Around the traps July 2016

Reflections from Chris Rowe on current employment issues.
Chris Rowe, Director of Corporate Dynamics Ltd, is a Sandspit-based Employment Relations Advisor and Mediator.
Tel 09 425 9069 or 021 284 9292
Email: chris@corporatedynamics.co.nz
Web: www.conflictsolutions.co.nz

Welcome to winter. In this newsletter I update an issue raised previously, and then focus on some interesting case law which keeps coming from the Employment Relations Authority and the Employment Court, and the lessons to be learned.

Ongoing Holidays Act Saga

In my April newsletter I referred to the recently exposed issue of employers and payroll companies (most likely inadvertently) calculating various types of leave in a way which does not comply with the Holidays Act 2003. It is interesting that the media coverage is predominantly focused on employees who have been potentially underpaid, with little attention to the plight of larger employers who are potentially facing a significant liability for payments to existing and former employees, probably without them knowing they were doing anything unlawful.

Various lobbyists are encouraging the Government to alter/extend the statutory timeframe for retaining employee records (6 years) to allow for employees outside that timeframe who might have been shortchanged to make a claim. The argument is that as every day goes by, more and more employees are being denied a statutory right. I think any such change is unlikely, and even if it is made, it will take some time to implement.

The best information I have been able to source for employers at this time is that your focus should be on negotiating a reasonable outcome with current employees whom you may have discovered have been incorrectly paid for sick leave, bereavement leave and statutory holidays during their employment with you. If former employees make a claim, then obviously such claims have to be dealt with, if they are in time. The key legal situation here is that current employees are covered by the good faith provisions of the Employment Relations Act 2000, whereas former employees are not.

Every case is different, and employers are encouraged to check in with their payroll provider (if they have not already done so) about how various leave has been calculated, and/or take specific advice if they have received any claims or believe they may be at risk. I will continue to monitor the situation and keep my clients informed.

More cases about the 90 day trial period

The 90 day trial period continues to generate case law about when a trial period is valid and when it is not.

Section 67A of the Employment Relations Act 2000 defines a trial period as one that is for a specified period not exceeding 90 days. The main attraction of trial periods for employers is deemed to be that they can 'take a punt' on an employee, and if things don't work out, either party can end the employment relationship without employer concern that the employee might lodge a claim for unjustified dismissal.

The Employment Court has previously held that[1] as sections 67A and 67B of the Employment Relations Act remove longstanding employee protection and access to dispute resolution and justice (by removing the right to claim for unjustified dismissal) then trial periods must be interpreted strictly and not liberally.

As I have noted in previous newsletters, extreme care needs to be taken that the trial period is valid. Abundant case law has confirmed that the trial period can only be used for new employees, and is not valid unless the employment agreement has been signed off before any work (even one hour) has taken place. Now a recent case has determined that the trial period will be invalid if the length of the trial period is not expressly specified in the employment agreement. Read on.

In the recent case of *Rahman v Initiative! Un Ltd*[2] the Trial period clause in the relevant employment agreement stated, in part, that "*a trial period will apply for a period of not exceeding 90 calendar days employment to assess and confirm suitability for the position……"*
This wording was apparently taken from the Agreement Builder on the MBIE website.

The Authority determined that this trial provision should have stated that it was for a specified period not exceeding 90 days <u>from the beginning of the employee's employment.</u> *(my underlining).* The trial period in this case was found to be invalid, and Mr Rahman's claim for unjustified dismissal was then allowed. Without going into the nature of the unjustified dismissal claim, he was awarded lost wages of $7364.00 plus $8000.00 in compensation. If the trial period had been valid, he would not have been able to pursue the unjustified dismissal claim.

I recommend you check the wording of the trial period clauses in your employment agreements (particularly if you have taken them from the MBIE agreement-builder) and ensure that the wording refers to the start of the period as the date or commencement of employment as well as the following 90 days. For current employees who are still on trial periods, you may decide to clarify this with them and prepare a variation if your current wording is not explicit.

<u>Constructive Dismissal claim upheld for failure to act on bullying complaint</u>

Bullying is another category of regular employment case law. In *Mackay v Spotless Facility Services (NZ) Ltd* [3] a longstanding employee in a hospital kitchen complained to her manager that she was being bullied. Her manager acknowledged the complaint but the Employment Relations Authority (ERA) determined that the employer did not take reasonable steps to investigate the complaint properly. The ERA also criticized the Manager for not acting appropriately when he learned that another employee was collecting statements and letters about the complainant – a classic example of "mobbing." The ERA determined it was entirely foreseeable that the employee would confirm her resignation when her employer was not prepared to do anything to investigate the bullying actions. This amounted to constructive

---

[1] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010 NZEmpC111
[2] [2016]NZERA Christchurch 69, 25 May 2016
[3] [2016]Christchurch 52, 26 April 2016

dismissal, and the employee was ordered to pay the employee $8000 in lost wages and $7500 for compensation.

A significant part of my own work is investigating cases like this when employers decide that an independent reviewer is required. Increasingly the ERA and the Employment Court have an expectation that bullying will be taken seriously, including being investigated by an appropriate professional in a position to be objective. When allegations have reached the bullying stage, there is often a lack of trust between the parties, making it difficult for a direct manager (who may be implicated) to get to the bottom of the matter. An independent investigation is usually more palatable for employees involved, and is invariably more cost-effective than defending a claim in the ERA and/or Employment Court. If matters do reach the ERA or Court, an independent investigation is usually most helpful to the adjudicator.

Distinguishing between casual and part-time employees: implications for annual leave and holiday pay

Understandably, employers are often reluctant to make long-term commitments about new employees, and so they prefer to offer casual or fixed term employment, thinking that this might allow them to cancel the arrangement, if things don't work out, or change it to a more permanent arrangement if things go well. Then they sometimes make a decision to pay employees their holiday pay as part of their wages (often called pay-as-you-go), to avoid what seems to some to be a hassle about allowing annual leave to be taken.

The Holidays Act 2003 provides that employees are entitled to take holidays and be paid for them.

Section 28(1) of the Holidays Act 2003 provides that employers can pay holiday pay "as you go" **only** in the following circumstances:

- The employee must be on a genuinely fixed term contract (in accordance with Section 66 of the Employment Relations Act 2000) for less than 12 months **or**
- The employee works on a basis that is so intermittent or irregular that it is impracticable for the employer to provide the employee with 4 weeks' annual leave.

Just because an employer describes an arrangement as fixed term or casual is not determinative, because employment relationships can change over time, and often do.

There must be specific consent in the employment agreement for a pay-as-you-go arrangement. If there is no such consent, and if the employee makes a legitimate claim, the employer may have to pay out the annual leave as if the holiday pay had never been paid with wages. [4]

This was the case with a recent matter I was involved with, representing a former employee of a local business. The employee had worked for 7 years on a regular weekly basis; had holiday pay paid with her wages; and never took annual leave. Her situation did not fit either of the categories described in the bullet points above. In the ERA proceedings she was awarded 7 years of holiday pay in accordance with Section 28(4) of the Holidays Act 2003.

[4] Section 28(4) Holidays Act 2003

The lesson for employers in this is that you need to take special care when deciding what kind of employment relationship you are intending to enter into. If it is initially a casual or fixed term relationship, and that situation becomes more permanent, you MUST alter the written agreement and leave arrangements between the parties so that it properly reflects the current situation. The normal situation should be that employees accrue annual leave and take paid holidays every year.

Correct and current records of work hours and leave are required to be kept for 6 years, and they can be crucial if any case like this reaches the Employment Relations Authority or Court.

Farmer gets things very wrong

The ERA in Auckland recently investigated a claim by two farm labourers who had been dismissed by their employer after working for a few months in a sharemilking business.[5]

There was a range of issues to be considered including whether the employer was the company that owned the sharemilking business, or the person who owned that company. The company was in liquidation when matters came to the Authority. It appears that there had been no discussion between the parties as to who was the employer. There were no employment agreements, no IRD forms, and no tax had been paid. Mr Smith had paid the employees in cash.

Mr Smith told the Authority he had dismissed Mr McKinnon because he would not or could not do some of the work expected of him. While performance issues were discussed, the employee was not told that dismissal was an option.

The second employee was told that her hours were to be reduced from 38 per week to an "as and when required" contract. The Authority found that to be an act of dismissal. Both workers were found to have been unjustifiably dismissed. They were awarded more than $23,000 in wage and holiday pay arrears; $8,750 in compensation, and a contribution to their costs. Mr McKinnon's compensation had been reduced by 25% because the ERA held that he contributed to the situation by not doing the work expected of him.

This was an example of very irresponsible and unlawful management of employees. Possibly many of the errors which came back to bite this employer could have been avoided if he had followed correct and lawful process in engaging his employees:

- selecting carefully applicants who had proven they could do the work
- establishing clearly who is the employer (legal name and reporting arrangements)
- deciding and discussing the nature of employment (casual, permanent part-time, full-time etc)
- preparing and offering a lawful employment agreement, and ensuring it was agreed and signed off
- completing all necessary paperwork including PAYE matters and paying IRD
- dealing in good faith with employees at all times including when things started to go downhill.

It is a big decision and cost to employ even one employee, and it makes sense to do everything possible to make it work. Most employers do that, but this one did not, and paid the price. Sometimes employees do not meet the standard despite the very best selection processes. There is a correct process for dealing with those

[5] McKinnon & Anor v Smith [2016]NZERA Auckland 183, 9 June 2016

situations. The law requires that employees are treated fairly and in accordance with natural justice principles.

Well that's it for this newsletter. As a practitioner who mediates between parties, investigates complex employment problems, and separately acts for either employer or employee in disputes that reach MBIE mediation, the ERA and Court, I am fortunate to see matters from many different angles. I try to share this learning, and select cases and information which will be valuable to my clients. If there are particular employment issues you would like to see covered in future newsletters, please email me.

Please feel free to share this newsletter.

Kind regards
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 – BA, Grad Dip Bus Studies (Dispute Resolution) FAMINZ - 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).
Tel 09 425 9069 or 021 284 9292
Email: chris@corporatedynamics.co.nz
www.conflictsolutions.co.nz