

## RECENT REDUNDANCY CASES IN SPOTLIGHT

The economic crisis led to various restructurings and downsizings. Previously employees went from a job to a job. Now things are less certain. Employees are potentially more litigious as they have fewer options.

A series of recent redundancy cases has illustrated that employers are not handling these restructuring situations as well as they might. Employers need to be aware of these recent decisions and there is an indication that there may be more similar decisions to come as further redundancy issues work their way through our judicial system.

### Restructuring Cases

The restructuring cases we focus on in this issue deal with:

- Selection issues
- Good faith
- Redundancy compensation plus lost wages
- Poorly drafted redundancy provisions
- Profound process failings
- Reinstatement

As restructurings are not all behind us having an appreciation of these relevant issues comes with the territory of management.

### Restructurings: Providing Information to Staff

The case of *Wrigley and Kelly v Massey University* concerned a restructuring where the positions of Messrs Wrigley and Kelly were made redundant. They applied unsuccessfully for two new positions that arose from the restructuring. Their employment with Massey was terminated as a result. The two employees claimed they had not been provided with relevant

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information relating to the selection process for the new positions. Initially they sought to prevent their dismissal but abandoned this as events overtook them. They sought a declaration from the Employment Relations Authority that Massey University breached its obligation under s.4(1A) of the Employment Relations Act to deal with them in good faith. Messrs Wrigley and Kelly argued the University was required to provide them with its assessment of the other candidates and an opportunity to respond to this information before a selection decision was made.

The Employment Relations Authority held the applicants were not entitled to all the information they sought. Massey was however required to provide all relevant information. In that regard it held that relevant information included:

- Interview sheets
- Individual assessment sheets
- The candidate comparison/summary of ratings sheet
- Panel recommendations

The University was directed to provide this information and to give the applicants the opportunity to comment on it.



#### *Full Court—Good Faith Obligation*

A Full Court of the Employment Court recently heard the challenge to the Employment Relations Authority determination. Indications are that Employers’ obligations to provide information to employees who are likely to be adversely affected by a restructuring may be far more extensive than previously understood. These obligations are likely to be held to exist whether the information is requested or not. The Privacy Commissioner was represented at the hearing. It is expected the decision of the Full Court will lift the bar further than many may be expecting so *“Restructure with care and in GOOD FAITH”*

## Deputy Managing Director Awarded almost \$350,000

In the case of *Margaret Whitten v Ogilvy New Zealand Limited* the Employment Relations Authority has not only awarded Mrs Whitten contractual redundancy compensation of almost \$130,000 but added to it, lost wages of over \$193,000 plus compensation for hurt and humiliation in the sum of \$15,000.

The defense of Ogilvy was that Mrs Whitten's position was not made redundant and she was not constructively dismissed. Its' Managing Director invited her to a meeting and asked her to relinquish her title in exchange for a directorship on the Ogilvy Board. He told her that there was no pressure on her to relinquish her title as Deputy Managing Director but said obviously it would be preferable if she did. The Authority found that the Company's actions backed Mrs Whitten into a corner. It held that she was on notice that her existing position had significantly changed and when she failed to accept the Company's proposal, the directorship option was unilaterally withdrawn. The Company's conduct in doing so undermined her trust and confidence that she would be fairly treated. The Authority held that the Company must have foreseen in those circumstances that Mrs Whitten would have resigned and accordingly she was unjustifiably constructively dismissed.



*Redundancy compensation and 8 months' lost wages!*

The most interesting aspect of this case is that Mrs Whitten not only obtained redundancy compensation, but also obtained 8 months' lost wages. The Authority held that if the consultation process had continued satisfactorily, then Mrs Whitten may have had an opportunity to negotiate a satisfactory redeployment option within the business. On that basis, it held it could exercise its discretion and make an award of lost wages greater than the 3 months' referred to in s.128 of the Employment Relations Act and it set the appropriate figure at 8 months' lost wages which totalled in her case, \$193,333. The Authority's decision is now subject to an appeal so "*hold all tickets*".

## Check the Wording of Redundancy Clauses

In the case of *Porteous v Department of Building and Housing* the Employment Court has found relevant documents of the Department in many respects were inconsistent or uncertain. The Court suggested that the Department needed to address these matters in-depth. Of particular concern to the Employment Court was the fact that it was repeatedly stated in letters to staff affected by the restructuring that if they did not accept offers of reassignment, they would be deemed to have resigned without the benefit of receiving redundancy compensation. It was held that to provide such incorrect advice was to cause unnecessary concerns to staff who were already engaged in a stressful process.



The Department had denied a Senior Manager, Mr Porteous, redundancy compensation and cessation leave on the basis he was offered a reassignment opportunity that he declined. The Court ordered that the Department pay his contractual entitlement to redundancy compensation together with his contractual entitlement to cessation leave plus interest and costs.

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## “Fundamental & Profound” Process Failings Cost Employer \$192,000

### *Facts*

In the case of *Page v GEOS (NZ) Ltd*, Mr Page held the position as Regional Director for NZ for almost 10 years. In November 2008 it was announced by GEOS, without prior warning or consultation, that Mr Page’s role was being removed and he now held the title of Auckland Language Centre Principal. In early 2009 Mr Page was advised if the Auckland Language Centre was not in profit by the end of May his employment would be terminated. A disciplinary meeting was then held without Mr Page or his

representative present and three days later Mr Page was advised by email that he was summarily dismissed. GEOS is owned by Tsuneo Kusunoki, a Japanese national.

### *Unscrupulous Exploitation of Prior Demotion*

Mr Page commenced a claim in the Employment Relations Authority who held that Mr Page’s demotion showed a complete lack of due process and the failings were “*fundamental and profound*”. The final warning given to Mr Page was described by the Authority as “*an unscrupulous exploitation of the earlier, unlawful demotion*”. It was held the dismissal lacked due process and the sequence

of events leading to it supported the conclusion that the decision to dismiss was pre-determined. The defence advanced by GEOS that Mr Page had been treated in the “*Japanese way of doing business*” was rejected and Mr Page was awarded a total sum in excess of \$192,000 which included compensation for lost remuneration, hurt and humiliation, superannuation, holiday pay and long service leave.

### **Reinstatement & Damages Exceed \$56,000**

In the case of *Van der Griend v Parker Hannifin (NZ) Ltd* (‘PHL’), PHL were ordered by the Employment Relations Authority to pay Mr Van der Griend damages in excess of \$56,000, to include \$49,170 in lost wages and a \$7,000 hurt and humiliation payment, and to reinstate him to his former position or one no less advantageous.

#### *Facts*

Mr Van der Griend had worked for PHL since 1981. The event that led to his dismissal was an incident where he was abused and sworn at by a colleague. He then lodged a complaint with PHL’s human resources specialist, Ms Bianchina. He was called to a meeting and told that the employee he had complained about had also complained about him. The meeting ended amicably but the next day Ms Bianchina returned

to deliver payslips and the like. She was wearing open toed shoes and sunglasses as opposed to the required safety glasses. Mr Van der Griend raised this with her, and she told him she was not there to “*beat him up*” and he responded “... *I am bigger than you, I’ll be okay*”. Ms Bianchina then complained about his behaviour and said that he had acted aggressively and had “*punched towards her face*”.

A meeting took place where Mr Van der Griend tabled a written statement. A further meeting took place two days later but Mr Van der Griend was not allowed to table another statement and he was advised that the information from his first statement had been sent to the Australian based manager making the decision who had already made the decision to dismiss him. Mr Van der Griend was later told that the factory manager of PHL had told staff that he had been dismissed for physically assaulting a female staff member.

#### *Determination*

The Authority held that the procedural breaches by PHL were “*sufficiently serious*” to make Mr Van der Griend’s dismissal unjustified. The Authority reinstated Mr Van der Griend and then awarded the lost wages and damages totalling over \$56,000.

## OBLIGATION TO INDEMNIFY FOR LEGAL FEES

A recent decision of the Employment Court in the case of *New Zealand Tramways and Public Passengers Transport Employee's Union Inc v Wellington City Transport Ltd* has reiterated an employer's obligation to pay for an employee's legal fees incurred as a result of an employee acting in the reasonable performance of his or her duties. This indemnity can extend, in some cases, to legal fees as a result of a criminal charge.

### The Facts

This case concerned an employee, Mr Xie, who was a bus driver. Late one night he was finishing his shift and noticed an intoxicated female passenger still on board his bus. He required her to leave the vehicle and subsequently following a complaint from the female passenger, Mr Xie was charged with indecent assault. Mr Xie pleaded not guilty and the prosecution withdrew the charges. Mr Xie was entitled, under the terms of his collective agreement, to reimbursement of his legal fees.

### Issues—Contract and General Indemnity

Issues for the Employment Court to decide were:

- Was NZ Tramways, as Mr Xie's employer, required under his employment agreement to reimburse his legal costs where he successfully defended a criminal prosecution for events that occurred at work; and
- Whether at common law, and irrespective of the contract, an employer is obliged to indemnify an employee's costs of successfully



defending such a prosecution.

### General Indemnity Upheld

The second issue before the Employment Court has relevance to all employers. The question posed was whether an employee, who was acting in the proper performance of his duties, should be indemnified for legal fees, including fees that related to a criminal charge. Although obiter (i.e. not binding), the Employment Court stated that in both the present case and more generally, an employer would be liable to indemnify an employee for such legal fees. The Court found that it is well established law that an employee would be indemnified where he acted in obedience to his orders or in the reasonable performance of his duties. An indemnity of this kind would not extend to someone who had knowingly committed a criminal act, but does extend to an employee defending himself against an allegation where it is never established that he committed a crime during the course of employment.

In the present case the Court found that the

provision in the collective agreement required Mr Xie's legal fees to be paid, but if such provision had not existed, the employer would have been obliged to pay them under the common law in

any event due to the fact the charges against him arose out of the proper performance of his duties.

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## SUPREME COURT RULES ON STRIKE-BREAKERS

The recent decision of the Supreme Court of New Zealand in *Air Nelson Limited v The New Zealand Amalgamated Engineering, Printing & Manufacturing Union Incorporated*, has clarified the law regarding who may perform the work of a striking employee in New Zealand. The Supreme Court considered the test under section 97 of the Employment Relations Act 2000 as it relates to the performance of duties of striking or locked out employees.

### The Facts

Air Nelson Limited, as a smaller airline, required relatively minor repairs and the servicing of aircraft to be done between flights and overnight. This maintenance was mainly carried out by its own employees. However, it was routine that a small amount (between 1% and 2%) was carried out by contract engineers. Essentially, the airline's employees would be the first port of call to perform the maintenance. If however the work required at a particular time was more than the employees could do, Air Nelson would arrange for contract engineers to assist. In the words of the Employment Court "*This did not occur regularly or frequently but does occur routinely*".



In June 2007 the airline's employees were engaged in a lawful strike. During this time Air Nelson used the contract engineers to carry out a routine inspection of an aircraft and undertake some minor maintenance work. The issue before the Supreme Court (and before that both the Employment Court and Court of Appeal) was whether by carrying out the maintenance work during a lawful strike Air Nelson contravened section 97 of the Employment Relations Act 2000.

### The Law

The relevant portion of section 97 states that an employer may employ another person to perform the work of a striking or locked out employee if that person is not employed principally for the purpose of performing the **work of a striking or locked out employee**.

## The Employment Court

This dispute originally came before the Employment Court. It found in favour of Air Nelson in holding that the limited amount of maintenance work performed by the contract engineers could properly be regarded as their own work, rather than the work of the employees that were engaged in the lawful strike. This led the Union to appeal to the Court of Appeal on a question of law as to the meaning of the words “*the work of a striking or locked out employee*”.

## Court of Appeal

The Court of Appeal found in favour of the Union being of the opinion that “*the work of a striking or locked out employee*” means “*the work a striking or locked out employee would probably have been performing had he or she not been striking or locked out*”.

## Supreme Court

The Supreme Court also focused on determining the interpretation of “*the work of a striking or locked out employee*”. In this regard, it noted that there were two possible definitions:

- The definition adopted by the Court of Appeal being, “*the work a striking or locked out employee would probably have been performing had he or she not been striking or locked out*”; or
- The type of work usually done by the employee who is on strike or locked out.

The majority of the Court decided the latter definition was the most appropriate. It departed from the reasoning of the Court of Appeal, and focused on the fact that an employee’s work may

in fact engage many tasks that may not necessarily be as comprehensive in practice as stipulated in a particular contract of employment. Some employees may regularly carry out some of the tasks that another employee usually does. In these cases, the duties or work of one employee are essentially integrated with or qualified by the work or duties of another employee. How often that integration or qualification takes place, and to what extent, will establish a pattern which may be analysed to determine whether a striking or locked out employee’s work has been performed in breach of section 97. The majority noted that a departure from the pattern of integration of work may indicate that section 97 has been breached.

In finding for Air Nelson, the majority held that the approach taken by the Employment Court was not in error. They noted that they did not favour a narrow or prescriptive approach which may encourage one employee’s entitlement to work being undermined by another employee’s entitlement to strike. What is required, in the majority’s opinion, is a broader, fact specific analysis that does not derogate from an employee’s right to withhold his or her work. It upheld the Employment Court’s view that the use of contract engineers who themselves habitually performed some of the line maintenance work (although a small proportion of it) was not in the circumstances performance of “*the work of the striking employee*”.

## LEGISLATIVE UPDATE

### **The Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill**

- The purpose of the Bill is to implement government policy on relaxing meal break and rest break provisions for employees.
- The Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill had its First Reading in April and has been referred to the Transport and Industrial Relations Select Committee. The Committee is due to report back on 29 October 2010.

### **Part 6AA Employment Relations Act**

- The Minister of Labour also has signed off on the final terms of reference for the review of Part 6AA of the Employment Relations Act 2000 (flexible working arrangements). The final report from this review is to be tabled in the House of Representatives in May 2011.

### **Minimum Wage Increase**

- The minimum wage increased on 1 April 2010. The adult minimum wage increased to \$12.75 from \$12.50 per hour and the new



entrants' and training minimum wage rose from \$10.00 to \$10.20 per hour.

### **Paid Parental Leave**

- As at 1 July 2010 it will be easier for self-employed parents to benefit from the paid parental leave scheme. Since 2006 self-employed people have been eligible for the scheme by submitting a declaration which had to be verified by a chartered accountant, a Justice of the Peace or a person entitled to witness a statutory declaration. To make access to the scheme more simple the declarations can now be witnessed by tax advisors.

## OVERSEAS SNIPPETS

### United Kingdom: Climate change — is it a “religion or belief”?

The case of *Grainger Plc v Nicholson* held that an asserted philosophical belief that mankind was heading toward catastrophic climate change could equate to a “belief” in accordance with the Employment Equality (Religion and Belief) Regulations 2003 (‘the Regulations’).

Mr Nicholson was claiming that his dismissal on grounds of redundancy was an act of discrimination contrary to the Regulations on the basis of his belief mankind was heading toward catastrophic climate change. Belief is defined in the Regulations as “any religious or philosophical belief”. The Employment Tribunal concluded at a pre hearing review that Mr Nicholson’s conviction that climate change was the world’s most important environmental problem did amount to a “philosophical belief”. Grainger Plc appealed to the Employment Appeal Tribunal (‘EAT’) on this point.

Grainger Plc argued that Mr Nicholson’s assertion was a scientific view rather than a philosophical one and that “philosophy dealt with matters that were not capable of scientific proof”. Mr Nicholson argued that his belief in climate change and its catastrophic implications was a “philosophical belief”.

The EAT agreed the case could go to trial on the basis that the asserted belief of Mr Nicholson upon which he blamed his case of discrimination

is “capable” of being a belief for the purposes of the Regulations.

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### United States: Fired for “being too beautiful”

A former employee of New York Bank Citi Group has filed a lawsuit against the Bank for sex discrimination claiming she was fired for being “too pretty” and that her figure hugging wardrobe was “too distracting” for her male colleagues and supervisors.

Debralee Lorenzana started work at a Citibank branch in New York and claims she was soon advised that she should not wear turtlenecks, pencil skirts and fitted suits like her other female colleagues because her figure was too shapely for her male colleagues to cope with. After Ms Lorenzana complained about the treatment she



was moved to a different branch of the bank 10 months after she commenced work. A month after that she was fired for poor performance, which included “*inappropriate*” attire.

Ms Lorenzana maintains that she was fired for being too pretty, that she could not help it if she had “*curves*” and that she did not dress provocatively. This case awaits a hearing. In the meantime Ms Lorenzana’s new employer is considering disciplinary action against her arising from the publicity caused by her case.

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**Australia: Sacked Editor awarded over \$500,000 from News Ltd.**

The former Editor-in-Chief of the Herald Sun Newspaper, Bruce Guthrie has secured a Judgment of \$580,808 plus interest and costs for unfair dismissal against News Ltd, the Publisher of the Weekend Australian. Judge Stephen Kaye however rejected the claim on behalf of Mr Guthrie in the sum of \$3.2m for the loss of a valuable opportunity to renew his employment contract. Justice Kaye said that Mr Guthrie should have been well satisfied that he had no prospect at all of his appointment being renewed.

News Ltd indicated after the verdict was released that the amount was close to the sum it had previously offered Mr Guthrie to settle the case. The response from Guthrie was that he was pleased with the decision as it was never about the money per se – it’s about vindication.

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**Australia: David Jones Boss Quits over Harassment Claim**

In a shock announcement last week the CEO of David Jones quit after a sexual harassment claim surfaced from a 25 year old female staff member. The claim related to events that took place at two recent company functions, the latest in May.

Employee for 13 years and CEO for the last 7, the CEO had been seen as responsible for the resurgence of David Jones. Despite having an entitlement to a A\$4m payout, it is reported the CEO settled for a bit under A\$2m. The David Jones share price fell 2.4% on the announcement. The price has since rebounded, but will the CEO?

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## 2010 EMPLOYMENT SEMINAR SERIES

REGISTRATION FORM  
GST Registration 76-761-317

- Thursday 26 August**     ***Recent Redundancy Cases***
  - Traps for the Unwary
  
- Tuesday 28 September**     ***Performance Management***
  - The old chestnut
  
- Thursday 28 October**     ***Management Issues***
  - Board/CEO/Senior Manager – special considerations
  
- Tuesday 30 November**     ***2010 Leading Cases in Review***
  - Lessons from the years leading cases
  
- All Four Seminars!**

**VENUE**     Quigg Partners Boardroom  
Level 8, The Bayleys Building  
28 Brandon Street (Cnr Brandon Street/Lambton Quay)  
Wellington

**TIME**     12:30 pm – 2:00 pm (nibbles provided)

**COST**     \$200 (incl. GST) for all four or \$75 (incl. GST) each  
Payment via cheque or **direct credit** to Quigg Partners **060501-0859155-00**

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