CEO PAY AND PERFORMANCE

As the economy enters more challenging financial times and this is reflected in the reduced value of some organisations, shareholders are asking whether a reduction in company value should result in a decrease in what CEOs earn.

Recent Australian research suggests it doesn’t. The Business Review Weekly recently reported on research that analysed the top 500 listed companies between 1996 and 2006. This research suggests many CEOs exert too much influence over their boards when it comes to setting pay and performance targets. The finding, which replicated the outcome of other overseas studies, found there was no relationship between CEO pay and company performance.

In New Zealand is the situation different?

The 2008 Sheffield Executive Remuneration Survey shows New Zealand still lagging well behind Australia and many other countries in the amount of performance pay CEOs may aspire to earn. We have had some recent examples of the State Services Commissioner leading the way in publicly reducing Public Sector CEOs’ pay for specific examples of non-performance. Indeed the State Services Commissioner has previously imposed a penalty on himself equivalent to a deduction of 2.5% from his annual salary.

The Challenges

Experience in this area would indicate that Boards face challenges in:

- Setting relevant performance measures and targets at the outset.
- Reviewing those measures and targets on a regular basis so that they align with the organisation’s current business plan.
- Having clear criteria against which to evaluate those measures and targets.
- Disciplining themselves or sub-committees to regularly make assessments with their CEOs in a transparent and procedurally fair manner.
- Not being afraid to be critical where criticism is justified.
- Providing criticism in a constructive and timely manner.
- Acting decisively when there is a need to do so.

Board Only Time

For all the above reasons we endorse the practice espoused by that highly experienced Company Director, Rick Bettle, that ‘Board only time’ is essential. This comprises a regular 15 minute session before every meeting starts for directors to discuss matters without management being present.
Remuneration for Australian and NZ CEOs Increases

A study by the Australian Financial Review has shown that the average remuneration for CEOs in Australia has increased markedly. In 2006 the average remuneration package was $1.99m. In 2007 the average remuneration package was $2.56m. Leading CEO beneficiaries:

<table>
<thead>
<tr>
<th>Name</th>
<th>Company</th>
<th>Remuneration</th>
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</thead>
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<tr>
<td>Rupert Murdoch</td>
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<td>Allan Moss</td>
<td>Macquarie Group</td>
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</tr>
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<td>Phil Green</td>
<td>Babcock &amp; Brown</td>
<td>$17.03m</td>
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<tr>
<td>Frank Lowy</td>
<td>Westfield</td>
<td>$14.3m</td>
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A report in the Weekend Herald of 22 March 2008 showed that in 2006 the average remuneration package of a New Zealand CEO was $1.05m. In 2007 it was up to $1.27m. Leading CEO beneficiaries were:

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<th>Name</th>
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<tr>
<td>Theresa Gattung</td>
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<td>SkyCity Entertainment Group</td>
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<td>Andrew Ferrier</td>
<td>Fontera</td>
<td>$3.37m</td>
</tr>
<tr>
<td>Graham Hodges</td>
<td>ANZ Banking Group</td>
<td>$2.14m</td>
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Shelf Lives of American Managers

In late 2007 recruiter Spencer Stuart reported that in the United States, the average tenure of a Chief Marketing Officer was only 26 months. This compared with a Chief Executive of some 44 months. The graph below shows the ‘life expectancy’ in the United States of the various managers.
Abusive Email Dismissal

The Employment Relations Authority has awarded former Auckland University Senior Lecturer Paul Buchanan a total of $66,000 compensation, having found that the University unjustifiably dismissed him. The Authority however declined Dr Buchanan’s application for reinstatement.

Facts

Dr Buchanan was a Senior Lecturer in Latin American and Environmental Politics at Auckland University. He was described as being recognised internationally as an authority on Latin American politics, US foreign and security policy, unconventional warfare, terrorism, intelligence collection and analysis, authoritarianism, democratisation, comparative labour relations and grand strategy.

The University dismissed Dr Buchanan for serious misconduct, having concluded that an email he sent to an international student undermined the trust and confidence the University had in him.

The Email

The email was sent as a response to a request by a student, Ms Asma Yammahi, for an extension for her final assignment. Ms Yammahi first requested the extension seven days before the assignment was due on the basis of her father’s death. Dr Buchanan’s initial response was compassionate, but noted that Ms Yammahi would need to obtain from the University’s medical centre verification of her loss and the stress it had caused her. Ms Yammahi followed Dr Buchanan’s instructions and a week later (the day after the essay was due) emailed him to set up a meeting. It was Dr Buchanan’s response to that email on 30 May 2007 that led to his dismissal. He wrote:

Dear Asma:

I say this reluctantly but not so subtly: you are not suitable for a graduate degree. It does not matter if your father died or if you have a medical certificate. I have been too nice and given you too high marks all along (at c+). I do not anticipate that you will do better in the final exercise. You are already a day late. The extension is meaningless because you have not attended for the last few classes and are the worse [sic] performer in the class. Of course by a far stretch, You [sic] will have the obituary of your father, but even if available and the student health people might have believed you, I do not. You are close to failing in any event, so these sort of excuses-culturally driven and preying on some sort of Western liberal guilt-are simply lame.

Prove that your father died and you were distraught and unable to complete assignments in spite of your abysmal record to date as an underperforming and underqualified student and perhaps you might qualify for an extension to get a C. But as it stands, you will flunk since your [sic] are already a day+late, and you [sic] track record is poor.

By the way-are you a Hoadley student? That would explain a lot of things.

In a word: NO-I do not accept your extension request.
At 4.15 the following morning, Dr Buchanan again emailed Ms Yammahi. Dr Buchanan’s view that this email constituted a sincere apology was not shared by the Authority, which described it as a “half hearted” and “confusing” apology that “completely ignores the fact that Ms Yammahi applied for her extension over a week earlier, and that her email on 30 May was merely a request for a meeting to produce the documented evidence Dr Buchanan had requested.” The Authority held that in further communications with Ms Yammahi, Dr Buchanan continued to justify his 30 May response and consistently reminded her of her failings. On 1 June, he again emailed Ms Yammahi stating: “[sic] I do not hear back from you I must assume that you do not have a valid medical or mental health certificate and will not hand in the final essay” and noting that:

“extensions cannot be granted AFTER the submission date. You made your request AFTER the last class and submission date. Hence-and the reason for my original annoyance-you had missed the deadline for requesting an extension based upon certified medical or mental health reasons. I was perfectly justified to say no under those circumstances.”

The Authority expressed surprise at this email, as Dr Buchanan knew that Ms Yammahi had the medical certificate on 30 May and that she had applied for an extension a week before the assignment was due. It held that this email compounded any distress to Ms Yammahi, while subsequent correspondence with her constituted a “heavy handed approach from a senior lecturer writing to a young international student and in conflict with Dr Buchanan’s pastoral care obligations.” Ms Yammahi handed in both her essay and medical certificates on 6 June 2007 and received a passing grade for the assignment.

Disciplinary inquiry

The University advised Dr Buchanan on 8 June that there was a serious issue to be investigated by the University. Dr Buchanan responded acknowledging that he was wrong to have been angry with Ms Yammahi and setting out the steps he had taken to apologise.

At a disciplinary meeting with the University, Dr Buchanan relied on his early apology and the fact that he had granted the extension and given Ms Yammahi a passing grade as mitigating factors. He also identified steps which he would be prepared to take to ensure that such behaviour would not be repeated and emphasised that he had an unblemished record over 22 years with no formal student complaints. Prior to a second meeting, Dr Buchanan was advised that that assertion was incorrect. The University referred to two issues in 2007, one involving a student and the other a fellow staff member. Both issues related to the content of emails sent by Dr Buchanan.

In one case, Dr Buchanan had responded to an honours student who missed a lecture due to a conflict of commitments, stating “I do not engage in hand holding of immature or ill-prepared students. I suggest you take responsibility for your course preparations immediately.” Dr Buchanan later said “Given that you knew when the first day of class was long in advance, what sort of excuse is it to say you had a “prior commitment?” Geez, get your priorities straight! I suggest that you drop the course as it is over-subscribed ….” In the second case, Dr Buchanan told a staff member to “grow a thicker skin”, and that “[you are] emotionally fragile and have things to deal with that transcend our employment relationship. Go solve them.”
**Termination**

At a final meeting, Dr Buchanan was told that the University had concluded that his total history suggested he would offend again. He was dismissed without notice for serious misconduct on the basis that the email he sent to Ms Yammahi was so serious that it undermined the trust and confidence the University had in him.

**The Authority’s Determination**

The Authority noted the evidence presented by Dr Buchanan “in graphic detail” as to medical symptoms he had suffered following surgery in January 2007. Dr Buchanan claimed that these symptoms created the stress which caused him to overreact to Ms Yammahi’s request. The Authority noted that the University did not have such extensive knowledge of Dr Buchanan’s condition during its disciplinary inquiry. It also noted that mention of such medical symptoms was absent from the numerous media interviews Dr Buchanan gave following his dismissal.

Despite this, the Authority concluded that a fair and reasonable employer would not have dismissed Dr Buchanan for the reasons the University did and in all the circumstances that then prevailed. It held that the University’s action in taking the earlier emails into account was unfair and unreasonable. Since it had not addressed them earlier, it could not later rely on them to show Dr Buchanan in a bad light.

The Authority held that whilst it was “beyond doubt” that there was misconduct by Dr Buchanan, the standard of serious misconduct was not met. It also noted that the University appeared to have completely ignored or overlooked Dr Buchanan’s suggestions for ensuring a similar situation did not recur. Accordingly, it was held that Dr Buchanan was unjustifiably dismissed.

**Contributory conduct**

The Authority also concluded that Dr Buchanan contributed significantly to the situation, in that he sent an offensive email to a student to whom he had pastoral care obligations, which he then half heartedly apologised for. Dr Buchanan’s contribution was assessed at 25%.

**Reinstatement**

Dr Buchanan sought reinstatement. This was strongly opposed by the University. The Authority referred to the need for Dr Buchanan to work autonomously and his pastoral care obligation. It noted that it had “grave doubts that Dr Buchanan comprehends” the latter obligation, “specifically as it relates to international students.” It noted that Dr Buchanan appeared to have “very little understanding of the impact his communication style has on those receiving his communications” and that he “promoted himself as a straight talker, with a blunt communication style. Traits Dr Buchanan promotes as being positive.” The Authority held that “This self assessment is short of the mark.”
Accordingly, the Authority held that in spite of reinstatement being the primary remedy, it was satisfied there were good reasons not to order it: “It is simply not practicable for the University to employ Dr Buchanan in a role where he is unsupervised and unmonitored and has failed to demonstrate a fundamental awareness of how his own actions and conduct impact on those he works with and teaches.” The Authority also took into account the “very public and extremely critical remarks made by Dr Buchanan following his dismissal.”

Compensation

Taking into account his contribution, Dr Buchanan was awarded $51,000 gross lost remuneration and $15,000 in compensation for hurt and humiliation.

Appeal

Dr Buchanan is now appealing against the Authority’s determination not to reinstate him. He is doing so on the basis that he feels the loss of his job effectively ended his academic career in New Zealand.

Supreme Court Holidays Act Decision

Late last year, the Supreme Court released its judgment in the long-running dispute between Air New Zealand and the New Zealand Airline Pilots Association as to the payment of ‘time and a half’ for work on public holidays. The case has implications for employment agreements that purport to ‘transfer’ the observance of public holidays from the days on which they normally fall.

The Agreement

The case was taken by the Airline Pilots Association in relation to the provisions of the parties’ collective agreement. The agreement, which was concluded under the 1981 Holidays Act, provided for 11 additional days’ leave in recognition of the fact that pilots would work on some of the 11 public holidays specified in the Holidays Act. Pilots were entitled to this extra leave regardless of the number of public holidays they actually worked.

Public Holidays – The Law

The Holidays Act 2003 provides that an employee who works on a public holiday (and who would normally work on that day) is entitled to be paid ‘time and a half’ for the time actually worked, and to a paid alternative holiday. The Act also at section 44(2) provides that “an employer and employee may agree (whether in an employment agreement or otherwise) that any public holiday … is to be observed by the employee on another day”.

Court of Appeal Decision

The majority of the Court of Appeal held that this section allowed an employer and employee to agree to transfer the observance of a public holiday to a different day. Provided the different day was a particular
and identifiable day, it would be treated as the public holiday for the purposes of any entitlement to ‘time and a half’ and alternative holidays. As noted in our December 2006 Newsletter, the Court of Appeal found that the agreement between Air New Zealand and the Airline Pilots Association was not an agreement under section 44(2) because the specific days could not be identified.

**Supreme Court Decision**

Despite being successful in many respects, the Airline Pilots Association appealed to the Supreme Court. The essence of its argument was that section 44(2) does not *in any circumstances* allow an agreement to transfer the observance of a public holiday (for the purposes of the calculation of ‘time and a half’ and alternative holidays) from the days listed in the Holidays Act to different days.

The Supreme Court agreed with the Airline Pilots Association’s interpretation. Looking at the scheme and purpose of the Holidays Act, the Supreme Court relied especially on one of the purposes of the Act being to provide public holidays for the observance of days that are of national, religious or cultural significance. Air New Zealand’s approach to section 44(2) was described by the majority as “a surprising method of effectively allowing “contracting out” of the section 44(1) and 50 requirements”, because “in most cases, the employee will never receive time-and-a-half.”

**Result**

The Airline Pilots Association appeal was dismissed as the substantive decision remained the same, although the reasoning of the majority of the Court of Appeal was rejected. Air New Zealand’s cross-appeal was also dismissed and costs of $25,000 were awarded to the Airline Pilots Association. The case was remitted back to the Employment Court to determine the factual consequences of the non-compliance with the Holidays Act. Judgment in that regard was released in February and is largely limited to its facts based on the particular contractual wording.

**Implications**

The Supreme Court’s decision means that employment agreements that provide for the ‘transfer’ of public holidays, whether to identifiable days or to a ‘bundled’ leave entitlement may be invalid insofar as they purport to remove the right to ‘time and a half’ and alternative holidays from the 11 listed public holidays.

**Defiant employee gets the “Boot”**

The Employment Relations Authority late last year rejected the claims of Mr Ashton, an employee who was dismissed taking five weeks’ leave to attend the 2006 Soccer World Cup. His employer, PMP Print, had refused Mr Ashton’s request for five weeks’ leave but instead approved three weeks’ leave.

Mr Ashton claimed that his employer knew that he was part of a syndicate fundraising for the trip, and that it had earlier indicated that the five weeks’ leave “shouldn’t be a problem”. Mr Ashton claimed that the refusal of his leave application related to his involvement in earlier strike action and that the process adopted by PMP Print in dismissing him was unfair.
No “unequivocal” commitment

The Authority rejected the argument that PMP had “agreed to or otherwise acquiesced to an extended period of leave”. When the subject of leave had been first raised by Mr Ashton in mid-2004, his manager had simply stated an opinion as to the possible availability of leave. The Authority also noted that Mr Ashton had failed to use the standard leave application system until December 2005. Prior to that his employer could not possibly have agreed to a specific period of leave or dates because Mr Ashton did not then know the intended days of travel.

Strike action not a factor

Mr Ashton’s argument that he was treated differently because of his involvement as a union representative in striking was also rejected. While it was noted that since that action the relationship between Mr Ashton and his manager had become “frosty”, the Authority found no evidence of different treatment. The Authority noted the ability of other employees to gain leave, but found that this was due their skills not being as ‘essential’ as Mr Ashton’s.

Disciplinary process “conducted fairly”

Mr Ashton alleged that he was not given sufficient opportunity to be heard. The Authority rejected this argument stating that “there is no serious challenge to the fairness of the disciplinary process” and that Mr Ashton “had clear notice of the meetings and the issues and was able to secure professional advocacy from this union organiser”.

Summary dismissal “justified”

The Authority determined that Mr Ashton’s “deliberate defiance” of PMP’s refusal to grant leave was clearly capable of constituting serious misconduct which could lead to summary dismissal. At the heart of the problem lay Mr Ashton’s commitment to travel without confirmation of leave approval. Accordingly the decision to dismiss was one that a “fair and reasonable employer would have taken in these circumstances”. Ashton was guilty of a “wilful and deliberate act of disobedience that a fair and reasonable employer would consider serious misconduct fatally undermining the trust and confidence in that worker.”

Detecting Drugs through Hair Analysis

Environmental Science and Research’s (ESR) Toxicology Laboratories are increasingly undertaking hair analysis to determine methamphetamine use. Most drug tests currently involve tests of blood and urine. This can only detect substances that have been taken quite recently. To detect drugs taken many months previously, there is now a move to use hair analysis. The use of hair analysis to detect methamphetamines is currently being undertaken for Child, Youth and Family at the direction of the Court according to ESR Toxicologist, Dr Stuart Dickson. The use of hair analysis has enabled ESR to detect a drug in hair collected 17 months after a drug-facilitated sexual assault.
Overseas Snippets

PwC Settle with Christina Rich

In our October 2007 newsletter we reported on the $10m sexual harassment claim against 20 PwC partners by former partner Christina Rich. The terms of settlement are confidential. Commentators have speculated that while Rich originally claimed $10m they would be surprised if her settlement was more than $3m. The benchmark for these sorts of cases is said to be 1 year’s pay. The maximum Court award is thought to be $387,422 in a case where a woman was raped by workmates. The feature of Ms Rich’s claim was the high level of her income at the time of the claim, being $900,000 per annum.

New Sexual Harassment Claim

Settlement of Ms Rich’s claim was almost immediately followed by a new sexual harassment claim filed in the Federal Court by Fiona Dunn against Perpetual. Ms Dunn earns in excess of $600,000 per annum. Employers wait to see whether this is the opening of a floodgate of such claims. Only time will tell.

CEO of an NZ based company personally liable for OSH offences

The prosecution of the CEO followed a NSW employee dying after a tank he was cleaning exploded. The CEO of the NZ based company with global operations argued that he was not personally liable for the breach as he was too remote from the Company’s daily operations to influence OSH policies and practices at particular sites. The CEO also claimed that he had satisfied his duty to prevent breaches occurring by reviewing relevant safety reports. The Court found that the CEO’s regular visits to the Company’s Australian sites demonstrated his ability to influence operations, although he chose not to do so. The NSW Industrial Court accordingly found the CEO of the NZ based Company personally liable for offences under the OSH Act and fined him A$22,500 – Inspector Ken Kumar v David Aylmer Ritchie.

Enforcing Restrictive Covenants – need to act quickly

The Court of Appeal in England heard an appeal from a decision to grant an employer an interim injunction to enforce the restrictive covenants contained in the employment agreements of two former employees. The Court of Appeal stated that it considered the speed with which the employer made an application to the Court was very relevant to where the balance of convenience lay.

The Court of Appeal then went on to criticise the trial Judge for the delay in issuing the order and the reasons. The Court of Appeal stressed the need for applications to be dealt with promptly. It noted that the balance of convenience may move over the passage of time.
Interestingly, the Court of Appeal said that the trial Judge was not necessarily wrong in finding that the balance of convenience favoured the granting of an interim injunction at the time of the hearing itself. It however went on to state that it was no longer true at the time the lower Court made the decision which was nearly a month later – *EE & Brian Smith (1928) Ltd v Hodson Morgan & The Juice Machine Ltd.*

**NB:**
- Employers must act promptly to enforce any restrictive covenant and then must try and have the Court do likewise.
- The need for a speedy outcome may be a factor in NZ in deciding whether to possibly seek to remove a matter to the Employment Court.

**Florida Senate gives ‘Take a gun to work’ law a shot**

The Florida Senate has recently passed the *Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act 2008* which was approved by a vote of 26-13. The Bill now only needs the Governor’s signature to take effect. This would mean that Florida workplaces would be unable to prevent employees from bringing guns to work.

**Australian Court clarifies what constitutes ‘Pay in lieu of notice’**

A NSW Court of Appeal decision might be of interest to NZ employers who have an express right in their employment agreements to make payments in lieu of notice. Some employers may believe that they only need to make payment of base salary to satisfy this contractual obligation. If that is their view, they may be concerned by a recent NSW Court of Appeal decision.

In a recent case that Court found that the employer was contractually obliged to not only pay base salary but also to make a payment to the employee’s Superannuation Fund when electing to end employment with a payment in lieu of notice. The termination on notice clause read:

*The notice period for yourself and HCN to terminate your employment has been extended from three to six months. In the case of termination by HCN, HCN may make payment in lieu of all or part of this notice at its discretion.*

In the letter that constituted a variation to the employment agreement, it was also stated that the employee’s remuneration was varied to a ‘total remuneration approach for packaging salaries and benefits’. The Court held the employee was entitled to 6 months’ worth of his total remuneration package which included a 9% employer superannuation contribution – *Peter Willis v Health Communications Network Ltd.*

Some employers are being increasingly attracted back to the total remuneration package approach in order to address KiwiSaver. Those employers need to be aware that in doing so, any payment in lieu of notice will almost certainly include payment of compensation for benefits that form part of the total remuneration package. The total package approach also raises such issues as to when a car that forms part of the package must be returned i.e. at the beginning or end of the notice period. If it is at the beginning must there be some cash compensation for the loss of the car?
To keep Managers and staff up to date with developments in employment law and best practice Quigg Partners are offering Employment Law Toolbox sessions in 2008. These can be held in your workplace or in our private seminar rooms. Toolbox sessions that can be tailored to suit your needs cover:

- Effective Disciplinary Procedure
- Restructuring
- Bill or Rights, Privacy, OIA and Codes of Conduct.

Other topics may also be available upon request.

**ENQUIRE NOW**

On a no obligation basis enquire now about the option(s) that may best suit you by contacting:

Michael Quigg on 474 0766 or email michaelquigg@quiggpartners.com; or

Deirdre Marshall on 474 0765 or email deirdremarshall@quiggpartners.com

**Team Members**

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<tr>
<th>Name</th>
<th>Email</th>
<th>Phone</th>
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<tbody>
<tr>
<td>Michael Quigg</td>
<td><a href="mailto:michaelquigg@quiggpartners.com">michaelquigg@quiggpartners.com</a></td>
<td>+64 4 474 0766</td>
</tr>
<tr>
<td>Jol Bates</td>
<td><a href="mailto:jolbates@quiggpartners.com">jolbates@quiggpartners.com</a></td>
<td>+64 4 474 0759</td>
</tr>
<tr>
<td>Deirdre Marshall</td>
<td><a href="mailto:deirdremarshall@quiggpartners.com">deirdremarshall@quiggpartners.com</a></td>
<td>+64 4 474 0765</td>
</tr>
<tr>
<td>Tim Sissons</td>
<td><a href="mailto:timsissons@quiggpartners.com">timsissons@quiggpartners.com</a></td>
<td>+64 4 474 0758</td>
</tr>
<tr>
<td>Simon Martin</td>
<td><a href="mailto:simonmartin@quiggpartners.com">simonmartin@quiggpartners.com</a></td>
<td>+64 4 474 0752</td>
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Seminar Series

In the coming months, Quigg Partners will be holding seminars on some of the more pressing employment law problems for New Zealand employers. To register for any of these seminars please complete this form and return. Please **enclose** your cheque for $85.00 (GST inclusive) per seminar or we can send you an invoice. Seminars are held at Level 8, The Bayleys Building, 28 Brandon Street, Wellington and run from 12:15—2:00 pm. Any queries please contact Evelyn Pong on (04) 474 0767 or email [evelynpong@quiggpartners.com](mailto:evelynpong@quiggpartners.com).

<table>
<thead>
<tr>
<th>Seminar Series</th>
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| **Dealing with Difficult Employees - Tuesday 17 June 2008** | • Poor Performance  
• Disciplinary Issues  
• Termination |
| **Restructuring in More Challenging Times - Tuesday 29 July 2008** | • Consultation  
• Selection Criteria  
• Redeployment |
| **Contractual Issues - Tuesday 26 August 2008** | • Drafting an employment agreement  
• Useful clauses  
• Total Remuneration  
• Fixed Term Agreements  
• KiwiSaver Issues |
| **Election Special (Evening session date and time to be announced)** | No cost. Koha encouraged to benefit the Mental Health Foundation |

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