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Reflections from Chris Rowe on dealing with employment and other problems.
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Spring already? Reviewing a Newsletter I wrote last August reminds me how long it takes for some employment matters to be resolved. A year ago one of my employer clients heard that a case we had won in full in the Employment Relations Authority (ERA) was being challenged in the Employment Court, (EC) and that the former employee was applying for legal aid, which she was granted. The events leading to the litigation had occurred in mid 2012. The case was to be heard in the EC in November 2014, but the complainant has recently withdrawn her claim. While this was very good news, the financial and mental strain for participants in any litigation are significant, and even when matters are settled or withdrawn, there is inevitably collateral damage. While I always try to maintain a balanced view about the legal right to challenge, I have formed the recent view as a result of a number of cases I've been involved with on behalf of my employer clients, that there needs to be a much better filter at the Employment Court stage which takes account of the merits (or otherwise) of the challenge and the consequences for BOTH parties of a challenge proceeding.

Having got that off my chest, here is a small compilation of matters I hope will be of interest to you.

RECENT CASE 1: Work Trials

The advent of the 90 day trial period has unfortunately lulled some employers into a false sense of security about testing new employees in their work environment in the belief that they will not receive a personal grievance claim for unjustified dismissal if they dismiss an unsatisfactory employee during the trial. I have discussed the traps about these trial periods in previous newsletters, and I will keep reminding you of the pitfalls. The most important fact is that the trial period must be formally agreed in the employment agreement before the employee starts **any** work for the employer.

A 2013 Employment Court case deals with the even more murky area of experiential work, internships and work trials of less than 90 days.

As with all employment cases, there is a dispute about some of the facts, but *The Salad Bowl Limited v Amberleigh Howe-Thornley* [2013]NZEmpC152 concerned a three hour work trial which Ms Howe-Thornley performed at a mobile food cart outlet, and was a challenge to an ERA finding that Ms Howe-Thornley was an employee and was unjustifiably dismissed.

One of the disputed facts is what was actually agreed before the work trial began, but it is common ground that there was no discussion about remuneration, and no draft employment agreement was presented to Ms Howe-Thornley. The trouble began when the employer conflated two matters and consequently decided not to proceed with employing

the trial worker. The employer had found a discrepancy in the till on the day of the work trial, and so she focused her referee checking on the employee's honesty. On the basis of what she learned (which was inconclusive), the employer decided without further ado that the work trial employee had taken money from the till, and texted her to that effect, in the short, sharp style of text messaging which tends quite regularly to get people into trouble!

The EC case contains an extensive and quite helpful discussion about what is and what is not employment, and about industry practice particularly in the retail and food and beverage industries, where short work trials and longer unpaid or inadequately remunerated work experience and internships, are not uncommon, particularly during periods of high unemployment. The end result was that the employee was found to have been dismissed by text message, and the Court upheld the ERA award of $5000.00 compensation effectively to compensate the Employee for being branded a thief without any justification.

The learning from the case is that if you are thinking about engaging a prospective employee in any kind of work trial, make sure both parties understand what is proposed, and that what you are doing is compliant with employment law. This much is common sense and basic fairness. The supplementary learning is that it is never okay to accuse someone of theft without proper investigation.

Texting

And while on the subject of texting, a number of my employer clients are making it clear in their employment agreements that communications about absences from work must not be by text. The employees are required to telephone the employer, unless there has been an emergency preventing the employee from speaking him or herself. Texting and emailing have their place, but they do unfortunately allow employees to avoid a direct conversation with their employer.

Fixed term agreements

I am aware of a mistaken view in the marketplace that a fixed term employment agreement can be used as a trial.

The Employment Relations Act 2000 provides that an employer and employee may agree that the employment will end:

- At the close of a specified date or period
- On occurrence of a specified event; or
- At the conclusion of specified project.

AND

Before the employer and employee agree that the employment will end in this manner, the employer must:

- Have genuine reasons based on reasonable grounds for specifying that the employment is to end in that way; and
- Advise the employee of when and how their employment will end, and the reasons for the employment ending in that way.

The Act specifies that it is not a genuine reason if the purpose of the fixed term is to:

- Exclude or limit the rights of the employee under any Act; or

- Establish the suitability of an employee for permanent employment.

RECENT CASE 2: ***Employee Sleepovers and work – application to Boarding Schools and others***

Several years ago litigation between *Dickson* and *Idea Services Ltd (previously IHC)* settled on the eve of a hearing in the Supreme Court, resulting in a number of principles about when employees (eg. Carers) who do sleepovers are deemed to be working. In essence the greater the degree or extent of each of the following factors, the greater will be the likelihood of sleepovers being deemed to be work:

1. Sleeping over necessarily places significant constraints on an employee's freedoms, even where the employee lives in his/her own accommodation while undertaking sleepovers
2. Employees on sleepovers have significant and extensive responsibilities including responsibility for safety and wellbeing of others
3. The sleepover is beneficial to the employer in a number of respects.

The consequence of activity being called "work" is the applicability of the Minimum Wage Act. Previously employees doing sleepovers tended to be paid a special rate for the night rather than by the hour.

In a recent EC case, [2014] NZEmpC25, the Court decided that salaried matrons and headmistresses at Woodford House boarding hostels were working when they were undertaking sleepovers as part of rostered duties, and were covered by section 6 of the Minimum Wage Act 1983. At such times as the employees were paid by the hour, these employees were entitled to be paid no less than the Minimum Wage Order for each hour worked during a sleepover, and this was backdated. The essence of the decision is captured in the words of Counsel for the Plaintiffs that the employees were "engaged to be available rather than available to be engaged." I found this quite a useful rule of thumb.

The principles from this series of cases need to be considered in any situation where employees are engaged for overnight duties for their employer. The key message is that employees who are working must be paid in accordance with the Minimum Wage Act.

Employment Relationship Problems

I'm sure you are all familiar by now with the wording in your employment agreements which describes what the parties should do in the event of relationship difficulties. The standard wording is taken from the former Labour Department (now Ministry of Business Innovation and Employment or MBIE). The clear intent of the Employment Relations Act 2000 is that employees who have a problem should first talk to their employer, with support as required. Only then should they engage with the Mediation Service of MBIE.

I am noticing from cases I have been involved with, that there is an increasing tendency for employees to bypass their employer and make contact with MBIE who give them information about their options. MBIE is not authorized to give specific advice to employees or employers about specific situations, but does give information. Sometimes employees interpret this as advice, and threaten their employers with the words "I've spoken to the Labour Department and they've told me……" If you hear this kind of talk from an employee, do not despair, but you should take professional advice.

When employees go to MBIE first, employers are quite often being denied the opportunity to deal with matters at an early stage before they are taken out of their operational control. They then may feel forced into MBIE mediation. This is not always helpful or desirable for employers because the matter can escalate beyond what should have been necessary.

As a result of this I am working on some new wording for employment agreements for my clients which makes it clear that employees must give their employers the opportunity to deal with concerns at an early stage before the employer will agree to engage in an MBIE mediation. If that does not work, MBIE mediation is of course available and often helpful if the parties agree. Mediation is a voluntary process, and as an experienced Mediator in private practice myself, I am somewhat dismayed that this fundamental principle of mediation is being lost.

You should also know that there is an increasing range of mediation options available locally without necessarily involving MBIE. Early intervention mediation is a cornerstone of my own business, and I am fortunate to have access to respected colleagues to mediate for clients in cases where I am unavailable for any reason, for example where there might be a conflict of interest Watch this space for further information on this service.

Warnings, and any changes to an employee's conditions

I frequently receive calls from employers asking me to help them write a letter to an employee about his/her position being redundant, or to give the employee a warning. While I am always happy to assist with any letters, my advice is always that the employer needs to meet with the employee before writing a letter of this kind. First step is to seek a meeting with the employee, with appropriate support if the employee chooses, to alert the employee to the issue and then invite their feedback before making a decision.
I find employers often balk at the idea of a meeting, and in particular at the idea of an employee bringing a support person to a meeting. Apart from the fact that this is a legal entitlement, my experience is that having a support person or representative present is usually extremely helpful for the discussion. There are of course (rare) exceptions which come to mind, but support people/representatives or advisors are generally able to counsel the employee and take an objective view of the situation, which is what good consultation requires. After you have discussed matters, it is important to document matters for the record. If you prefer to write the letters yourself, I am always happy to cast my eye over your draft to check that you have not inadvertently put yourself in harm's way!

Workplace Bullying

WORKSAFE New Zealand has recently published an excellent resource booklet entitled *Preventing and responding to workplace bullying* (February 2014). The booklet provides best practice guidelines and gives options and examples of how to prevent and respond to workplace bullying. The publication is free and I recommend it. Go to www.worksafe.govt.nz for further information or to obtain a copy.

Cheers until next time– Chris Rowe