regarded as proper practice in conducting investigations of this kind.

As many eminent observers have already pointed out, given the range of potential or real factors in this case (including women, sex and alcohol), the cautious approach would have been for the NZRU to commission an independent appropriately qualified and experienced panel of at least one female and one male to investigate the matter and report its conclusions to the NZRU.

Of course decisions on the outcome were for the NZRU to make. The conclusions of any investigation may have been the same, but at least a balanced panel was more likely to produce a result which was seen to be impartial. Perception is reality. The added benefit for the NZRU is that they would most likely have escaped the limelight sooner.

Case Law 1: Drug testing: Employer did not follow its own procedures

If you are intending to drug test employees, you must have solid procedures for doing so, and many employers have those. The next step is to always follow them!

In the case of *McLeod v Envirowaste Services Ltd*[1] the Employment Relations Authority (ERA) found the suspension and later dismissal of Mr McLeod to be unjustified, and awarded him a total of $32,000.

Mr McLeod was selected for random testing on 9 April 2015. When the result was "non-negative" the sample was sent to a laboratory for a confirmatory test. While awaiting the result, Mr McLeod was suspended on full pay. After the result was confirmed positive, the employee was called to a disciplinary meeting where he was told his test was positive. Mr McLeod's legal advisor requested a range of information including a copy of the test showing the amount of THC found, but this was not provided. Envirowaste also changed the suspension to be unpaid, which was not a provision of the company's policy.

At the first disciplinary meeting, Mr McLeod said he was not a habitual drug taker. He said he was at a party the night before the test but claimed he did not remember taking drugs because he was very intoxicated. Another two disciplinary meetings were held and the employee was eventually dismissed. He raised a personal grievance.

The ERA determined that the company had not followed its own drug and alcohol policy in a number of respects, and had not double-checked that important aspects of the testing procedure had been followed before dismissing Mr McLeod. The company failed to investigate any of Mr McLeod's explanations or information in mitigation; and had no evidence for its decision-maker's view that McLeod might reoffend and that he was lying.

In summary, the ERA said that the company breached its own drug and alcohol policy and that the decision to dismiss Mr McLeod was accordingly unjustified.

The important learning from this case is to ensure that anyone in your business who has responsibility for arranging drug testing is familiar with company policy, and follows it to the letter.

Case Law 2: Bonus payment clause unenforceable

In an unusual and you might argue unlucky situation for the employee,[2] the Services Manager for a plumbing company had a bonus clause in her operative employment agreement, but following her resignation and claim for her bonus to be paid to her, that clause was deemed to be unenforceable because (the ERA found) the method of calculating the bonus was never agreed upon.

[1] [2016] NZERA Christchurch 103, 7 July 2016

[2] *Robinson v Gillon & Maher Plumbing Ltd [*2016]NZERA Christchurch 123, 26 July 2016

The case is too complex to go into in detail here but raises important issues for any employer paying or intending to pay bonuses to employees.

The employment agreement between the parties included several references to the bonus including in the Schedule which provided for a "Bonus of 2% of our earnings before interest and tax and other fixed and variable costs are deducted."

The ERA accepted that there was agreement between the parties to pay a bonus; but the bonus term was uncertain because it omitted a number of elements including:

- The period of assessment of payment
- When it was to be paid
- The meaning of certain terms used in the clause.

Much of the case was focused on the actual meaning of the bonus clause. In the end the ERA determined that the basis for the calculation argued by Ms Robinson had been arrived at *ex post facto* in order to legitimise her claim.

Nevertheless Ms Robinson's claim for unjustified disadvantage was upheld on the grounds that, during her notice period, the employer withheld from her its understanding and belief that she was not entitled to the bonus. She was awarded compensation of $5000.00. But no bonus was payable.

Case Law 3: Still more about 90 day Trial Periods

In my previous newsletter I discussed a May 2016 decision of the ERA[3] which determined that a 90 day Trial Period was invalid because it was not specific that the trial period began on the date of commencement of employment.

That has been followed by three more cases on the same point, this time involving early childcare teachers and their employer Lighthouse ECE Limited. The ERA determined that Lighthouse was precluded from relying on the trial period provision because it did not state and was not "*to the effect*" that the trial period provision started at the beginning of employment.

There is no doubt a trend towards close examination of the wording of trial periods when employees are dismissed during a trial period. A number of recent cases on validity of trial periods have been upheld in the ERA, and the employees concerned were then entitled to pursue a personal grievance for unjustified dismissal. If you are in doubt about using trial periods in particular situations, it is prudent to take advice.

Minimum Wage (Contractor Remuneration) Amendment Bill (2015) REJECTED

The purpose of this Private Member's Bill (from Labour's David Parker) was to amend the Minimum Wage Act 1983 to extend its provisions to apply to payments under a Contract for Services where the latter are remunerated at less than the minimum wage.

[3] [NZERA[Christchurch 69, 25 May 2016

For those of you unfamiliar with the difference between Contractors and Employees, a key factor is that Contractors are not covered by the Employment Relations Act 2000. Contractors are self-employed and are usually engaged through a document known as a Contract for Service. Employees are engaged through an employment agreement with an employer.

Those of you who engage both employers and contractors will be interested to know that the Bill passed its second reading in Parliament but has subsequently been rejected by the Select Committee. It had been roundly criticized by the Employers and Manufacturers Association (EMA) because it was seen to be unworkable.

Having difficult conversations with your staff

There is a common theme in many of the discussions I have with employers who have identified a problem with a staff member's behaviour or conduct. The employer is clear what the employee is doing wrong, and knows something needs to happen, but it just all seems too hard to take the step of setting up and having that difficult conversation. Confrontation is not something many employers enjoy.

The excuses for procrastination are various, including that the law is always on the side of the employee and that employers are expected to jump through hoops to make sure everything is done correctly. I don't necessarily agree with the former, but have some sympathy with the latter.

I do empathise particularly with the fact that small to medium business people without dedicated in-house HR support cannot be expected to maintain an up-to-date knowledge of employment law and its many "grey areas".

It is of course the employer's responsibility to manage staff, but if you seriously don't want to do it, or feel you are just putting it off, I can assist with or facilitate those discussions for you – with you present. Not only does this enable you to observe what needs to be done, but it indicates to your employee that you are taking matters seriously and following a careful process. The advantage is that you will gain confidence to do it yourself next time. Early intervention is the key to avoiding problems getting out of control.

Please feel free to contact me if you wish to clarify any matters in this newsletter.
Until next time -

Cheers
Chris Rowe

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