



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

Welcome to any new clients reading this newsletter for the first time. To existing clients, you haven't received a newsletter for a while, but I hope this will make up for it.

My business continues to evolve to meet the varying needs of my clientele, and that has resulted this year in the following new activities:

- Presenting 3 seminars on behalf of AMINZ (Arbitrators' and Mediators' Institute of NZ) with a Wellington colleague on "Conducting Safe Employment Investigations". These seminars have been run very successfully in Auckland, Wellington and Christchurch, and will be rolled out to other centres during the coming year.
- Presenting a series of seminars on behalf of AMINZ for the Retirement Villages Association on "Effective Communication and Consultation."
- Working with an AMINZ team (as AMINZ Councillor responsible) to develop a Mediation scheme for clients of EQC throughout New Zealand, but particularly in Christchurch. The EQC Mediation Service is run independently by AMINZ. I am also on the Panel of Mediators for this work. Spending time on this project in Christchurch has been challenging, poignant, and inspiring.

In between times I have conducted some extremely complex employment investigations throughout the north; mediated or advocated in a large number of mediations; assisted many of you in a range of other employment advisory matters; and continued to be a panel member of the Lawyers and Conveyancers Disciplinary Tribunal including for some challenging high profile cases. And it's only September!

Recent Cases

There is a continuing flow of new employment case law to keep up with, and I'm summarizing some which may be of particular interest to my clients.

1. Suspension

My clients will know that employment agreements I prepare have a clause in them allowing employers to suspend an employee (usually on full pay) in the event of an allegation of serious misconduct. As with all alleged misconduct matters, it has previously been necessary for the employer to discuss the proposed suspension with the employee. Suspension usually assists both parties: the employer can conduct a proper workplace investigation without directly affected parties present; and the employee has time to consider his/her position and take appropriate advice.

In the recent case of *Davis v Leana Bins (2003) Ltd* [2012] NZERA Auckland 111, the Employment Relations Authority (ERA) determined that the procedural requirements in s103A(3) of the Employment Relations Act 2000 (Test of Justification) apply in the case of suspension (not only dismissal). This means that, even where suspension is provided for in the employment agreement, an employer must: investigate sufficiently whether suspension is appropriate before suspending; discuss the proposed suspension with the employee and give him/her a reasonable opportunity to respond to the proposed suspension before suspending; and genuinely consider the employee's response before suspending. In *Davis*, the employer did not comply with procedural fairness and was required to pay \$500 to the employee for unjustified disadvantage. The cost in this case is comparatively low, but the change in process for those considering suspension of an employee is significant.

2. Overpayment

Have you heard about *Foai v Air New Zealand* [2012] NZEmpC57? Foai started as a part-time employee on \$17 per hour for the first 30 hours, and a higher rate for overtime. In 2007 Foai was offered a temporary full-time role for which there was no set hourly rate in his employment agreement. It simply said "payment for hours worked will be as now, at your average earnings hourly rate."

Foai was subsequently overpaid for a period of 16 months. He realised his pay was too high and raised it with his manager, the HR manager, and payroll department on a number of occasions. They all told him his pay was correct. When Foai lodged a personal grievance (unsuccessfully) for unjustified dismissal in 2009, Air NZ counterclaimed for overpaid wages of \$42,000. The ERA determined this was a recoverable debt and ordered Foai to repay it. Foai appealed to the Employment Court which set aside the ERA's findings on the grounds that the Company had not identified a particular mistake that contributed to the overpayment. On the contrary the manager and payroll manager had denied any knowledge of the mistake. This meant that the common law right to restitution for "unjust enrichment" could not properly be taken into account. The Court concluded that the injustice which would result from compelling Foai to repay the money would significantly outweigh the potential injustice to the company if it was denied recovery.

Some good learning in here: if an employee thinks they're overpaid, it's probably worth a good look!!!

3. Excessive work hours and health and safety

Carpenter v Mondiale Freight Services Ltd [2012] NZERA Christchurch 20, is a compelling reminder of obligations under the Health and Safety in Employment Act 1992 to take all practicable steps to ensure the safety of employees while at work.

Carpenter's normal work hours were 8.30am to 5.30pm, but these increased when she assumed the work of an employee on parental leave who was not replaced. Carpenter complained several times during the year about her long hours (55-65 hours per week) and said her health was suffering. She was diagnosed with depression caused by work stress, and resigned. She lodged a personal grievance for constructive dismissal, claiming that her employer had breached the express and implied terms of her employment agreement by not providing her with a safe and healthy workplace. The ERA determined that the company had breached its obligation to maintain a safe workplace and Carpenter was awarded \$15,000 for non-pecuniary loss, plus lost wages.

Some tips from my own cases:

- a. The hoary chestnut: make sure you have employment agreements for all your employees. It doesn't matter whether they are casual or permanent. In fact, if you think they are casuals, that makes it even more imperative to have agreements with them. In the case of casuals, if there is no written agreement, it is very difficult to prove the intention of the parties. It is a legal requirement for all employees to have written employment agreements.
- b. Beware the micro-manager in your workplace. Reasonably regularly I deal with allegations of workplace bullying. Those of us who work in this field know that there is a high threshold for workplace bullying to be proven. But one of the most destructive workplace behaviours which can fit the description of workplace bullying is micro-management. The manager targets one of his or her staff, monitors their every move, and keeps a log of all the negatives about that person. The cumulative effect of this behaviour is that the targeted employee loses confidence, feels constantly undermined, and often leaves the workplace. The bully remains to fight another day, and the aggrieved employee, whose health is often affected, may strike back with a personal grievance. Apart from the nuisance value of personal grievances, it is unacceptable practice to allow bullies aka micromanagers to prosper. Watch out for them and deal with them!

Until next time, keep you and your employees safe, and do call if you have a problem! Cheers 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) 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).