



EXIT OPTIONS FOR CEOs



When the relationship between the Board and the CEO breaks down it is not possible to simply “work around” the problem. Something must be done. Strategies will vary as to the best means to address the situation. Different means will be adopted depending on the individual circumstances. Commercial interests may be at least in part in conflict with employment obligations. A fair, quick, pragmatic solution will almost inevitably be in the interests of both parties. Both parties will wish to preserve their reputations and future interests.

MATTERS TO CONSIDER

The parties need to consider a raft of matters that include:

- The announced reason for the CEO’s departure
- Advice to Stock Exchange (including advice as to any payout)
- Timing of the CEO’s departure
- Payment in lieu of notice
- Pro-rata bonus entitlements
- Short term incentive payments
- Long term incentive payments
- Share option entitlements
- Superannuation entitlements
- Golden parachute payments
- Retirement payments
- Change in control entitlements
- Resignation of directorships
- Release from personal guarantees
- Confidentiality
- Restraint of trade provisions

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Exit arrangements may also include the consideration of options such as:

- Garden Leave
- Continued Project work
- Secondment
- Contract Work.

Exit payments are likely to attract controversy if seen as “a payment for failure”.

However, the appropriate combination of the above options can result in satisfactory outcomes for all parties.

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HOW NOT TO SACK FOR SERIOUS MISCONDUCT

More than a year after the case was heard at the Employment Court in Auckland, the Chief Judge has issued the judgment in *X v Auckland District Health Board*.

The case concerned an application by X for reinstatement and compensation following his dismissal by ADHB after offensive electronic images were found in the hospital's IT system.



FACTS

X was a senior physician working as the director of a specialist unit and a director of research at Auckland City Hospital. He led a team of 25 researchers.

The case concerned two types of electronic material. The first consisted of images X took of his own genitalia using the camera on a cell phone purchased for him by the hospital. Because the phone automatically synchronised with the hospital's IT system, the images became stored within that system.

X subsequently attempted to email one of them to a female friend. However, he mistyped her email address and the email bounced back to the IT system. X's subsequent attempts to delete the bounced back email failed to fully erase it.

The second matter concerned an electronic calendar sent to X by a colleague. It contained pornographic pictures of elderly and obese women. The Court accepted that X only looked at one or two of the images before attempting to delete the calendar. However, he subsequently retrieved it and sent it to another employee. X's PA discovered the calendar in X's archives and reported its existence to ADHB, triggering the investigation which resulted in X's dismissal.

THE INVESTIGATION

X was invited to an urgent meeting. He was advised by the hospital's Chief Medical Officer ('CMO') that although he was entitled to representation, it would probably be unnecessary. ADHB was represented at the meeting by its lawyer, whose presence X had not been warned of.

X acknowledged sending the photographs and forwarding the calendar. He expressed regret, and admitted that his actions were wrong. At a second meeting, X expressed similar sentiments, but was unable provide any explanation of his behaviour.

After considering X's written responses to the allegations, and after a final meeting, ADHB dismissed X with immediate effect, but paid him 3 months' salary.

INTERIM REINSTATEMENT

X successfully applied to the Employment Relations Authority for interim reinstatement, and resumed work. ADHB unsuccessfully appealed that decision to the Employment Court.

POLICIES

ADHB's email policy distinguished between "*unacceptable use*" and "*illegal content*". It was common ground that none of the images involved were illegal through being 'objectionable' or 'restricted publications' under the Films, Videos and Publications Classification Act 1993. Accordingly, ADHB could only assert that the images were "*unacceptable*".



While holding that X was unaware of the e-mail policy (one of hundreds of policies promulgated by ADHB), the Court noted that the policy largely expressed common sense and professional expectations and accordingly could not have come as a surprise to X.

JUDGMENT – DISADVANTAGE GRIEVANCES

The Court held that X was subject to various unjustified actions by ADHB, including:

- Failing to properly provide X with an opportunity to be represented at the first meeting.
- Allowing the CMO to have the conflicting roles of Clinical Advisor to the inquiry and a professional colleague assisting X to deal with the inquiry's possible consequences.
- The CMO passing on to ADHB matters X told him in the expectation of confidentiality.
- ADHB bringing representation to the meeting without informing X in advance.
- Failing to acknowledge the existence records of interviews with staff and not providing these to X. The Court held that by asserting that it had no further written relevant material, ADHB communicated "*a patent untruth*", being the "*antithesis of good faith dealing*".
- The decision to dismiss was not made in accordance with the decision-maker's delegated authority, which required consultation with the CEO. No such consultation occurred.

The Court held that the unjustified disadvantage grievances were so integrally connected to the dismissal that they should be considered in assessing the justification for the dismissal.

JUDGMENT – UNJUSTIFIED DISMISSAL

The Court found that X's dismissal was unjustified on substantive and procedural grounds.

Procedural Justification

It was held that no fair and reasonable employer would have conducted the investigation as ADHB did. ADHB's flawed and unfair investigative and decision-making process was "*so unfair and unlawful*" that ADHB failed to show that it acted as a fair and reasonable employer would have done in all the circumstances, accordingly rendering the dismissal procedurally unjustified.

Substantive Justification

The Court noted that when it came to substantive justification and reinstatement, value judgments were unavoidable, and it was important “*that I am not seduced into making value judgments that say more about me than about the merits of the case that I am to decide*”.

The Court found that both the calendar and the cell phone images were misconduct and breaches of ADHB’s policies. It noted that “*Put simply, the plaintiff’s actions...were wrong*”. However, it also noted that even if the incidents met ADHB’s criteria for serious misconduct, it was not a foregone conclusion that dismissal should result.



The Court held that if ADHB had acted fairly, it would not have dismissed X. Instead it held that ADHB should have applied sanctions and behavioural correctives and safeguards to ensure that the misconduct would not reoccur. It held that the decision maker had rejected ‘behavioural change strategies’ out of hand, considering (wrongly in the Court’s view) that X was:

“such an incorrigible recidivist pornographer that he could not be permitted to practice as a clinician in a public hospital under any circumstances”.

Disparity of Treatment

While not upholding X’s claim solely on the basis of disparate treatment, the Court noted that an incident involving another employee in similar circumstances had not resulted in dismissal.

REMEDIES

X sought permanent reinstatement, compensation for financial loss and \$60,000 for hurt and humiliation.

X’s contributory conduct was a significant issue. The Court rejected (as ADHB did) X’s excuses involving medication and injury, describing them as “*a very belated explanation*” that “*does not survive even cursory scrutiny*”. Instead the Court considered that X’s conduct

“probably falls into that category of human behaviour that defies rational explanation, the occasional and spectacular Zidane¹ “brain explosions” of human existence.”

Despite noting the conduct was “*adolescent and frankly stupid*” and that “*Put simply, had he not engaged in these logically inexplicable acts of self-gratification, it is unlikely that he would have been dismissed*”, the Court reinstated X, finding that not to do so would essentially end his career, and would be “*all too draconian and unwarranted an outcome*”.

¹ *Italy v France*, FIFA World Cup Final, Germany July 2006.

The Court agreed that X's bizarre reprehensible conduct caused ADHB to consider whether its necessary high level trust and confidence in him was broken and whether it could be restored. However, it did not agree that a reasonable employer in ADHB's position would have concluded that there was such an irretrievable loss of trust and confidence that X both had to be dismissed and could not be reinstated. It also held that the decision maker's conclusions "*ignored completely the ability of humans generally, and the plaintiff in particular, to reform, to learn from their experiences*".

CONCLUSION

X was reinstated but awarded no other remedies. His identity had been the subject of an interim non-publication order which he sought to have made permanent. This was opposed by ADHB.

The Court declined to make a permanent order, noting a need for patients to be able to choose whether to be treated by X, and the fact that X brought the situation on himself. However, a further interim order was made so as to preserve X's appeal rights.

KIWISAVER

From 1 July employers will have obligations to new staff in relation to the KiwiSaver scheme.

Key Points for Employers:

- *Enrolling new employees* – As from 1 July 2007 employers must give new employees (excluding casual and temporary employees) an Information Pack (to be supplied by IRD in May/June) within 7 days of their starting work. New employees will be automatically enrolled in KiwiSaver and have 8 weeks in which to opt out by telling their employer or IRD. Employers must give IRD the names, IRD numbers and addresses of all new employees and those existing employees who want to join KiwiSaver.
- *Choosing a KiwiSaver scheme provider* – Employers can select a preferred KiwiSaver provider which all employees will be allocated to, unless they nominate their own provider. If employers do not select a preferred provider they will be allocated a default provider.
- *Making deductions* – Employers will be required to deduct KiwiSaver contributions from those employees who join KiwiSaver or are automatically enrolled. Employees may make deductions of either 4% or 8% of gross salary. Contributions must be forwarded to IRD on a monthly basis along with PAYE payments.
- *Employer contributions* – Employers have no obligation to make employer contributions. Employer contributions of up to 4% (matching employee contributions of up to 4%) are exempt from tax.



- *Existing superannuation schemes* – If an Employer already operates a superannuation scheme for employees that employer will have a number of options; including converting its existing scheme to KiwiSaver, adding KiwiSaver to its current scheme, or applying for an exemption from the automatic enrolment requirements of KiwiSaver.

If you have any questions about Kiwisaver please contact us.

→ ***Quigg Partners are holding a KiwiSaver seminar on 29 May. See page 11 for details.***

HOLIDAYS ACT CASES

Originally touted as clear and simple legislation to govern the traditionally complex issue of leave entitlements, there are few signs to suggest that employers and employees are finding leave entitlements under the Holidays Act 2003 clarified or simplified.

Since the Air New Zealand case in November 2006 (reported in our December newsletter) Holidays Act issues have remained at the forefront of employment law. The Supreme Court on 7 March granted the Airline Pilots' Association leave to appeal that decision, while in the meantime two further cases have been decided, as parties seek clarification of their rights and liabilities from the courts.

A BUSMAN'S HOLIDAY - DO 4 WEEKS TURN INTO 5?

Under the Holidays Act, from 1 April 2007 employees' minimum statutory entitlements to annual leave increase from 3 to 4 weeks. In *NZ Tramways and Public Transport Employees Union v Transportation Auckland Corp Ltd* the Employment Court addressed a claim that the new annual leave entitlements in the Act led to employees being entitled a fifth week of annual leave.

The Collective Agreement

The plaintiff unions represented bus drivers for Stagecoach and Cityline in Auckland. A collective agreement granted employees 3 weeks' annual leave plus "*a further holiday of one week per annum in recognition of the nature of the work making a total of four weeks leave per year*".



The Claim

The unions sought declarations from the Court to the effect that employees would become entitled to a total of 5 weeks' annual leave from 1 April on the basis that:

- the "*further holiday of one week per annum*" was a purely contractual entitlement existing separately from statutory entitlements;
- therefore the extra 1 week in the CEA must be added to, and not counted as part of, the minimum 4-week entitlement under the Act vesting on 1 April.

The Decision

The Court dismissed the claim. It examined the purpose of the extra week's leave in the CEA, finding that it was in recognition of long and unsociable working hours. The extra week was to ensure drivers had adequate time for rest and recreation in light of these working conditions.

The Court found this was essentially the same rationale as the policy reasons for providing minimum annual leave entitlements by statute.

The Court held that the extra week of leave was therefore an “*enhancement*” of the statutory entitlement. It merely improved on minimum requirements. It was not an additional entitlement standing apart from the statutory entitlements, as occurs with different categories of leave, such as long service leave or tuition leave for example.

Comment

- The Court’s decision appears to confirm the common sense position that employees who presently have an entitlement to 4 weeks of annual leave will not automatically become entitled to 5 weeks from 1 April 2007.
- The exact words of an employment agreement will usually be determinative in disputes of this nature. The key issue appears to be whether extra leave provided by contract is an *enhancement* of existing statutory entitlements to annual leave (currently 3 weeks) or a separate stand-alone category of *additional* leave.
- It is anticipated that in most cases the answer will lie in extra leave being treated as an enhancement of statutory entitlements. In that regard employment agreements that currently state that the annual leave entitlement is 4 weeks seem unlikely to be susceptible to challenge.

THE FIREFIGHTERS’ CASE

- FINDING OUT (AGAIN) WHAT WOULD “OTHERWISE BE A WORKING DAY”

An often-litigated issue under the Holidays Act 1981 related to what constituted a day that would “*otherwise be a working day for the employee*”. This awkward terminology was again utilised in the 2003 Act, and has again fallen to be interpreted by the Court of Appeal.

The Collective Agreement

In *New Zealand Fire Service Commission v New Zealand Professional Firefighters Union* firefighters were employed under a collective agreement. The CEA provided an intricate roster system whereby:

- Firefighters were assigned to one of four “watches”;
- Each watch worked on a 160 day roster;
- Each roster comprised 18 cycles of 8 days;
- In any 8-day cycle, firefighters were rostered 5 days on, 3 days off;
- At the end of all the 8-day cycles, firefighters took 16 days off work; 14 of which were designated in advance as leave, 2 of which were rostered days off (not treated as leave).



The CEA dealt with annual leave and days in lieu (for working on public holidays) together. It provided for a cumulative leave balance covering all annual leave and day-in-lieu entitlements.

When firefighters worked on a public holiday, they were paid double time and provided with a day in lieu. Any days in lieu that had been earned were deemed to be included as part of the 14-day leave period at the end of the 160-day roster.

It was common ground that the 14 day leave period at the end of each 160-day roster period met the minimum entitlements to annual leave and any entitlement to a day in lieu that could be earned for working on public holidays in a year.

The 2003 Act requires a day in lieu to be provided and actually taken on a day that would “*otherwise be a working day for the employee*”.

The Claim

The firefighters claimed that the CEA breached the Act because it required lieu days to be taken during the 14-day leave period. That period was said to comprise only days the firefighters were not expected to work and so could not be days that would “*otherwise be working days*”.

The Employment Court agreed and allowed the claim. On appeal, the Court of Appeal overturned the decision, finding for the Commission.

The Court of Appeal Decision

The majority noted that whether a day would otherwise be a working day for an employee is an “*intensely practical question*” relating to what “*genuinely constitutes a working week for the employee*”. The days an employee would ordinarily work were the days that would otherwise be working days.

The Court held that the 160-day roster system was actually little different to a full time, Monday to Friday employee. In that situation, Monday to Friday would be days that would otherwise be working days for the employee, while Saturday and Sunday would not be.



The Court noted that the 160-day roster system operated in the same way. The first 5 days of each 8-day cycle were days that would otherwise be working days, while the last 3 days were not. The only difference was that the days the firefighters would take leave had been agreed in advance. But the Court did not consider this factor distinguished the firefighters’ situation from that of any other employee.

The Court therefore found that even though leave days had been identified and agreed in advance, 10 of the 16 days at the end of the 160-day roster period were days that would otherwise be working days for the firefighters. It held that the firefighters’ days in lieu could be taken on any of those 10 days.

COMMUNICATION DURING BARGAINING

The Court of Appeal has released its decision in an appeal from an Employment Court judgment regarding Christchurch City Council (‘the Council’) and the Southern Local Government Officers Union (‘the Union’). The case concerned communications between the Council with Council employees who were members of the Union.

The Law

In accordance with s32(1)(d) of the Employment Relations Act, the duty of good faith requires a union and an employer bargaining for a collective agreement:

- (i) To recognise the role and authority of those chosen by each party as its representative;
- (ii) Not to directly or indirectly bargain about matters relating to terms and conditions of employment with persons whom the representative or advocate are acting for, unless the union and employer agree otherwise; and
- (iii) Not to undermine or do anything likely to undermine the bargaining or the authority of the other in the bargaining.

The Issue

The central issue in this case was the extent to which s32(1)(d) prohibited the Council communicating with its employees without the Union's consent.

Employment Court Decision

The Full Court of the Employment Court had held that:

"The effect of s32(1)(d)(ii) is that, on matters of bargaining, the union and the employer must neither engage in negotiations that relate to the bargaining nor communicate or correspond with the persons for whom a representative is acting."

The Court noted that "relating to bargaining" was a general term not to be read down, and was not limited to communications that persuade or undermine. It held that:

"Communications and correspondence need only concern the bargaining which has been or will be initiated, to be regarded as relating to bargaining for a collective agreement."

Court of Appeal Decision

The Court of Appeal held that the Employment Court had misinterpreted s32. Having considered the legislative history of the section (the terms of which had been somewhat altered at Select Committee stage), the Court of Appeal held that the Employment Court's interpretation would result in:

"a general ban on communications between employer and employees during bargaining, when the parliamentary intent was clearly to prevent communications only to the extent that they undermine or might undermine the bargaining or the union's authority in the bargaining".

Such a blanket ban had specifically been rejected by the Select Committee. The Court of Appeal instead held that section 32(1)(d)(ii) prevents employers negotiating or attempting to negotiate directly with employees, in circumstances where those employees have a union acting for them. Accordingly it was held that the Council was only prevented from communicating with its employees in so far as:

- Such communications amounted, directly or indirectly, to negotiation about terms and conditions of employment, without the Union's consent; or
- Such communications undermined or were likely to undermine the bargaining with the Union or the Union's authority in the bargaining.

After agreement by both parties that the Employment Court was wrong on the point, the Court of Appeal also held that section 32(1)(d)(ii) cannot apply where bargaining “*will be initiated*”.

The Court held that the Council “*succeeded on several of its arguments and its future conduct will not be quite as restrained as it would have been under the Employment Court’s reasoning*”.

Comment

The Court of Appeal’s decision resolves some of the confusion and uncertainty that surrounded the Employment Court’s decision, and accordingly has been welcomed by employers’ groups.

AUSTRALIA – DISMISSAL BY NUMBERS

The recent Australian case of *Baldacchino & Ors v Triangle Cables (Aust) Pty Ltd* illustrated that employees of New Zealand companies ‘related’ to Australian companies will be counted as being employed by the Australian company for the purposes of the “100 employees or fewer” exemption for unfair dismissal under the Work Choices legislation.

The exemption provides companies that employ less than 101 people with immunity from unfair dismissal action. Predictably, there has been a spate of cases by dismissed employees arguing that their former employer’s workforce numbers greater than 100.

In the *Baldacchino* case, the evidence of the employer, Triangle Cables was that it had 97 employees - 88 employees of the Australian company and nine employees of two related corporate bodies: Triangle Cables Singapore Pty Ltd and Triangle Cables (NZ) Ltd. These companies fitted squarely within the definition of “related bodies corporate”, the definition of which includes: a holding company or subsidiary of another body corporate, or a subsidiary of a holding company of another body corporate.



The former employees submitted that the following entities should also be included in the employee count of the Australian company:

- Triangle Cables (Germany), Triangle Cables (USA), Triangle Cables (Italy) and Triangle Cables (Netherlands).

The defendant company gave evidence that these were trading names only and not incorporated bodies that employed people.

- Three labour companies used by the defendant company.

The defendant company submitted that none of those companies was its related body corporate and it did not have any control over the employees of the labour companies. Interestingly, the representative for the employees did not, despite being given the opportunity to do so, argue that the arrangements with the labour companies were a sham.

- Triangle Cables Thailand.

The defendant company submitted that it did not control the composition of the board of directors, could not control more than half the votes that might be cast in a general meeting of the board, did not hold more than half of the issued share capital and couldn’t

determine the outcome of decisions about financial and operating policies in the Thai company; therefore the Thai company was not a related body corporate.

The Commissioner ruling on this case accepted the defendant company's position on each point, finding that none of the additional entities referred to by the former employees were "related bodies corporate". The Commissioner found that the only relevant entities for the purposes of counting employees were the Australian company and the New Zealand and Singapore related companies. Accordingly, there were less than 101 employees and therefore it was not open to the former employees to claim that they were unfairly dismissed.

KIWISAVER SEMINAR

Quigg Partners, together with an expert from IRD, are holding a seminar on the new KiwiSaver legislation on Tuesday 29 May. The Seminar will run from 12.15pm to 2pm accompanied by a light lunch and refreshments. To register please complete this form and return it to Quigg Partners, PO Box 3035, Wellington OR EMAIL TO: evelynpong@quiggpartners.com

Name _____
 Position _____
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Please **enclose** your cheque for **\$80.00 inclusive of GST** or alternatively we can invoice you.

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