Around the traps
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Reflections from Chris Rowe on current employment issues.
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A lot is happening on the employment front.
There has been significant media coverage about new legislation and responsibilities for both employers. This newsletter highlights some important dates and changes, and alerts you to other employment issues.

Health and Safety at Work Act 2015

This much heralded legislation came into effect on 4 April 2016. Most employers know that there are existing reciprocal obligations on employers and employees to maintain safety at work. Those obligations are continued and strengthened under the new Act. Worker engagement and participation in health and safety is a real focus in the new legislation.

The other significant change is the birth of a new acronym: a PCBU: a "person conducting a business or undertaking". A PCBU has a primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers. A PCBU must engage with workers who work for the business and are likely to be affected by matters relating to health and safety at work. Procedures which satisfy the provisions of the Act must be in place and followed. If they are not, the PCBU is liable for conviction and significant penalties under the Act. If you are a Director or CEO, you should read the provisions of the Act and commentary carefully. A good place to start, if you haven't already, is the WORKSAFE website: http://www.business.govt.nz/worksafe/

Minimum Wage Increase from 1 April 2016

The adult minimum wage increased to $15.25 per hour from 1 April 1016. The starting-out and training minimum wage rates increased from $11.80 to $12.20 per hour, remaining at 80% of the adult minimum wage.

A reasonably common issue which arises with the minimum wage is that employers who require employees to work additional hours for a salary based on the minimum hourly rate, are often not complying with the minimum hourly wage when their salary is divided by the hours they have worked. This is one reason to keep detailed time records even for employees on salary and ensure you are in fact complying with the legislation. See below about record keeping.

Employment Standards Legislation

Changes under this heading from 1 April 2016 include:

- Extension of the parental leave payment period to 18 weeks from 1 April 2016
- Employer and employee do not have to agree on specific hours, times and days of work, but if they do agree on these matters, those agreements must be recorded in the employment agreement
- Employers must give reasonable notice of changes or cancellation of shifts
- Employers cannot expect employees to be available for work without reasonable compensation
- More focus on record keeping
- Prohibiting unreasonable deductions from employee wages
- Prohibiting unreasonable restrictions on secondary employment.

Employers whose employees are on salary and who do not currently keep timesheets would benefit from doing so, especially where working hours vary, if only to enable easy tracking of hours of work if required.

Employers should not expect necessarily to have a visit from a Labour Inspector out of the blue simply because of this legislation. The record keeping requirements have not changed. However, in the event of an enquiry from an employee or a Labour Inspector, usually as a result of a burgeoning dispute, it is necessary to be able to retrieve time and wage records promptly.

Widespread Incorrect Calculation of Holiday Pay

Many employers heaved a sigh of relief when they handed over the calculation of holiday pay to one or other Payroll provider. It seems this was not necessarily the blessed relief expected!

We have learned only recently that a number of State sector organisations, ironically including the Ministry of Business Innovation and Employment (MBIE) itself, have been incorrectly calculating and paying their employees' holiday pay for some years, and are now faced with correcting and paying backpay to shortchanged employees.

A spokesperson for one of the payroll companies (Smoothpay) believes that the majority of payroll systems used in New Zealand fail to comply with the Holidays Act. Other recent media reports reveal that this is a widespread problem in both the public and private sectors. In the last couple of days it has been revealed that recent investigations by the Labour Inspectorate show that about 24,000 private and public sector workers have been paid less than they should have been through (probably inadvertent) breaches of the Holidays Act. Those of us who work in the employment field deal with disputes about holiday pay from time to time, but it is clear that the magnitude of this problem has taken everybody by surprise. So much so that I am expecting some kind of government intervention, probably earlier rather than later.

In the meantime employers would do well to contact their payroll provider, or their own records, to check whether their employees have been paid holiday pay in accordance with the Holidays Act 2003. If not, the first step is to remedy that situation for the future. Next step is to check records for previous employees, attempt to contact them, and calculate their backpay. Employee records are required to be kept for 6 years, and given the media focus on this matter it is likely that your former employees may approach you to find out whether they have been

correctly paid. Forewarned is forearmed. I am following developments in this matter and will keep my clients informed as more information comes to hand.

Case Law: Unjustified dismissal related to a certificate of medical fitness for work

A recent case in the Employment Relations Authority (ERA)[1] focused on the employer's process in dismissing an employee for not providing a medical clearance to say he was fit to return to work following a stand down. The employer's errors were that it depended on a rumour about an alleged incident involving the employee (Waititi), and did not allow Waititi's medical advisors to hear from witnesses about the alleged incident in order to confirm their opinions that Waititi was medically fit to resume work.

The ERA held that a fair and reasonable employer would have fully consulted with the employee's doctor and facilitated the process to enable the doctor to come to a decision on valid medical grounds on whether Waititi was fit to return to work. A fair and reasonable employer would not have prevented the doctor from interviewing witnesses who had the most relevant information on which to base his diagnosis. Lack of access to witnesses also prevented the specialist from coming to a diagnosis for the same reason.

The Authority also held that the company imposed the requirement of a medical clearance even before it had commenced its investigation into the alleged incidents. At that stage, there was no medical evidence available. At one of the meetings between the employer and the employee, the HR Manager announced right at the start that Waititi's employment at the company was over. He was not asked for comment at any time either before or after the dismissal.

The Authority found both unjustified dismissal and breach of good faith by the company. It ordered it to pay lost wages for four months, plus holiday pay owing for that period, as well as $18,000 in compensation. A penalty of $5000 was also ordered to be paid directly to Mr Waititi.

This case is interesting for a number of reasons, including the level of compensation, and the expectation of consultation between medical advisors and the employer and employee in cases of medical fitness and/or medical termination.

What do you think motivates your employees?

A recent report from recruitment firm Hays, found that being valued, recognized for a job well done, and understanding how their success is measured, are the top motivators for employees at work. Yes, higher than annual salary reviews, which reinforces previous studies which note that remuneration is not the key motivator for employees. What is significant in the report is that employers and employees had quite divergent ideas on the subject. The author of the report said this:

"*An engaged workforce is typically one in which employees understand and are committed to an organisation's values and objectives, and are passionately motivated to go above and beyond to help achieve its goals. But this doesn't just happen. Employers need to focus on both intrinsic and extrinsic engagement factors and understand what really matters to people rather than assuming they know best.*"

[1] *Waititi v Pedersen Industries Limited* [2016] NZERA Auckland 82, 11 March 2016

Change at Corporate Dynamics Ltd – but everything will stay the same!

Sadly I said goodbye to my life and business partner, Michael Taplin, on 13 January 2016. Michael was my co- Director of Corporate Dynamics Ltd, and a busy Consultant and Massey University teacher until health issues began to take their toll some years ago. Most recently he has been supporting me in my very busy employment relations and mediation practice. Many of you will have known Michael or, at least, have spoken with him on the telephone when I have been unavailable. Michael and I both committed to my retaining our business as usual, and that is what I am doing. I record this simply to prevent any concern that I might be leaving town or my business, and also to pay tribute to Michael and his huge contribution to the services provided by Corporate Dynamics Ltd over the years. He died content that I was committed to support our very special clients for years to come.

Kind regards until next time

Chris Rowe

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