



Seasons Greetings

DIRECTORS/SHAREHOLDERS AS “VULNERABLE EMPLOYEES”?

A recent decision of the Wellington Employment Relations Authority considered the extent to which Part 6A of the Employment Relations Act applies to directors and shareholders who operate businesses.

The Facts

In *Hughes v Upper Hutt Cosmopolitan Club*, the owners of Hughes Catering Limited (‘the Company’) argued that the protections of Part 6A should extend to them as owners/operators of the Company. In this instance, Upper Hutt Cosmopolitan Club (‘the Club’) had terminated the catering contract of the Company due to an alleged failure to produce food of a reasonable standard. The Club proposed to perform the catering services ‘in house’ and notified the Company that they would accept the transfer of the Company’s employees to the Club.

Mr and Mrs Hughes believed that the Club was also required under Part 6A to employ them. They claimed they were employees of the Company as well as being owner/operators, and turned up at the premises advising the Club of their ‘election’ to transfer their employment to the Club. Mr and Mrs Hughes’ employment agreements contained not only a salary of \$60,000, but also redundancy compensation of one year’s pay. No other employees of the Company were afforded such generous entitlements, which the Club would have to honour if the Hughes’ transferred their employment.

The Law

Part 6A, entitled “*Continuity of Employment if Employee’s Work Affected by Restructuring*”, provides protection to specified categories of employees in cases where, as a result of a proposed restructuring (contracting in, contracting out or subsequent contracting), their work is to be performed by another person. Employees may then have the right to transfer their employment to that person on the same terms and conditions of employment.

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The categories of employees to whom Part 6A applies are outlined in Schedule 1A to the Act. The category in question in this case was *"food catering services in relation to any other place of work"*.



The Decision – Are they Covered by Schedule 1A?

The Authority considered whether the Hughes' provided food catering services. Although the requirements of the Company such as updating the Company's accounts were considered, it was accepted by the

Authority that the majority of Mr and Mrs Hughes' time would be taken up by purchasing goods, supervising staff, acting as front of house and (in Mr Hughes' case) being executive chef. These tasks were accepted as constituting food catering services and the Authority concluded that Mr and Mrs Hughes were covered by the Schedule if they were employees for those purposes.

The Decision – Were they Employees?

The Club contended that Mr and Mrs Hughes were never employees to whom Schedule 1A actually applied, as they were not in fact employees of the Company for the purposes of Part 6A. In deciding on this issue, the Authority considered the 'real nature of the relationship' between the Hughes' and the Company. It also considered cases in New Zealand and overseas jurisdictions in relation to the ability of directors and shareholders of a company to enter into employment agreements with that company.

Taking into account all relevant considerations and the context of the matter, the Authority concluded

that Mr and Mrs Hughes were not employees of the Company. In coming to this determination, the Authority found that the Hughes' were in business on their own account and were in control of the Company. They had twice reduced their income by a significant amount to ensure the viability of the business and also personally guaranteed major Company contracts. These were not usual actions of employees.

Also of note, the Company effectively had no control over the Hughes' – there were no other directors or shareholders to control their behaviour and there was no real negotiation of the employment agreements, which were prepared by Mrs Hughes and which contained very generous redundancy clauses. Neither was able to dismiss the other, they would come and go from work as they pleased and took leave and breaks and consumed alcohol when it suited them.

Implications

While this decision is authority for the fact that directors and shareholders may come within the protections afforded to certain categories of work under Part 6A, those directors and shareholders must also satisfy the usual tests of whether they are employees under the Act. The possibility of directors and shareholders being entitled to transfer employment under Part 6A is something that should be addressed by anyone considering restructuring a business or operation.

RESTRUCTURING HALTED FOR LACK OF EPP

A recent decision of the Employment Relations Authority may carry significant implications for companies wishing to restructure their business. In *Pulp & Paper Industry Council of the Manufacturing and Construction Workers Union v Norske Skog Tasman Limited* the Authority held that until both parties agreed on the inclusion of an Employee Protection Provision (“EPP”) in the relevant collective agreement, the employer was unable to proceed with the restructuring they had proposed.

The Facts

Norske Skog (“the Company”) operates a paper mill in Kawerau. It employed several employees in a wood processing area which were represented by the Pulp and Paper Industry Council of the Manufacturing and Construction Workers Union (“the Union”). Both parties had initiated bargaining on 31 December 2006 for a new collective agreement covering the wood processing employees. These negotiations were extensive and the parties attended numerous days of mediation. However, the parties were unable to reach agreement on the form of an EPP that was to be included in the new collective agreement.

The Company then informally raised with the Union the possibility of contracting out wood processing in the future. The Company prepared

an information pack for a consultation meeting to be held with the Union and the effected employees. However, the Union informed the Company that neither they nor the employees would participate in the consultation process, claiming that any consultation regarding the proposed contracting out was premature as the parties had not been able to agree on an EPP. This meant, the Union claimed, that the Company could not possibly meet its legal obligations under the collective agreement or its obligations of good faith in any consultation process without first negotiating and agreeing upon the form of an EPP.



The Law

Section 69OJ of Part 6A of the Employment Relations Act reads that:

“Every collective agreement and every individual employment agreement must contain an employee protection provision to the extent that the agreement binds employees to whom this subpart applies.”

What caused difficulty for the Authority was the fact that the Act does not set out any consequences for failing to comply with section 69OJ.

Union’s Argument

The Union argued that Parliament’s intention when it passed the legislation was to ensure that

an employer could not restructure its business without the affected employees having the protection afforded by the Act. It also stated that implementing a restructuring without an EPP is not a situation that can be rectified or addressed by damages after the fact as the purpose of an EPP is to put boundaries around any bargain that an employer is able to reach with any third party in a restructuring process. Without an EPP in place, it was argued that an employer is not in a position to know what its obligations are within a restructuring process, let alone comply with them.

Company's Argument

The Company argued that the Act was silent on the consequences of a failure to have an EPP, that the failure in this instance lay at the feet of both parties, and that such a failure cannot have been intended to lead to a penalty as harsh as effectively prohibiting the restructuring process going forward. The Company argued that Parliament would have had to have inadvertently omitted an entire section from the Act which would confer a substantial power on employees and unions and the Authority should be hesitant to imply such an onerous provision.

The Decision

The Authority found for the Union. In doing so it considered that where Parliament has legislated for specific protections to be included in employment agreements and that the purpose of that inclusion

is to protect the interests of employees in a restructuring situation, it is difficult to accept that Parliament could possibly have intended that a failure to agree on such a protection would effectively render those protections ineffective.

The Company's argument that a penalty for breach of the Act was sufficient was rejected by the Authority. The Authority considered that such a penalty would not address the problem or facilitate the purpose of the statutory provision.

The parties were directed to negotiate until such time as they complied with section 69OJ. Until that time, the Authority ordered that the Respondent was not to implement its proposed restructuring.

Implications

This case has potentially wide ranging implications for employers. While this case concerned employees covered by a collective agreement, it is difficult to see why the same reasoning would not apply to employees employed under individual agreements. In instances where a Company is planning to restructure, sell, or transfer all or part of its business, consideration should be given to whether or not affected employees' employment agreements contain EPPs. If not, those employees may have the ability to effectively bring a halt to any restructuring process.

This decision has been appealed to the Employment Court and it is another case of "watch this space".

PUBLIC ADVISORY GROUP ON RESTRUCTURING AND REDUNDANCY

The recently released report of the Public Advisory Group on Restructuring and Redundancy signalled some possible changes to the law in this area.

Recommendations

The purpose of the report was to assess the adequacy of redundancy laws and provisions in New Zealand and recommend options for addressing any gaps found in those laws and provisions. Within the report, the Group made ten recommendations. The first of these recommendations was that *“the government should consider the introduction of a statutory requirement for redundancy compensation and other entitlements”*. Such a statutory requirement would incorporate notice of termination by reason of redundancy, redundancy compensation based on length of service, a maximum level of statutory compensation and the provision of redundancy support to affect workers.

Other recommendations included:

- an insurance scheme similar to ACC which provides for payment only to those affected by redundancy;
- if a statutory provision for redundancy compensation is introduced, such a provision should be phased in with a one year delay, the



Department of Labour should be adequately resourced to provide advice and other resources and the government should consider ratifying International Labour Organisation (ILO) Convention 158 (see below);

- redundancy compensation should be non-taxable and a priority debt under the Companies Act 1993; and
- employers should be encouraged to notify the Ministry of Social Development of redundancies as early as possible.

Summary

As New Zealand finds itself caught up in the present global economic downturn, it is apparent that redundancies and restructurings are likely to be “hot” topics. However, it should be noted that the Advisory Group was an initiative of the former Labour-led Government. With the National Party now in power, the likelihood of the recommendations being implemented is likely to have decreased.

NATIONAL QUICK TO MAKE AMENDMENTS

As anticipated, the new National-led Government has acted fast to make amendments to employment legislation in two key areas that formed the basis of their employment relations policy during this year's election. The Employment Relations Amendment Bill passed its third reading in Parliament under urgency on 9 December and is currently awaiting royal assent.



The Bill firstly provides that an employment agreement may contain a trial period for 90 days or less. Also, the amendment repeals the recent amendment regarding KiwiSaver that allowed employees to bring a personal grievance if the employee's employment was "adversely affected" as a result of being a member of KiwiSaver.

Trial Periods

The Bill provides that employment agreements entered into after 1 March 2009 may contain provision for a trial period of 90 days or fewer. If the employer dismisses the employee during that period, the employee is not entitled to bring a personal grievance or other legal proceedings in respect of the dismissal. For an employer to be able to include a trial period in a new employee's employment agreement, that employer must employ fewer than 20 employees.

Trial periods are not the same as the probationary

periods that the Employment Relations Act has allowed for until now. Probationary periods continue to be provided for under that Act. Accordingly, employers wishing to take advantage of the amendment will need specifically drafted clauses to that effect. The amendment sets out prescriptive requirements for what must be included in such clauses.

While the amendment clearly states that an employee whose employment is terminated during or at the end of a trial period may not bring a personal grievance or legal proceedings in respect of the dismissal, the amendment interestingly provides that the employee retains the right to bring a personal grievance against their employer on the grounds of unjustifiable disadvantage, discrimination, sexual or racial harassment, and duress in relation to the employee's membership or non membership of a Union. This may have the unintended consequence of employees simply "re-packaging" their personal grievances into unjustifiable disadvantage or discrimination claims.

The amendment also provides that an employer who is considering whether to terminate the employment of an employee who is subject to a trial period is not required to follow the standard procedural steps in deciding whether to terminate

the employee's employment. An employer is also not required to comply with a request for reasons for the employee's termination under section 120 of the Employment Relations Act.

KiwiSaver – Total Remuneration

The Employment Relations Amendment Bill also repeals the Labour-led Government's September amendment which provided that employees may bring a personal grievance against their employer if their employment has been "adversely affected" as a result of being a member of KiwiSaver. That amendment effectively prohibited employees and employers agreeing to total remuneration arrangements by which the employer's contributions may be included in the employee's remuneration.

National has also passed the Taxation (Urgent Measures and Annual Rates) Bill, which provides that employees who become members of KiwiSaver on or after the date the Bill received royal assent (15 December 2008) can agree with their employers to contractual arrangements that include compulsory employer contributions within a total remuneration arrangement. However, those contractual arrangements must take account of the amount of compulsory contributions i.e. if compulsory employer contributions will be \$2,000, the contractual arrangement would include a \$2,000 pay rise. If the contractual arrangements **do not** take account of the amount of the compulsory employer contribution, the employer will be required to pay compulsory employer contributions as additional payments.

KiwiSaver – 2% Minimum Contribution

The Taxation (Urgent Measures and Annual Rates) Bill also provides that the minimum KiwiSaver contribution for both employers and employees is now 2% of gross salary or wages. The default contribution rate for new employees and those who opt in to KiwiSaver on or after 1 April 2009 will be 2% (matched by the employee). Those who are already enrolled in the scheme and contributing 4% will continue to do so (which will also be matched by the employer), until they give their employer notice that they wish to contribute 2%.

National's policy states that the rationale for reducing the minimum contribution rate for both employees and employers is that when KiwiSaver was initially proposed by the Labour-led Government, that government had a large surplus to work with and economic conditions were largely favourable. National believes that its changes will enable KiwiSaver to continue to be an attractive choice no matter the prevailing economic conditions

Discontinuing the Employer Tax Credit

National has also scrapped the current Employer Tax Credit which is paid by the Government directly to employers and matches the compulsory contributions employers are required to make up to \$1,040 a year. This will be discontinued from 1 April 2009.

The discontinuance of the Employer Tax Credit will increase the cost of the Scheme for employers in the short term. However, the reduction of the minimum employer contribution to employees'

KiwiSaver accounts from 4% to 2% may go some way to offset the effect of no longer receiving the Employer Tax Credit in the long term, as more employees elect to contribute 2%. The National online policy gives the example of an employee who is earning \$52,000 per year: under National's plan the Compulsory Employer Contribution

for that employee will be \$1,040, whereas under the Labour-led Government's Scheme that contribution would be \$2,080. Once the Employer Tax Credit is removed from that amount under the Labour-led Government Scheme, the net contribution by the employer is the same as it will be under National's proposed scheme.

BEWARE THE CHRISTMAS PARTY HANGOVER

With the "silly season" fast approaching, so too does the annual workplace Christmas Party. While these functions are often a good opportunity to relax and unwind with your workmates and clients, employers should be aware of their duty to require their employees to engage in appropriate behaviour at these functions. Inappropriate employee behaviour, particularly of the kind that may amount to workplace bullying or sexual harassment, may result in employer liability.



potential risks. In that case, the conduct of an employee which took place in a hotel room after the workplace Christmas function was held to be sufficiently linked to her employment to allow her to claim against her employer.

Employers should be aware of the possible connection between the conduct of their employees at work functions and the employment relationship itself. There have been numerous instances where inappropriate conduct of an employee towards another employee at a workplace function has been found to be sufficiently connected to that employee's employment to sustain a claim against his or her employer. Just last year, the case of *Streeter v Telstra* in Australia highlighted these

To better protect against inappropriate behaviour at workplace Christmas functions, employers should ensure that their Bullying and Harassment Policies are adequate and up-to-date. These policies can make clear the fact that conduct which some may consider merely "fooling around" is not acceptable and may actually constitute harassment. Other tips for employers who are wishing to protect against inappropriate conduct at Christmas functions are:

1. Remind staff beforehand what is inappropriate workplace behaviour.
2. Set clear boundaries around the consumption of alcohol.

3. Be aware of any current workplace attitudes that condone or accept excessive drinking and attempt to address these attitudes.
4. Ensure that any harassment or bullying complaint, whether arising from a workplace

function or not, is taken seriously and where necessary is followed by a procedurally adequate investigation. Where necessary, employers should seek legal advice to ensure the correct procedure is followed.

PUBLIC HOLIDAYS: ADDITIONAL CONSIDERATIONS FOR THE FESTIVE SEASON



Where an employee **is required** to work on any public holiday, employers must be mindful of the need to appropriately pay their employees. Employers should observe the following:

- When an employee is required to work on a public holiday they must be paid their usual daily rate for any hours actually worked plus half that amount again.
- An employee who works on a public holiday that would otherwise be a working day for that employee is also entitled to be provided with

an “alternative holiday”. This holiday is often referred to as a “day in lieu”.

- If an employee does not work on a public holiday and that day would have otherwise been a working day for that employee, the employer must pay the employee not less than the employee’s relevant daily pay for that day.
- When an employer is paying an employee for work done on a public holiday, that payment must relate to the pay period in which the holiday actually occurs.

OVERSEAS SNIPPETS



Australia – “Joking Around” proves Costly

The Victorian Civil and Administrative Tribunal recently awarded a 17 year old apprentice engine conditioner A\$35,000 in damages after finding that he had been sexually harassed by his boss over an extended period.

The actions complained of took place in a toilet block where workers would take showers after completing their days work. The Tribunal found that Mr Thomas’ boss, Mr Alexiou, had sexually harassed Mr Thomas on as many as 120 separate occasions both physically and verbally. One witness stated that Mr Alexiou would be

“joking around” by making sexual comments and physical actions directed at Mr Thomas, including putting his hands inside Mr Thomas’ pants. Staff who observed these occasions would often laugh, although one witness said that it appeared “obvious” that Mr Thomas was uncomfortable.

In making its decision the Tribunal found that Mr Alexiou was motivated by a desire to bully Mr Thomas in front of his work mates and was obviously under the mistaken belief that his inappropriate behaviour was in fact “appropriate workplace horseplay”.

USA – “Chicken of the Sea” Cooked for \$4.5m

A recent jury verdict in the State of California has awarded almost \$4.5 million to Frozen Seafood Specialists Contessa Premium Foods Inc. Contessa filed a complaint in the Los Angeles State Court alleging that employees of “Chicken of the Sea” and related companies, including two former Contessa sales managers, had conspired to illegally acquire and use confidential information related to Contessa’s business. This confidential information included food ingredients and customer lists.

The jury heard that employees of Chicken of the Sea had begun contacting key Contessa sales executives in 2005 and that ultimately those executives conspired with the Chicken of the Sea employees to divert business from Contessa to Chicken of the Sea. The Contessa sales executives had been using the Company’s time and resources to contact customers in an attempt to persuade them to purchase the competing Company’s products.

The jury found that the two managers involved had breached their duty of loyalty to Contessa and awarded to the Company US\$2.8 million in compensatory damages as well as another US\$1.7 million in punitive damages.

Australia—Facebook Sickie doesn’t Pay Off

A Sydney employee of TELCO was recently reminded of the “double-edged sword” nature of the internet. Kyle Doyle, a call centre employee, was asked by his employer to provide a medical certificate to verify a sick leave absence. However, Mr Doyle refused on the grounds that his employment agreement provided that he was not required to provide proof of sickness for one day’s leave.

Mr Doyle’s manager replied that while that was usually the case, in this instance the company had reason to believe that his leave was not due to medical reasons. To this Mr Doyle replied: *“my leave was due to medical reasons, so you cannot deny leave based on a line manager’s discretion, with no proof, please process leave as requested”*.

The manager then sent to Mr Doyle a screen shot of his facebook page (pictured RIGHT), which stated in his “status” section that *“Kyle Doyle is not going to work, f**k it i’m still trashed. SICKIE WOO!”* In response to this email, Mr Doyle replied *“HAHAHA LMAO (laughing my ass off) epic fail. No worries man.”*

It is not known what, if any, disciplinary action was taken against Mr Doyle as a result of his “epic fail”.

Australia—Court Awards Largest Damages Award for Sexual Harassment Ever

The Victorian Civil and Administrative Tribunal recently awarded an employee who was sexually harassed by her tutor general damages in the sum of A\$100,000. Dr Caroline Tan was training at Monash Medical Centre to become a neurosurgeon when she alleged that Dr Chris Xenos, a neurosurgeon providing her with tuition, took her by the hand into his office, embraced her, kissed her on the lips and put her hand down her top while pinning her against his desk.

Dr Xenos claimed that Dr Tan had concocted the story in an attempt to protect herself from possibly failing her course, which was a possibility due to her poor performance. However, the judge accepted Dr Tan's version of events and ruled that in defending the accusation, Dr Xenos had *"deliberately and falsely denied the harassment"* in a way that *"attempted to completely smear her [Dr Tan's] character"*. After weighing up all the factors, including the finding that Dr Tan *"suffered acutely as a result of the harassment"*, the judge believed that such a high award was warranted.


Australia—No Duty to Dismiss "Redundant" Employees

A recent decision of the Federal Court in Australia has addressed the issue of whether an employer is able to retain employees whose position is redundant while attempting to find alternative work for them. In *Unsworth v Tristar Steering and Suspension Australia Limited* [2008], Tristar was unable to provide work for most of their employees after losing one of its major contracts. Knowing that the redundancy compensation payable to the employees would be considerable, Tristar decided to keep certain employees on while they attempted to source new business opportunities and work for them.

Justice Gyles, in agreeing with Tristar, found that the company was entitled to choose to keep particular employees on the payroll and that there was no obligation for the company to dismiss certain employees, triggering their redundancy packages.

From: [REDACTED]
Sent: Wednesday, 27 August 2008 9:50 a.m.
To: Kyle Doyle
Subject: RE: Absence on Thursday 21st 2008

Hi Kyle,
I believe the proof that you are after is below



Kyle Doyle
is not going to work, [REDACTED] I'm still trashed. SICKIE WOO!
Updated on Thursday

Networks:	Australia
Sex:	Male
Interested In:	Women
Birthday:	[REDACTED]
Hometown:	Sydney, Australia
Political Views:	Liberal Party Of Australia
Religious Views:	Agnostic

Mini-Feed



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 can be tailored to suit your needs and may cover:

- Effective Disciplinary Procedure - managing difficult employees
- Right Sizing - tailoring to accommodate the credit crunch
- Bill of Rights, Privacy, OIA, Codes of Conduct and Conflicts of Interest issues
- CEO/Board Relationships - special considerations

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:

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