

“GET RID OF THE BOSSES WHO DON’T PERFORM”

This was the headline and billboard for the 15 January 2009 edition of the Dominion Post. It was said to be a quote from Mark Weldon the CEO for NZX. Mr Weldon was said to be urging company directors to sack CEOs who do not perform as the economy faces its biggest crisis in decades.

There has been international antipathy for large salaries and bonus payments being paid to CEOs of large corporates whose share price and capital value has been decimated by the global economic downturn. Vehement ire has been directed at CEOs and Managers who have been receiving large bonus payments that effectively came from Government *‘bailout monies’*. It is disingenuous for them to claim the payments are from operational funds when but for the *‘bailout monies’* those operational funds would not have been available.

In NZ firing non-performing CEOs ‘aint that easy’

It is easy and perhaps popular to say that a non-performing CEO should go. After all, because of their failure, other employees are losing their jobs as redundancy rates climb worldwide. To fire a CEO in New Zealand (as distinct from most other countries) requires the Board to be able to prove that such an act is fair and reasonable in all the circumstances. Additionally due process must be observed. Before bowing to popular pressure an astute Chair must consider:

- the CEO’s employment agreement (there must be one)
- any relevant disciplinary policies/procedures
- any performance criteria or KPIs
- previous performance reviews
- any performance enhancement measures
- any formal warnings for non-performance
- previous salary reviews
- past bonus payments
- any relevant previous practices or messages as regards non-performance
- other reasons for non performance

Employment Team Contacts

Michael Quigg
Partner
DDI: 474 0766
michaelquigg@quiggpartners.com



Jol Bates
DDI: 474 0759
jobates@quiggpartners.com



Tim Sissons
DDI: 474 0758
timsissons@quiggpartners.com



Simon Martin
DDI: 474 0752
simonmartin@quiggpartners.com



Level 7, The Bayleys Building
28 Brandon Street
PO Box 3035, Wellington
Phone 64 4 472 7471
Fax 64 4 472 7871
www.quiggpartners.com

Quick Reference

“Get Rid Of The Bosses Who Don’t Perform”	1
No Grounds To Dismiss	2
Big Ideas Brewed At Job Summit	3
No Redundancy Within ‘9-Day Fortnight’	4
Legal Lockouts	5
Recession-Proof Careers	6
Gay Taunts Prove Costly For Employer	7
Kiwi Saver	8
Annual Holiday ‘Cash-Up’	9
‘Try Before You Buy’ Trial Period - Reminder!	9
Overseas Snippets	10

Cutting/Freezing Executive Bonuses

This can be achieved but only with care. Boards and employers cannot unilaterally alter terms and conditions of employment in New Zealand unless this is expressly allowed. If the Executive Bonus Scheme permits the company to alter or withdraw it unilaterally then it can do so. Otherwise the company must negotiate any change, withdrawal or suspension. It may do so by offering other considerations e.g. additional holidays or a freeze on redundancies etc. Alternatively, staff may simply feel morally compelled to accept the proposal. The board and company must be careful in such circumstances not to breach their duty of good faith by exerting coercion or duress.

Other Measures to deal with the Downturn

Employers in New Zealand are adopting various other measures to deal with the economic downturn. This particularly applies where

there is an international parent company that is introducing measures on a worldwide basis. Such measures include:

- Freezing salaries/wages: care needs to be taken in addressing contractual salary review provisions
- Reduced pay: imposed unilateral reductions are unjustifiable in New Zealand but can be agreed to
- Forced annual leave: achievable provided the provisions of the Holidays Act as to advance notice are followed
- Reduced hours/days: by agreement (see ‘9 day fortnight’ on page 4)
- Job sharing: by agreement
- Retraining schemes: by agreement and perhaps as part of a Government Scheme
- Increased hours for same pay: being introduced by a few organisations on a worldwide basis. Needs employee agreement in New Zealand.

TELLING EMPLOYER TO “STICK HIS JOB UP HIS ARSE” NOT GROUNDS TO DISMISS

A recent decision of the Employment Relations Authority may have implications for employers who rely on ‘heat of the moment’ resignations. In *Davis v Toolking Plus Ltd* the Authority held that care is required in determining whether there has been a resignation if the words used were part of an ‘*emotional outburst in the heat of the moment.*’

The Facts

Mr and Mrs Davis were employed by Toolking Plus Ltd to run their Hamilton store. The Davis’

lived in the flat above the shop and ran the shop for a number of years without issue. The relationship soured when the Davis’ took annual leave and Mr Edge, a director of Toolking Plus Ltd, took over running the store. Mr Edge was not impressed at the state of the store and when the Davis’ returned on the Friday evening he raised his concerns with them. Things got heated and Mr Davis told Mr Edge to ‘stick his job up his arse.’ Mr Edge immediately requested that the Davis’ be

gone by the following Monday (giving them two days' notice).

The next day Mr Edge had changed his mind and wanted the Davis' out by Sunday. The Davis' brought a claim for lost wages and compensation for humiliation, distress and injury to feelings. The Authority sought to determine whether the Davis' resigned or whether they were dismissed.

The Decision

The Authority held that a fair and reasonable employer would not have found that the performance issues in the absence of previous warnings amounted to serious misconduct that

would justify dismissal. The Authority accepted that although Mr Davis made an inappropriate suggestion about his job, he was not given an opportunity to explain and there was no proper disciplinary process implemented. A fair and reasonable employer would have taken into account that Mr Davis was not expecting to be confronted with Mr Edge's concern because he had not previously been warned. The dismissal was thus held to be unjustified. Mr Davis received \$5,915 for lost wages and compensation of \$4,000, and Mrs Davis received \$2,739 for lost wages and compensation of \$6,000.

BIG IDEAS BREWED AT JOB SUMMIT

The Government's recent Job Summit focused on how different sectors, organisations and businesses can maintain and generate jobs during the current global recession. 200 people were invited to participate in the Job Summit and they came up with a 'top twenty' ideas list:

- Retention of Jobs by upskilling
– 9 day fortnight
- Improve intra-national migration
- Create jobs by promoting training and education
- Training: match supply and demand
- Redundancy support programme
- Improve utilisation of iwi assets
- Government systems



- Urgently develop/implement new sources of bond funding
- Decrease regulatory compliance costs and barriers
- Fast track 'big projects'
- Freeze rule-making
- Boost tourist traffic- co-fund \$60 million

- Improve employment and productivity by accelerating energy, environmental and water initiatives.
- Streamline regulatory approval processes for major projects
- Access to working capital delivered via an extension of the Export Credit Office
- Level the playing field to NZ firms for local and central government procurement
- Super-charged debt market
- Government/bank equity investment fund
- Banks commitment to provide capital to NZ firms
- Banks to significantly invest in financial literacy

NO REDUNDANCY WITHIN ‘9-DAY FORTNIGHT’

The Government recently announced the details of its a ‘9-day fortnight’ Job Support Scheme. The scheme had its origins from the recently held Jobs Summit.

The scheme is at present available only to businesses that currently employ more than 100 staff. To participate in the scheme, employers, employees and (if applicable) unions would need to negotiate agreements to vary existing employment agreement(s) for a period of up to 6 months to reduce the employees’ hours of work by up to 10 hours per fortnight. To participate in the scheme, employers must agree not to make any participating employee redundant.

The Government will pay directly to the employer for each employee participating in the scheme up to \$62.50, being the minimum wage of \$12.50 an hour for up to 5 hours per fortnight. That amount provided by the Government would then be directly passed on to the employees involved in the scheme, less any tax and levies payable.

The Job Support Scheme became available on 27 March 2009 and will run through until 31 December, 2010. However, businesses, employees and unions will only be able to participate in the scheme for up to 6 months within that period. The allowance is payable in respect of up to ten employees for each averted redundancy and will apply only to full-time employees.

An original key component of the scheme – that participating employees are involved in some form of workplace training on the ‘10th day of the fortnight’ – has been removed from the scheme. In making his announcement, the Prime Minister stated that the provision of training led to some complications around the monitoring of workers’ attendance at courses and noted the possible unfairness of requiring employees to meet the cost of getting to training after their salary or wages had been reduced. Mr Key also indicated that further thought would be given in the future as to whether the scheme could be extended to smaller employers.

LEGAL LOCKOUTS

The recent Court of Appeal decision in *Spotless Services (NZ) Limited v Service and Food Workers Union Nga Ringa Toa Incorporated (SFWU)* reconsidered whether a lockout by Spotless was lawful under section 82 Employment Relations Act 2000 (ERA) and whether the employees who were locked out were entitled to compensation for lost wages.

The Facts

SFWU, a registered union, had a number of its members employed by Spotless as cooks, cleaners, kitchen hands and orderlies. In June 2007 SFWU gave various notices of strike on behalf of Spotless employees. Spotless' response was to issue lockout notices covering similar periods.



The strike notices advised that the employees would strike for the first 55 minutes of each hour and would work the last 5 minutes of each hour. The corresponding lockout notices advised that selected employees would be locked out for the first 23 hours and 55 minutes each day if the demands in the notices were not accepted. Attempts at bargaining were ineffectual and when strike notices were not withdrawn a series of lockouts followed.

Spotless' lockout notices attempted to compel employees who were union members and worked at any District Health Board site, to agree that a minimum number of employees should be

available during any period of rolling strike action. The demand was to ensure that there was minimal impact on patient health during these periods. If the employees agreed, Spotless would withdraw the lock-out notices. Spotless issued further notices that were different to the original notices. After a series of injunctions and a substantive hearing, Chief Judge Colgan ruled that the lockouts were not lawful and awarded \$54,500 in lost wages.

Spotless appealed to the Court of Appeal.

The Law

Section 82 of the ERA defines 'lockout' as being the act of an employer that; closes/suspends/discontinues the employer's business, or discontinues an employee's employment, or breaks the employment

agreement, or refuses to engage employees for work and is done with a view to compel employees to accept terms of employment or comply with demands made by the employer. For there to be a lawful lockout the employer's demand under section 82 must be linked to a lawful ground under section 83 (furthering collective bargaining) or section 84 (health and safety). In addition, justification under section 83 or section 84 must be the dominant motive for the lockout. Section 96 of the ERA provides that employers are not liable for wages during a lawful lockout.

The Decision

The Court of Appeal held that Spotless' demands did not purport to require the employees to give up the right to strike. The demands were not open-ended and only related to the period of the rolling strikes. The Court decided that the question of whether the additional lockout notices altered the lawfulness of the lockouts should revert to the Employment Court. The Judges stated that if

subsequent lockout notices invalidated the original notices then the Employment Court would need to reconsider wage recovery. The Court noted that compensation for wages will depend on the individual employment agreements and if not provided for, Spotless would have unlawfully deducted wages under the Wages Protection Act 1983.

RECESSION-PROOF CAREERS

In the current economic climate it is natural that employees will become increasingly concerned about job security. 'Key industries' and 'essential services' will always require staff regardless of the economic situation. However, the definition of 'key industries' and 'essential services' continues to change over time. Jobs that are deemed to be 'essential' and tend to be recession-proof include nurses, midwives, doctors, teachers and police. Accountants and auditors are still required for tax purposes, auditing, GST, reports and payroll, and this will continue due to tight credit lines and increasing employer contributions. Resource planning positions and environmental consent experts are currently required in order to create more sustainable options.

Current Top 5 Recession-Proof Jobs in New Zealand

According to research conducted by Tradestaff, there are 5 jobs that have remained in demand despite the recession.

- Plumber - A service people can not do without.
- I.T. Engineer - Huge demand to keep equipment running
- Dairy Farm Worker - More profitable, needs increasing
- Roading Engineer - More infrastructure equals more roads
- Wallpaper Hanger - Almost no specialist training available in New Zealand

Sectors being hit by the recession

- Tourism (Low international tourist numbers)
- Construction (Since June 2007 number of new homes has halved)
- Hospitality (Huge cutbacks in household spending)
- Finance (lost 6,000 jobs last year)
- Residential Property - design and development
- Retail (7,000 job losses in the last year)
- Agriculture (fell 5% last year)
- Manufacturing (jobs declined by nearly 11,000 last year)

Who is feeling vulnerable?

A survey conducted by the New Zealand Business Council for Sustainable Development showed;

- 19% of the working population believe they will lose their jobs this year.
- Workers in transport or storage industries are most concerned about losing their jobs (44%) and construction workers are a close second (40%).
- Those feeling most secure are farm workers and managers (94%) followed by police, nurses, teachers and service workers (88%).
- Women are slightly more confident than men of keeping their jobs (78% vs. 74%)
- Future prospects are good in areas of agriculture and in new clean technology investment

GAY TAUNTS PROVE COSTLY FOR EMPLOYER

An Auckland employee has been awarded more than \$7,000 for unjustified dismissal and hurt and humiliation after being teased about his sexuality at work. Jason Cunningham had worked at Ponsonby-based Action Media for one month before resigning in late 2007. He had hoped to work out his notice but his Employer suspended him four days later.

An investigation into the claim revealed that his boss, Sean Mitchell, had taunted Cunningham for being gay. Mr Cunningham's voice and mannerisms were often mimicked by Mr Mitchell and when he resigned Mr Mitchell offered to help find him work at a gay magazine. Mr Cunningham's partner took exception to this behavior and called Mr Mitchell. This prompted Mr Mitchell to suspend

Mr Cunningham and there was discussion of Mr Cunningham working out his notice from home. Evidence indicated that at a later meeting Mr Cunningham was dismissed and told that he would not receive any more pay.

Conduct – “Infantile”

The Employment Relations Authority found in Mr Cunningham's favour and said that Mr Mitchell's conduct was *'infantile'*. Orders included wage arrears of \$3,461 plus 9% interest. Mr Cunningham was genuinely distressed by Mr Mitchell's comments regarding his sexuality. Action Media were accordingly required to pay a further \$3,800 as compensation for humiliation, loss of dignity and injury to Mr Cunningham's feelings.

KIWI SAVER: TOTAL REMUNERATION

National's KiwiSaver reforms took effect on 1 April 2009. We set out in our December 2008 Newsletter an overview of the changes. This article focuses on the somewhat confusing amendments relating to including KiwiSaver employer contributions in total remuneration arrangements.

The Amendments

The National Government repealed Labour's July 2008 amendments under urgency as part of its first 100 days package. This has enabled employers who wish to engage in a total remuneration approach to do so once again. As a result, any total remuneration agreements created before 13 December 2007 run the risk of being held invalid. Any agreements made after this date fall under the Act and will be upheld. However, any agreements made after 15 December 2008 are required to account for the amount of employer contributions in its terms to be valid. For example, a term stating that remuneration includes any contributions that the employer is required to pay under KiwiSaver. A total remuneration approach can be very useful to employers in certain businesses however one must acknowledge that there is a risk of future legislative change.

Benefits

A total remuneration approach can allow employers to predict wage budgets with certainty and treat KiwiSaver and non-KiwiSaver employees equally. Total remuneration approaches may be appropriate when the employee is well paid or the market is extremely competitive because it allows employers to offer the highest salary without the risk of hidden costs. Non-KiwiSaver employees benefit because their salaries will not be reduced on the basis that they may join KiwiSaver.

Disadvantages

A total remuneration approach may discourage some employees from joining KiwiSaver because their employer's contributions are subtracted from their remuneration. The Government originally announced that KiwiSaver membership would not reduce a person's gross taxable pay, however, it appears that the legislation can do exactly that. Employers can contract out of paying contributions in addition to salary/wages if they are acting in 'good faith.' We understand that this area may cause some level of anxiety for employers and recommend seeking legal advice before implementing total remuneration arrangements that include compulsory employer contributions.



ANNUAL HOLIDAY ‘CASH-UP’

The Prime Minister recently indicated that by next year employees would be able to trade their fourth week of annual holidays for cash. Such a move would require amendment to the Holidays Act 2003, which is something that National foreshadowed throughout its election campaign. The Prime Minister, in an interview with Radio Station NewstalkZB, stated that: *“It is our view that if you wanted to trade that fourth week for cash you should be able to do that”*. Mr Key also indicated that the decision to trade an employee’s fourth week of annual leave for cash would have to be made in agreement with employers and may not be



feasible for every organization. He said that the change to the Holidays Act could be made by April 2010. The move has been met with concerns from unions who believe that the policy will effectively mean a return to a three-week holiday entitlement.

‘TRY BEFORE YOU BUY’ TRIAL PERIOD - REMINDER!

The new 90-day ‘trial period’ provisions came into force on the 1 March 2009. It is now possible for an employer who employs fewer than 20 employees to place a new employee on a 90-day trial period. If an employer dismisses an employee during the trial period that employee is barred from bringing a personal grievance or legal proceedings in respect of their dismissal. However, the employer is still required to give notice, the employee still has access to mediation services and can bring a

personal grievance relating to discrimination, harassment or disadvantage. If an employer would like to take advantage of this provision they will need to agree with their employee that the employment agreement will contain a trial period. A trial period clause must then be included the written employment agreement. If you would like any assistance in including a 90-day trial period in your employment agreements or require further information please do not hesitate to contact us.

OVERSEAS SNIPPETS

Peru: Drunk Employee has Last Laugh

Workers should leave their hip-flasks at home – unless they live in Peru that is. Peru's top Court has held that workers can-not be fired for being drunk on the job. Pablo Cayo, a janitor for the municipality of Chorrillos, was fired for being intoxicated at work. The Constitutional Tribunal ordered Cayo to be given his job back because the dismissal was considered 'excessive.' The Court reasoned that although Cayo was drunk, he did not offend or hurt anyone. Despite Government complaints and comments by Labour Minister Jorge Villasante that "*It's not a good idea to relax rules at workplaces,*" the Court said it will not revise its decision.

United Kingdom: Tougher Test for Disability Discrimination

The House of Lords recently ruled that the decision in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm*, which made claims for disability-related discrimination much harder for claimants to bring under the housing sections of the Disability Discrimination Act 1995, also applies in employment cases. Before *Malcolm*, claimants were able to prove less favourable treatment by comparing themselves to a person to whom the disability-related reason did not apply. For example, if a disabled person was dismissed for excessive sick days, they would be compared to a person who had not been dismissed for excessive sick days. This comparator test was changed under *Malcolm* to a non-disabled person to whom the disability-related reason also applied. For



example, the comparator for the above example would be a non-disabled person who has had excessive sick days. In most cases employers will argue that they would have treated the claimant and the comparator exactly the same.

In *Child Support Agency v Truman* the Lords stated that the narrow comparator test is not restricted to housing cases. Although it is unclear how long *Malcolm* will remain good law, current disability-related discrimination claims will rarely satisfy this tougher test. The UK Government is discussing possible amendments to the law surrounding disability-related discrimination to make it easier to succeed in these claims.

South Africa: Suspensions – Fair Process Required

A recent case from South Africa has served as a timely reminder to New Zealand employers of the potential pitfalls associated with the suspension of employees. In *Post Office Ltd v Jansen Van Vuuren*, an employee was suspended on the basis that his employer suspected he was responsible for a power outage simply because he was present in the server room when it occurred. The Commission for Conciliation, Mediation and Arbitration found that the employer had placed the burden of proof on the employee to prove that he was not responsible for the outage and had been

very vague in its explanation of the nature of the alleged misconduct. The suspension was held to be unfair on the grounds that the employee was unaware of the nature of the offence he was alleged to have committed and was not given an opportunity to present his side of the story or dispute the allegations before being suspended. The Commission's findings in this case reinforce the following aspects of the law surrounding suspension in New Zealand:

1. the decision to suspend an employee must be based on substantive reasons;
2. when considering suspension, an employer must follow a fair procedure; and
3. an employee must be offered an opportunity to be heard and potentially refute the allegation(s) before the decision to suspend is made.

US: 'Popcorn Lung' Earns Employee \$7.5m, 1 Day After Death

The District Court for the Northern District of Iowa recently awarded an employee and his wife a total of \$7.5m in damages. Unfortunately for

the complainant, the decision came just one day after he passed away. In *Kuiper et al. v Givaudan Flavors Corp*, Mr Kuiper alleged that he developed the respiratory dis-ease known as "popcorn lung" due to his exposure to butter flavourings while working at American Popcorn Co., which contained the chemical diacetyl. The flavourings were manufactured by Givaudan and three other companies. The other companies all settled with Mr Kuiper. The Court heard evidence that Givaudan had known of eight cases of popcorn lung in its Cincinnati plant, where the flavourings were made, before Mr Kuiper began employment at American Popcorn Co. It was thus argued, and accepted by that Court, that Givaudan were negligent in not warning Mr Kuiper of the likelihood of developing the respiratory disease from exposure to diacetyl in the flavourings.





RIGHT-SIZING TOOLBOX SESSION

With the current global economic downturn putting the squeeze on many businesses, it is important that managers and staff are up to date with the law around restructuring and redundancy. Quigg Partners are offering Employment Law Toolbox sessions in 2009 which can assist businesses, both small and large, to accommodate the credit crunch through 'right-sizing' their operations. These can be held in your workplace or in our private seminar rooms. Toolbox sessions can be tailored to suit your needs and may also cover:

- Effective Disciplinary Procedure - managing difficult employees
- Bill of Rights, Privacy, OIA, Codes of Conduct and Conflict of Interest issues
- CEO/Board Relationships - special considerations

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

THE EMPLOYMENT TEAM

Michael Quigg	michaelquigg@quiggpartners.com	+64 4 474 0766
Jol Bates	jolbates@quiggpartners.com	+64 4 474 0759
Tim Sissons	timsissons@quiggpartners.com	+64 4 474 0758
Simon Martin	simonmartin@quiggpartners.com	+64 4 474 0752
Gretta O'Connell	grettao'connell@quiggpartners.com	+64 4 474 0765