# Around the traps September 2013

**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 my clients who are 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. I'm having a busy year to date, including dealing with a number of employment cases which have gone further through the statutory system than any of us would have liked. As my longstanding clients know, my business focus is on early intervention dispute resolution, so that any sniff of trouble and/or a personal grievance is detected early enough to deal with collaboratively, promptly, and inexpensively. Unfortunately for a number of my clients, we have come upon some former employees who appear to be on a crusade. I have represented two employer clients in the Employment Relations Authority (ERA) so far this year, and won both cases in their entirety. Unfortunately one of the employee applicants is seeking a de novo hearing in the Employment Court, and has applied for legal aid to do so. This means we have to go through it all over again. Given that the ERA determination was very decisive in my client's favour, this is extremely frustrating. Enough said!

In between times I have continued to conduct 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!

I'll start by sharing some interesting recent case law.

**Recent Case Law**

**(1) Redundancy**

As you may know, any employer proposing to make redundancies must be able to show that any dismissal as a result of redundancy is justified both substantively and procedurally. Until a recent Employment Court decision, it has been generally accepted that the Employment Relations Authority (ERA) or Court would not delve into the business reasons for any such decision, so long as the proposed redundancy or restructure was genuine, and was carried out in a procedurally correct manner.

However, the decision in *Rittson-Thomas t/a Totara Hills Farm v Davidson* [2013] NZEmpC 39 takes a further step. It says that, while it is not for the ERA or Court to substitute its business judgment for that of the employer, section 103A of the Employment Relations Act 2000 (ERA 2000), which is known as the "test of justification", requires the Court (or ERA) to enquire into a decision to declare an employee's position redundant and determine whether what was done, and how it was done, were what a fair and reasonable employer could have done in all the circumstances.

In the case referred to, Davidson was a Farm Manager whose position was made redundant to reduce farm expenditure. At the same time the employer created a junior position which Davidson was invited to apply for. He did not apply, claiming the redundancy was a charade. The Court was not persuaded that the redundancy was a charade, but the dismissal was held to be unjustified because the employer did not offer Davidson the new position. Given the evidence that Davidson was well regarded by the employer and competent to do the job, the Court held that a fair and reasonable employer would have offered him the position. The Court also enquired into the financial information supporting the redundancy proposal and found it to be wanting. Davidson was awarded $3000 in lost wages and $4000 compensation for hurt and humiliation.

The learning from this case is that employers contemplating redundancies must have done their financial homework and have it available to justify their plans. This is not about giving away commercially sensitive

information to employees. It is about being able to demonstrate that any proposal is likely to achieve any cost savings which are used as reasons for redundancy.

**(2) Misuse of sick leave**
Increasingly I hear of situations where employees appear to be abusing their sick leave entitlement. This case is about that.

In *Taiapa v Te Runanga O Turanganui A Kiwa t/a/ Turanaga Ararua Private Training Establishment* [2013] NZEmpC38, Taiapa requested 5 days' leave without pay. His manager said he could take 3 days off, but would have to work the other 2 days. Instead, Taiapa took the whole week as sick leave, claiming he had damaged his calf muscle. The medical certificate he provided later simply said (as they often do) that he had been medically unfit for work during the week in question.

Unfortunately Taiapa had put a photo of himself on Facebook during the time he said he was on sick leave. In addition another employee reported to his manager that he had seen Taiapa leaving town with his family early in the week. This all led to a disciplinary investigation during which Taiapa was evasive and provided contradictory information. He was in due course dismissed for serious misconduct as a result of dishonestly taking sick leave for personal reasons. The ERA determined his dismissal was justified, and he appealed to the Employment Court. In the latter forum Taiapa invoked the New Zealand Bill of Rights Act 1990 (NZBORA) which affirms citizens' rights of movement within New Zealand. The Court rejected the NZBORA submission, but allowed that, if an employee had sick leave available, and he was genuinely sick or injured, he could reasonably recuperate somewhere other than at home. The issue at the heart of the case was that the employer had reasonable suspicions that Taiapa's sick leave was not genuine, and the Court held that the employer was justified in investigating further. When Taiapa declined consent for his employer to seek further medical information and prevaricated about providing further information, he was warned by his employer that his employer might have no alternative but to conclude that its suspicions were well founded. They were, and he was dismissed. The Court concluded (as the ERA had) that the dismissal was justified.

**(3) Trial Periods**
The 90 day Trial period has now been available for employers since 2011, and has been used quite extensively. Predictably there is now significant case law about the pitfalls, which I have traversed in previous newsletters. Most importantly, the early cases were clear that the trial period must be agreed and signed off before the employee started any work (even one hour of work) for the employer. A recent case has taken a slightly different tack which will be interesting to employers who have had trouble getting signed employment agreements back from employees.

In *Simmons v Collins Stainless Steel Fabricators Ltd* [2011] NZERA Auckland 330, Simmons was offered an employment agreement including a trial period, and he said he had no issue with it. But after starting work he failed to return the signed agreement despite repeated requests from his employer to do so. Eventually the employer provided him with a new copy of the agreement with the trial period section highlighted, and Simmons signed it. The employer later dismissed Simmons during the trial period and Simmons challenged this dismissal on the grounds that he had started work before signing off on the trial period. The ERA dismissed the challenge. The ERA found that there was no requirement for the agreement to be signed. The ERA said that when Parliament created this law, it could not have been its intention that employees could evade the provisions of a trial period simply by not signing the employment agreement. The ERA referred to the good faith provisions of the ERA 2000 which require employees and employers to be responsive and communicative with each other and not to mislead each other. In particular, Simmons should not have misled his employer into thinking that the terms and conditions of his employment offered in writing had been accepted when in fact that was not the case.

While this might be taken as some relief for employers who frequently experience tardiness in getting employees to sign their employment agreements, it is important not to relax about this. An agreed, signed and dated employment agreement is the best possible protection when things go wrong.

**<u>Some tips from my own cases:</u>**

**(1) Casual employment**
Cases surrounding casual employment are rife, and I have dealt with several myself this year – including the one referred to above which is heading for the Employment Court. There is some reasonably settled law on

who is or is not a casual employee (see below), but there are still lots of grey areas, and it is important to be really clear about this when you offer employment. And yes, casual employees do need an employment agreement. One reason for caution is that if your so-called casual employee is deemed by the ERA or Court to actually be a permanent part-time employee, you could be up for paying annual leave for the entire period of employment even if you have already paid the employee holiday pay on a pay-as you-go basis.

The following are the characteristics which the courts have used to describe casual employment:

- Engagement for short period of time for specific purposes
- Lack of regular work pattern or expectation of ongoing employment
- Employment dependent on availability of employee or work demands
- No guarantee of work from 1 week to the next
- Employment as and when needed
- Lack of obligation on the employer to offer employment, or on the employee to accept any offer
- Employees are only engaged for the specific terms of each period of employment.

If an employee is rostered, that would suggest a regular pattern of employment and might count against an employee being casual. It is all about the particular circumstances, and being able to identify the intention of the parties. I strongly advise you, if in doubt, to take advice before categorizing employees as casuals.

**(2) Employment agreement templates**

As many of you know, there is an excellent employment agreement builder on the website of the Ministry of Business Innovation and Employment (MBEI) formerly the Department of Labour. I have noted there are some traps in using this tool. Choosing particular clauses and fitting them together for your particular situation can sometimes result in contradictions which cause confusion when the agreement is considered as a whole. Also there is often a temptation for employers to alter wording which inadvertently causes the agreement not to be compliant, or to create confusion. If you use this tool, it may be sensible to ask an employment specialist to review it quickly when you have completed it just to avoid any inadvertent problems in the future. I'm all in favour of employers using this tool, but care is needed.

**(3) Minimum Wage Act**

The Minimum Wage Act effective from 1 May 2013 is $13.75 per hour. Be careful that the 8% holiday pay for genuinely casual employees is on top of this rate. Holiday pay must be identified as a separate element on payslips. It is illegal for the hourly rate net of holiday pay to be less than the minimum wage.

Be careful when setting a casual employee's hourly rate as a round figure "inclusive of holiday pay" or "inclusive of kiwisaver" because it does invite enquiry as to whether this is genuine.

**(4) Selection of employees**

Often when I am conducting employment investigations I ask myself "Why on earth would this employer have employed this employee?" This is when I observe a clear mismatch between the two parties which has led to big trouble. It is not easy to describe what is meant by "good fit", but in my view the most common mistake employers make is to engage the wrong person. It often leads to extreme compatability issues which are very difficult to address down the track. You can't easily dismiss somebody for being a poor fit for the organization, i.e. a poor selection decision. Employers are well advised to put significant effort into the "front end" of employment: carefully considering the attributes required for any vacancy; making sure (in collaboration with others) that the person they select fits the criteria; giving careful thought to how they will relate to others and to your work culture; and conducting robust reference checks. If you get it wrong after all that, you will be unlucky. But at least you will have stronger grounds for ending the relationship if you need to.

**(5) Employment Investigations**

I've referred above to the fact that a significant part of my work these days is conducting independent investigations for employers. It is increasingly common practice where employers feel they need an objective view of employment problems – often about alleged bullying, harassment, theft or other dysfunctional behaviours, or where the managers are conflicted in some way. Often independent investigation reports form part of proceedings when matters go the ERA or Court, and can be extremely helpful to employers who are seen to have behaved fairly and objectively by seeking a specialist opinion.

I recently acted for an employee who was the victim of an employer's inadequate internal investigation which resulted in the employee's dismissal, without a fair process having been followed. The investigation was

conducted internally without hearing from all the parties involved. It was what I call a "quick flick" investigation. The employee is in the process of seeking redress, which is a damaging and destructive process for all concerned. Given the dollars this employer has already spent on the matter, it would have been more sensible and cost-effective for the employer to engage an external investigator who was independent of all the parties in the workplace.

The Continuing Legal Education (CLE) of the NZ Law Society recently published a very good booklet on "Disciplinary Processes – the thorny issues" in which the authors said the following:

"*Advantages of using an external investigator*

- Employees are more likely to cooperate and be more forthright with the information they provide as they are more likely to view the external investigator as someone who is interested in the truth rather than having a hidden agenda or preconceived ideas;
- Employees also see the appointment of a neutral investigator as indicative of the employer's good faith commitment to conducting a legitimate investigation; and
- An external investigator does not bring career aspirations and expectations of promotion to the investigation task and can instead focus on applying an objective approach to this task. "

There are of course disadvantages of using an external investigator, including lack of familiarity with the organizational culture (but this can also be an advantage); and some investigators might run too wide an investigation, but this can be avoided with tight terms of reference.

**(6) Changes to Employment Relations Act 2000**

There are a number of proposed changes currently going through the legislative process which will result in amendments to the Employment Relations Act 2000. Depending on the political environment next year, there could be reversal of those amendments, and even more, different changes. I highlight two of these below.

***Disclosure of information and duty of good faith***

The main change is to amend the duty of good faith so that the employer is not required to provide an employee with access to confidential information in the event of a proposed change to their ongoing employment if that information is:

- About an identifiable individual other than the affected employee;
- Evaluative or opinion material compiled for the purpose of making a decision that may affect an employee's continuing employment;
- About the identity of the person who supplied the evaluative or opinion material.

This change is effectively to get around the judgment in a 2010 Employment Court case which held that two employees who were made redundant were entitled to information <u>in the minds of</u> the selection panel members.

***Time frames for ERA determinations***

At the conclusion of an investigation meeting, the Authority will be required to provide either an oral determination, which must be followed within 3 months by a written record of the determination; or an oral indication of the Authority's findings to the parties, subject to any additional evidence, which must be followed by written determination within 3 months.

Having waited recently for 5-6 months for determinations from the ERA, I fully support this change!

**CONCLUSION**

I've tried to make up for a lack of recent newsletters with this rather longer one. I hope you find it helpful. If there is any matter you would like me to cover in my newsletters, I'll be happy to do so. Just email me.

Kind regards until next time.

Chris Rowe