Around the traps November 2014

Reflections from Chris Rowe on dealing with employment and other problems.
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Now that the election is over (thank goodness), there is more clarity about the employment relations landscape over the next few years. The Employment Relations Amendment Bill passed into law on 30 October 2014 and will come into effect 4 months after receiving Royal Assent – probably April 2015. In this and upcoming newsletters I will discuss significant changes.

REST BREAKS

To the relief of many employers, and the angst of those who have fought for existing breaks provisions, the Bill changes the existing rules for employees' entitlements to rest and meal breaks. The aim is to move from a prescriptive to a more flexible approach, encouraging employers and employees to negotiate in good faith about workable arrangements as to how and when breaks should be taken. The proposed changes require an employer to provide the employee with reasonable compensatory measures (most likely time in lieu) where an employee cannot reasonably be provided with breaks.

This is not cause to immediately change your employment agreements, although those employers who have real difficulty with currently legislated set amounts of time for breaks, and time spaces between them, may decide to do so. There are sound health and safety reasons for regular breaks to be taken, and we can expect, for example, that when accidents occur at work, there will remain a focus on when/how/if the employee was tired or stressed when the accident occurred. I will be preparing suggested new clauses for employment agreements for those clients who need flexibility. Otherwise there is no need to change anything.

I should emphasise that the new rules will not override any requirements under other legislation, for example the specific regulations governing hours of work for drivers of passenger transport services; and the general duties on employers under health and safety legislation to take all practicable steps to ensure the safety of employees at work.

HEALTH AND SAFETY REFORM BILL

Speaking of health and safety, the Health and Safety Reform Bill is also making its way through parliament at present. This Bill is part of the "Working Safer" reform package announced by the Government in 2013. The resulting Health and Safety at Work Act is expected to be passed this year and come into force in April 2015.

You can access the Bill in its current form at:
www.legislation.govt.nz/bill/government/2014.

Employers are strongly advised to read more on the WORKSAFE New Zealand website, in particular the duties and obligations the Bill allocates to a PCBU, defined as a *person conducting a business or undertaking.* The PCBU is the person or entity in the best position to control risks to health and safety, as appropriate to their role in the workplace.

Key changes to current legislation are focused on:

- The PCBU's primary duty of care
- Overlapping duties eg with multiple contractors on a building site
- Health and safety duties on officers of a PCBU (such as company directors or partners) to actively engage in health and safety matters to ensure that the PCBU complies with his/her duties
- Strengthened worker engagement and participation in health and safety matters
- Wider range of enforcement and increased penalties for contraventions of the Act.

There will no doubt be significant information material sent to businesses as we get closer to the legislation passing. But employers are advised to start thinking about the implications of the new legislation for their businesses, and taking specific advice where necessary.

SELECTED CASE LAW OF INTEREST: Recent Case 1: Redundancy

I expect you are all aware by now that there are two separate issues to be considered when conducting restructuring leading to possible redundancies:

1. Was any redundancy for genuine commercial reasons; and
2. Was any redundancy carried out in a fair way, with genuine consultation and consideration of alternatives before a decision was made?

A September 2014 case in the Employment Relations Authority (ERA) - *Colin Mark Phillips v Juken New Zealand Limited* [2014] NZERA Auckland 419 – concerned Mr Phillips' redundancy from his position of Warehouse Manager at Juken.

There is no statutory requirement to pay redundancy compensation, but some employers do provide for such compensation in their employment agreement. Juken is a case in point. In accordance with a term of his employment agreement, Juken paid Phillips 20 weeks' wages as compensation for termination of his employment, but he raised a personal grievance alleging the redundancy was not for genuine reasons and was carried out in an unfair way. Phillips failed on the first count of genuine reasons; but succeeded on the second count of process deficiencies. He was awarded $8000.00 compensation for distress and humiliation accordance with s123(1)(c)(i) of the ERA 2000.

The Authority concluded that Juken had failed to establish that it had done what a fair and reasonable employer could have done in all the circumstances to seek Mr Phillips' response and any ideas on alternatives to the redundancy of his position; and to explore options for potential redeployment as an alternative to his dismissal. The ERA said Juken's actions were unjustified because those failures were defects in its procedure. The identified process deficiencies were detailed as follows, and provide good learning for any employer conducting restructuring:

- Phillips was called to a meeting without notice or indication of the topic of the meeting, and consequently had no opportunity to arrange for a representative or supporter to accompany him.

- Phillips was so shocked at the first meeting (of just 12 minutes) that he simply answered *yes* or *no,* and could not comment meaningfully on the proposal he had not seen or had any prior knowledge of.
- The meeting was informal. No notes were taken, and no written information was given to Phillips about the proposal or its rationale. Apart from being unhelpful to the employee, this did not assist the employer in attempting to corroborate its actions.
- There was a very loose discussion about redeployment, but Juken took no action on any opportunities which might be available elsewhere in the company.
- A further meeting was similarly without notice or opportunity to bring a supporter.

In summary the ERA described a general lack of sensitivity in carrying out the dismissal for redundancy. Earlier in the decision the ERA cited the case of *Rolls v Wellington Gas Co*[1] which said that *a significant paper trail or other solid foundation of evidence* is an important indicator as to whether the employer's decision on the redundancy of a position was for genuine commercial reasons.

My advice to clients is to always have two representatives of the employer present at formal meetings, one to be responsible for recording the discussion. Remember that an electronic record cannot be kept unless all parties present agree. The *Juken* case is one of a line of cases where the lack of a paper trail turned out to be critical factor in the final outcome. The ERA makes its decisions on the balance of probabilities, and if there is a lack of documentation, it simply makes their job harder.

Recent Case 2: Termination for Incapacity

An ERA case reported on 7 October 2014 – *Watson v Trainor Electrical Ltd* [2014] NZERA Chch 156 - has many similarities to a number of cases I have been dealing with in my practice about "Incapacity" of an employee in the workplace.

Trainor dismissed Ms Watson, an electrician, in December 2013 because of her inability to perform her normal duties in the foreseeable future. In April 2013 Ms Trainor had sustained a non-work injury. It was initially diagnosed as a strain and led to what essentially was 5 weeks' absence from work at that stage. In May she returned to work for 6 weeks. In June the initial injury was re-diagnosed and required surgery. There was some delay in establishing whether ACC would cover the surgery, and then there was estimated to be a 6-8 week recovery. In late July the employer wrote to Ms Watson indicating that the nature of their small business was that they could not keep her position open indefinitely, and that they were seeking medical opinion on when it was reasonably expected Ms Watson could return to full and normal duties.

The originally expected date for Ms Watson's return to work was 11 November, but like many injury situations, expectations for recovery were different from the reality. The physiotherapist updated the situation in late November to the effect that Ms Watson could now work fulltime on the following conditions:

"*no lifting or forceful movements; no heavy physical work; no prolonged sitting; no prolonged walking; no prolonged standing; cannot heavy lift, crouch, walk or stand for too long."*

[1] [1998] 3ERNZ 116,123 (EC)

Like many similar businesses, *Trainor* did not have light duties available for a recovering employee. Having decided that Ms Watson's full recovery was still a long way off, and that the uncertainty regarding staff availability was unsustainable from a planning perspective, they decided to terminate Ms Watson's employment, and this was done by letter on 2 December 2013.

Section 103A of the Employment Relations Act 2000 states that the question of whether a dismissal is justifiable :

Must be determined on an objective basis, by considering whether the employer's actions, and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal occurred.

In its determination, the Employment Relations Authority focused on whether, taking into account the resources available to the employer, its enquiry was sufficient. The employer should raise its concerns, allow a response and genuinely consider the response. While the employer did in July raise its concerns, it could not show that its later enquiries were sufficient. In citing the following paragraph from a precedent case of *Motor Machinists Ltd v Craig* [1996], the ERA has provided useful guidance for employers who are in this type of dilemma:

"(2) Where the illness or injury occurs which prevents an employee from returning to work the employer is not necessarily bound to hold that employee's position open indefinitely. However, if the employer chooses to dismiss the employee, its action must be justified at the time in accordance with the established jurisprudence. The employer must have substantive reasons for the dismissal and must show that the procedure it followed in carrying out the dismissal was fair. This ensures that the employee is not dismissed without the opportunity to provide information, such as medical reports, to prevent the employer taking such action, while at the same time allowing the employer to end the contract without needing to establish that the contract was frustrated."

The dismissal was found to be unjustified. The ERA said the deficiencies were significant, and that "*size and resources do not excuse the omissions".* Ms Watson had claimed $15,000 compensation. but was awarded $2000, largely because of weaknesses in other aspects of her claim.

A number of my clients have experienced the frustration, and in some cases significant business losses, from an employee's injury absence for continually extended periods. Medical certificates saying very little appear just before the previous one has expired, and there is often an inability, or lack of consent, to obtain useful information from the employee or his/her medical advisors. Employers are also reluctant to be seen to be harassing an employee while on injury or sick leave. There is a fine balance to be struck. Above all your process for dealing with these situations must be clear, fair and transparent. As with the previous case, it is important to have a good document trail.

EMPLOYMENT RELATIONSHIP PROBLEMS: Appendix to employment agreements

In my August Newsletter I advised you that I was preparing for my clients a suggested new Appendix for employment agreements about dealing with employment relationship problems. The primary reason for this is to emphasise to employees that they must first let their employer know of any concerns before contacting the Ministry of Business Innovation and Employment (MBIE) to seek a mediation. If you would like a copy of this wording, please simply email me that request and I will provide it free of charge. As with any

variation to an employment agreement, you must get sign-off from your employees before the variation becomes effective. Any variation presents an opportunity to talk with your staff either at a group staff meeting or in person.

Mediators North – local providers of mediation services

In the document I refer to above, there is reference to the opportunity for you to engage a private (as opposed to MBIE) Mediator to assist with early resolution of problems at work. With government emphasis on its own Mediation Service, it is often forgotten that there are highly experienced and credentialed mediators in private practice locally who can assist you and your staff to facilitate meetings about employment problems or to mediate disputes. The Employment Relations Act 2000 provides for the use of private mediators.

As a Mediator in private practice, I have over the years assisted many of you and your employees to resolve matters at an early stage. For some time I have been looking for, and have now found, a similarly qualified mediator with whom I work collaboratively, which allows for back-up when one of us is unavailable. We're both locally based, and can assist you promptly, close to home, and at a similar or less cost than you would expend travelling to an MBIE mediation in Auckland with a representative or advisor. We are both used to mediating with or without representatives present. We will always ensure that any potential conflicts of interest, for example as a result of previous work, are dealt with properly and in accordance with our Code of Ethics. The reality is that properly credentialed mediators are trained to be impartial in any dispute before them whether or not they have encountered the parties previously.

If you wish to know more about this service I will be pleased to hear from you.

As this is likely to be my final newsletter for this year, I will take this opportunity to wish you a harmonious and profitable lead-up to Christmas, a happy festive season, and a prosperous 2015.

I'll be taking some time off during January, but will be working right up until Christmas.

Cheers – Chris Rowe