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Reflections from Chris Rowe on dealing with employment and other problems.
Chris Rowe, Director of Corporate Dynamics Ltd, is a Warkworth-based Employment Relations Advisor and Mediator Tel 09 425 9069
Email: chris.corpdyn@maxnet.co.nz ***Website: www.conflictsolutions.co.nz***

Welcome to winter. It had to come eventually! I am hearing that many businesses are experiencing tough times, and that they are having to be much more careful about expenditure, and continually aware of employee performance.
Recently a new client employer asked me to prepare for him a summary of the important matters which would (hopefully) enable the new employment relationships he was initiating to run smoothly. I'll share my thoughts on this here, and in upcoming newsletters. Dealing with change is the first of these.

Dealing with Change in Employment
I've written a lot about employment agreements and why you must have them and retain copies of them. This is enshrined in law.
Whenever there is a possibility of some significant change in an employee's employment, the employer must meet with the employee and/or consult with the employee about the relevant matters. This could include restructuring, disciplinary matters, a need to reduce hours or to institute some change to conditions of employment e.g. drug testing. There is a proper process for these meetings, which you must follow:

- Check that you have the employment agreement, and familiarize yourself with its content
- Advise the employee in writing, with at least 24 hours' notice, that you require him/her to attend a meeting on a suggested date/time
- In that letter advise of entitlement/encourage the employee to bring a support person or representative to that meeting
- If the employee's continuing employment is in jeopardy (eg. If serious allegations have been made, or if redundancy is possible) you must say so in the letter
- You must allow the employee to tell his/her side of the issue at the meeting
- If in any doubt about what you are doing, take advice

If the employee is for some reason unable to attend on the day scheduled, or his/her support person is unavailable on that day, you may wish to reschedule the meeting. You need to do whatever is reasonable, but you are entitled to suggest to an employee that s/he find an alternative support person if you feel matters are being delayed unnecessarily. In the vast majority of cases it is beneficial for an employee to have a support person present. So never be afraid of this.
Depending on the seriousness of the issues it may be in your best interests to have your own advisor present at these meetings. The important thing is to be fair and reasonable, take good notes (or have a good scribe present), allow the employee to be heard, confirm the discussions afterwards, and make no decision until you have considered all matters carefully and legally.

I'm often asked whether you should electronically record the meeting, or allow an employee to record the meeting. I do not favour electronic recordings because the employee can use this against you without your consent. (Under the Privacy Code it is not lawful to record meetings without consent). Labour Department Mediators do not allow electronic recording devices in their mediations for this reason. That is a reasonable reinforcement of my own policy if you need one.

Note taking
Unfortunately note-taking is something of a lost art, but it is an important skill, particularly for people dealing with employment matters. In meetings such as described above, it is important to know what is important to record, to be precise about recording it, and to do it immediately after the meeting while it is fresh. If you need guidance on this please let me know.

Speaking of Privacy
A recent Case Note from the Privacy Commissioner's files deals with pre-employment screening. [Case note 218236 NZ Priv Cmr 4:Man objects to pre-employment screening].
As part of the process of applying for a job in a Government Department, an external company which specializes in pre-employment screening was used to screen potential employees including the man who was the subject of this case.

The man did not get the job, and requested under Principle 6 of the Privacy Act that he be given the personal information held by the agency. Some information was withheld. The man complained to the Privacy Commissioner who investigated the complaint.

Principle 1 of the Privacy Act provides that an agency must not collect personal information unless it is required for a lawful purpose connected with an activity of the agency and the collection is necessary for that purpose.

In this case information had been collected about the man's personal and commercial credit history. The position applied for did not indicate significant financial risk to the department. The Privacy Commissioner decided the department did not need to collect this information to find out if he was suitable for the job, and thereby breached Principle 1.

Principle 6 provides that individuals have a right of access to personal information an agency holds about them, with some exceptions. One of these exceptions is evaluative material obtained in confidence – in this case reference checks. The Privacy Commissioner was satisfied the department had a proper basis to withhold information in the reference checks because to disclose would be breaching a confidence.

Principle 9 provides that personal information collected must not be held for longer than required for the purposes for which the information may be lawfully used. In this case the pre-screening company, surprisingly, stated on its form that information collected would be retained indefinitely and would form part of its database for the purpose of determining that person's suitability for future positions. The Privacy Commissioner determined that this practice did not accord with Principle 9, and instructed the agency to destroy the information.

What this means for you

When you are recruiting staff, be careful about what and how you collect resumes and other personal information, and do not retain material for unsuccessful candidates unless you have asked them and they have agreed that you can hold it for any future positions. If I am recruiting for clients, after an appointment has been made I destroy personal details of rejected candidates unless I have been asked by the client to retain them, and have consent from the applicant to do so. I retain records I wrote of interviews if I was present. This is only in case of any enquiry.

Telephone referee checks (not written references) are an essential part of selecting staff. If you do your own reference checking, you may not contact referees other than those who have been authorized by the applicant. So it is not acceptable to ring someone you know who knows the candidate if the candidate has not named that referee. In your discussions with referees be careful and clear at the outset that anything they tell you is intended to be used to make a selection decision, and that if they do not want their comments shared, you will not do so. Often referees expressly do not require confidentiality about what they say, but if they do require it, you may not breach that confidence.

Understanding of Confidentiality and Privacy

I have been surprised about the number of employees who do not understand the concepts of confidentiality and privacy. When you induct your new staff, go through employment agreements with them and explain what you mean when you say they cannot disclose or use company information they learn about at work. Give them some examples so they are clear.

Parental Leave

A recent Employment Relations Authority (ERA) case [*Bridget Isherwood v Insyn Limited NZERA Chch 30June 2011]* reinforces the need for employers and employees to be clear about their intentions and agreement about returning to work following parental leave. Those of you who have dealt with parental leave applications will know that the legal notice and other requirements are quite complex.

In this case Ms Isherwood said she had discussed and agreed with her employer (a hairdressing business) that she would take maternity leave and return to work at the end of her paid parental leave (14 weeks). Unfortunately she did not provide notice under s31 of the Parental Leave and Employment Protection Act 1987 (PLEPA) confirming the proposed date for commencement and duration of leave and a return date. While the employer had previously experienced employees taking parental leave, he had always taken a relaxed approach to maternity leave as he appreciated as a family man that things can change after a child is born. When Ms Isherwood emailed her employer prior to the end of her paid parental leave, about her return to work, she received a non-committal response. She then wrote a formal letter under s39 of the Act, which her employer said later he had never received. Around this time Ms Isherwood heard from a colleague in the business that the franchise where she had worked had been sold, and she assumed her employment had been terminated, so she sought legal advice. I will not go into the further complexities of the case, which determined in the end that Ms Isherwood was not in fact dismissed, and not owed lost wages, but was due compensation of $4000 for hurt and humiliation. The complexities and distress arose because the parties did not follow the prescribed processes for applying for and agreeing to parental/ maternity leave. These processes are set out on the Labour department website.

Did you know? Unpaid leave

There is no legal right to unpaid leave (except in certain situations like maternity leave) but the employer may grant it by agreement. An employer cannot compel an employee to take a period of unpaid leave, nor can an employee demand a period of unpaid leave.

Cheers for now……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. Chris Rowe is a Director of Corporate Dynamics Ltd; and is a Fellow (Mediation) and Member of the Accredited Panel of Mediators for the Arbitrators' and Mediators' Institute of NZ Inc. (AMINZ).