Around the traps May 2011

Reflections from Chris Rowe on dealing with employment and other problems.
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In my last newsletter I promised to share more about recent changes to the Employment Relations Act 2000 (ERA 2000) and the Holidays Act 2003. The media tend to focus on the "political" issues like the 90 day trial period which is now available to all employers. I discussed this in my last newsletter and will say no more except that, if you wish to have a 90 day trial period in any of your employment relationships, you MUST have the employment agreement with the trial period provision signed off before the employee starts work.

Employment agreements
Like many employment relations advisors, I'm very pleased that one of the changes to the ERA 2000 is related to employment agreements. The ERA 2000 has always required that there be a written employment agreement between the parties. Problems often arise when employees are given the agreement and choose not to sign it, for whatever reason. The situation now is that employers must provide employees with a copy of the "intended" employment agreement between them; and, after giving employees an opportunity to take advice and/or consider the agreement, employers they must retain a copy of the "intended" agreement, **even if the agreement has not been signed.** I recommend that when you give your employees the agreement, you attach a cover sheet or letter which is dated and refers to the attached employment agreement being offered. You should chase up any recalcitrant employees who don't get around to signing the agreement, or to letting you know any concerns so you can discuss them. If having done all that, you as an employer need to respond to a request for the agreement (for example from the employee, an employee's representative, or a Labour Inspector) you can show that and when the agreement was offered. There is bound to be upcoming case law on this topic, to confirm (or not) what was the intended agreement between the parties. Watch this space.

Action needed? Ensure you have written agreements for all employees and start documenting when you offered them so that you can follow up, deal with any issues promptly, and if necessary provide proof that you have fulfilled your obligations. Labour Inspectors have expanded powers, and they do use them if the "gently gently" "enforceable undertakings" approach fails. Maximum penalties for business non-compliance have been doubled to $20,000. The latter would be for serious offences, but penalties can be in the region of $4000 for employment agreement non-compliance.

Mediation in the Labour Department
As many of you know, I am a Mediator in private practice, but I also regularly assist either employer or employee clients as an advocate in mediations conducted by the Employment Relations Service of the Labour Department. I am well known to the Labour Department Mediators, and regularly observe and am updated through workshops on the way they do things.

One of the recent changes to the ERA 2000 requires the Labour Department Mediation Service to develop options for "early problem resolution." As my own mediation practice was founded on, and continues to be focused on early intervention mediation, I am obviously a strong advocate for that. I am, however, cautious about some of the options now available in the statutory system. Parties can, for instance, request that a Labour Department Mediator make a written recommendation in relation to the issues in dispute, and the parties have 3 working days to either accept or decline that recommendation. If they accept the recommendation, the decision becomes final and binding. I can see that this option might be potentially helpful if, for example, there is a stalemate specifically about an amount of money to be exchanged. But it is not mediation, and the danger is that parties begin to expect that when they go to mediation, the Mediator will "sort it out". Mediation is fundamentally about an impartial person with no decision-making or advisory powers assisting parties to make their own decisions. These sorts of changes blur the edges of mediation practice, and are almost certainly intended to save cost, rather than fulfil the self-determination promise of mediation.

The Labour Department is beginning to talk about "Guided self-resolution" which is designed to guide parties towards resolving their own conflicts. Again I support this initiative, because I know it works. If you or an employer you know

would like me to share my strategies about early intervention in employment problem-solving, I will be happy to run a short, interactive and inexpensive workshop for you, or for a group of employers and employees.

The Jobs Market

A number of my clients are recruiting staff at present, and this indicates to me that there is some confidence returning to small business. Hooray! For one position I advertised for an Auckland client recently, I received 165 replies, and the majority were very good applicants! That's the biggest field of applicants I have ever dealt with, but it is not indicative of some professions/trades where it is difficult to find good people.

Did you know?
According to a recent TRADEME survey, the highest paid professions are IT project Managers, IT sales, Doctors and specialists, and Financial Controllers. The highest paid locations are (in order) Wellington, Auckland City, Central Hawkes Bay, Westland and Central Otago.

Interesting Case Law: Incompatability

Sometimes, even with the best possible recruitment policies and practices, and good management, there develops an irreconcilable breakdown in trust and confidence in an employment relationship, and it is not related to serious misconduct or poor performance. It is really about incompatability.

Maria Campuzano v Western Bay Dental Care Limited [2011] NZERA Auckland 198 (12 May 2011) was such a case.

Ms Campuzano was given a verbal warning following an altercation she had with another employee with whom she shared the role of Receptionist in this dental practice. The altercation appeared to be related to rostering. The situation developed into a dispute about the respective aptitudes of the two part-time receptionists, what they should be paid, and then how the practice should be run (mostly according to Ms Campuzano). Meetings and further warnings followed in an attempt by the Principal Dentist and her Practice Manager to resolve what was threatening to destabilize the practice.

Eventually, -after being accused among other things of bullying, being mean- spirited, cruel and otherwise deficient, - the Principal Dentist decided to dismiss Ms Campuzano, and the matter ended up in the Employment Relations Authority (ERA). It is important to note that the practice followed a careful process before the ERA became involved.

In its Determination, the ERA Member noted that a fundamental term of an employment contract is that "trust and confidence exists and is reciprocal." {*NZ Fire Service Commission v Reid*[1998] 2 ERNZ} The Member went on to say that "it will be an unusual and rare case in which an employer may justify dismissal of an employee because of an irreconcilable breakdown of trust and confidence in the employment relationship, rather than the usual grounds of serious misconduct. However, upon a close analysis……I am satisfied that this is such a case." The Member went on to say :

" I find that because of the egregious views of her employer, held by Ms Campuzano, and evident by her allegations against (her employer); and from which Ms Campuzano was not prepared to resile, there was an irreconcilable breakdown in trust and confidence between the parties. It follows that I also find that the dismissal of Ms Campuzano was the action of a fair and reasonable employer in all the circumstances."

Warning: Situations of this severity are rare and difficult, and you should always take appropriate advice before acting!

Difficult Conversations and letters

One of the benefits of engaging an independent person to assist with workplace issues is that we are trained and experienced in having those difficult conversations with employees which are essential to satisfactory ongoing relationships. It may also help you to develop your own strengths in facilitating these discussions.
In addition, it is important that letters written to employees about behavioural or performance issues are constructive and in accordance with the law. Any documentation which might be referred to in a personal grievance letter needs to be carefully prepared. If you need assistance with difficult communications, or just a final check, feel free to call me.

Kind regards - Chris Rowe

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