



# CEO SEVERANCE / BONUS PAYMENTS

## Winners and Losers in 2009

Winners include:

Sir Fred Goodwin	Royal Bank of Scotland	£700,000 pension
David Kirk	Fairfax	A\$4.1m
Sol Trujilla	Telstra	A\$3.8m
Greg Clarke	Lend Lease	A\$3.1m
Peter Watson	Transfield	A\$1.9m
Geoff Dixon	Qantas	\$657,500

**Commerzbank ordered to honour bonus payments:** Four city bankers won a £10.8m legal battle, leading to Commerzbank being ordered to honour its bonus and severance commitments to former Dresdner Kleinwort bankers following its bailout by the German Government.

### Losers

**CEO of NHS loses £175,000 Severance Package:** The former CEO of the Maidstone and Tunbridge Wells NHS Trust oversaw Britain's worst outbreak of the hospital's superbug infection. There were 90 deaths due to the superbug. 1,150 people were infected. The NHS Inspectorate found there were appalling hygiene standards.

As CEO Ms Rose Gibbs was reluctant to leave as she had been in the job for three years. She was persuaded to go quietly and told she would receive a severance payment of £175,000. Following a public outcry the Health Secretary blocked the payments. Ms Gibbs sued and lost in the High Court. It was held the Trust had no power to award the payment.

This case contrasts with the situation of Sir Fred Goodwin. He is the former CEO of the Royal Bank of Scotland and under his leadership the Bank lost £24b in 2008, the biggest in UK corporate history. He has resisted calls to return his £700,000 a year pension, which has led to calls for legislation.

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**One-off 50% tax on UK Bankers Bonuses**

The Chancellor of the Exchequer has just announced a new one-off Bank Payroll tax on bonus payments exceeding £25,000. The law

is to cover bonuses also paid in shares. There will be some exclusions for existing contractual arrangements and guaranteed bonuses.

**Casual Employment: What is it?**

The recent Employment Court decision of *Jinkinson v Oceana Gold (NZ) Limited* considered the nature of a casual employment arrangement and clarified when a casual employee may in reality be a 'permanent employee'.

**The Facts**

Ms Jinkinson worked for Oceana Gold (NZ) Limited ('Oceana Gold'), a Central Otago mining company, from May 2005 until December 2006. Her employment agreement provided that she was employed on "*a casual basis to support our permanent workforce at peak times, to provide cover when required, or to undertake work that is only required irregularly. You are employed hour by hour to work as and when required.*" However, throughout her 19-month employment Ms Jinkinson worked on a consistent basis and had regular shifts amounting to 45 hours per week. She was paid on a fortnightly basis and received quarterly bonuses based on the overall mine performance. Her performance was reviewed annually and at her request, her holiday pay was accumulated over this time and paid out when she took her holidays. If she was required to

work on a public holiday, she would be given an alternative day's holiday on pay.

In December 2006, Oceana Gold terminated Ms Jinkinson's employment for redundancy. Ms Jinkinson brought a number of claims against Oceana Gold, including that her redundancy was not genuine and that she had been unfairly selected for redundancy.

**The Law**

The essence of a casual employment relationship is that it only exists during periods of work or engagement, which are on an 'as required' basis. Once these periods of work conclude there is no further obligation to provide work and no further obligations exist between the parties in between these periods of engagement.

Only employees are entitled to bring personal grievance claims (i.e. the person must have been an employee at the time of the action/dismissal and not simply be in between engagements)

**The Employment Relations Authority**

In order to determine the matter, the Employment Relations Authority ("ERA") first had to consider

whether Ms Jinkinson was an 'employee' at the time of her dismissal and therefore entitled to bring her claim. Ms Jinkinson challenged the ERA's decision in order to pursue her claim of unjustified dismissal by reason of redundancy.

### **The Employment Court**

Judge Couch believed that the Court must look at the obligations assumed by the parties before determining the 'real nature of the relationship'. The Court emphasised that the definition of 'employee' includes a 'person intending to work' (i.e. a person who has been offered and accepted work as an employee). The fact that Ms Jinkinson's employment agreement described her as 'casual' was not determinative (although it was a relevant consideration). The Court recognised that relationships can change with time and therefore the appropriate time to assess the relationship is at the time of the proceedings. Often such changes are not formally agreed upon but are simply changes in the parties' day to day behavior. Couch J stated that the strongest indicator of permanent employment is where the employer has the obligation to provide further work and the employee has a corresponding obligation to accept that work. He also noted that regularity and continuity of work in an employment relationship is indicative

of permanent employment as opposed to casual employment.

### **The Decision**

The Court held that Ms Jinkinson's employment agreement was inconsistent with a casual employment arrangement in that it provided a two week notice period for termination and provided that the Company would assist her with all reasonable relocation costs. The agreement imposed an obligation on Ms Jinkinson to accept work offered to her. While there was no corresponding obligation on Oceana Gold to provide her with work, the Court said that this situation was at the outset of the relationship and the nature of the relationship had changed since this time. Ms Jinkinson was routinely included in the work roster and had become an integral part of the workforce at Oceana Gold.

Her initial employment arrangement had therefore been "*abandoned*" in favour on a permanent employment relationship, which was clearly a contract of service. It was of no consequence that the new arrangement did not meet formal variation of contract requirements. The issue of whether her termination was justified was to be heard at a subsequent hearing.

# Cheese Company Prevented From Locking Out Dairy Workers

The case of *New Zealand Dairy Workers' Union* ('the Union') v *Open Country Cheese Company Limited* ('the Company') concerned the legality of an impending lockout by the Company of some of its employees.

In June 2009, the Union initiated bargaining for a collective agreement that was intended to cover all employees who were, or who were to become, Union members. The Union and the Company were unable to reach agreement after two months of negotiations and the Union gave notice of their intention to strike for a period of eight days. In response to this, the Company issued a lockout notice for a period of six weeks commencing on the final day of the strike. During the course of the strike the Union withdrew the strike notice and stated that its members should be able to return to work on Monday.

## Allegations of Sabotage

The Company, by way of their solicitors, advised the Union that before and during the strike there were a number of serious acts of sabotage. The Company considered that these may have been undertaken by the striking workers and that the Union may have known or encouraged these acts. The Company alleged that these acts caused significant economic harm and could

have resulted in serious injury or death. The workers in turn alleged acts of intimidation by Company management and that the Company had employed or engaged persons to do the work of the striking employees.

## The Decision

It was held that the lockout was unlawful because it related to the bargaining for individual employment agreements. The evidence showed that at no time did the Company offer employment on a collective agreement basis. It was found that the lockout would only conclude if the employees accepted the Company's offer of individual employment agreements or elected to remain on their current individual employment agreements.

Under the Employment Relations Act 2000 "*collective bargaining*" and "*bargaining for individual employees' terms and conditions*" are provided for separately. Timothy Slade, the general manager of the Company, openly stated that as a result of the sabotage the Company was "*more strongly opposed to a collective employment agreement than before.*" The Court held that the lockout was not for the purpose of furthering bargaining but was intended to compel employees to accept individual employment agreements on the Company's terms.



## Bill to Relax Rest and Meal Break Rules

A Bill is currently before parliament that would, if enacted, greatly increase the amount of flexibility employers and employees have to agree on the timing and duration of rest and meal breaks. The current legislation (within Part 6D of the Employment Relations Act) contains prescriptive provisions around when such breaks must be taken, and for how long. An employee's right to rest and meals breaks is absolute—there is no real provision for negotiation between the parties.

The Bill (the Employment Relations (Rest Breaks and Meal Breaks) Amendment Bill) would introduce a requirement that rest and meal breaks be provided, but that these breaks be *“at the times and for the duration agreed between the employee and his or her employer”*. Where the parties cannot agree, these breaks are to be taken at *“the reasonable times and for the reasonable duration specified by the employer”*. An employee's entitlement to rest and meal breaks may also

be subject to restrictions having regard to the nature of the employee's work. For instance, an employee's break may be interrupted, or he or she may be required to perform some of his or her duties during the break.

One final point to note about the proposed amendment is that employers and employees can agree on *“compensatory measures”* that can replace an entitlement to rest and meal breaks. An employer may also not be required to provide breaks where, having regard to the nature of the business, the employer *“cannot reasonably provide”* the employee with such breaks. In these instances, an employee must be provided with compensatory measures e.g. later start times, earlier finish times, time off in lieu.

The Bill is yet to have its first reading in the House but is intended to receive Royal assent no later than 30 December 2009, and come into force the day after.

## Cab Driver Refuses to Wear “Nazi” Uniform

A recent decision of the Employment Relations Authority (‘ERA’) concerned Mr Kleiven, a cab driver in Nelson, who was suspended from work for refusing to wear the new uniform



prescribed by his employer Nelson City Taxi Society (‘the Society’). The uniform included a black shirt, which Mr Kleiven argued reminded him of Nazi collaborators' actions against his family in his native

Norway and also of the *"wickedness perpetrated by agents of the Nazi Reich throughout continental Europe"* in general. Mr Kleiven refused to wear the shirt because of the memories attached to it and consequently he was suspended from work.

In the ERA, he sought compensation for unjustified dismissal. Speaking on behalf of the Society, Mr Moore said that despite holding Mr Kleiven in the highest regard, the Society could not make an exception for him regarding uniform. ERA member Mr Crichton was satisfied that the

Society had a legal right to insist its staff wore a uniform. In relation to Mr Kleiven's claim for compensation, it was found that he had not in fact been dismissed, but had been *"blacklisted"* and therefore was not entitled to compensation of any kind. However, the Authority did state that *"It may be possible for the society and Mr Kleiven to come to terms where perhaps the society might re-think its refusal to give Mr Kleiven an exemption, given his passionate belief that the present uniform shirt is a symbol of past evil."*

## Employee's \$10 Million-Dollar Error

A Westpac employee whose error led to a customer accessing \$10 million dollars will be taking her case to the Employment Relations Authority ('ERA') after she was dismissed. The dismissal followed a keying error made by the woman when entering a loan amount. The woman was formalising a loan for Rotorua Service Station Owner Leo Gao, when she missed the decimal point and accidentally increased what ought to have been an overdraft of \$100,000 to a overdraft of \$10 million. Unfortunately, Gao was able to transfer \$3.8 million into another account before he fled to China with his partner and other family members.

Following these events, the employee was called to attend a meeting with her superiors, members

of the Bank Workers' Union and Finsec. An internal investigation by Westpac in May 2009 resulted in further allegations that she had made another error by stipulating the incorrect amount in a loan confirmation. It was suggested that she transfer to an alternative role but when she declined to do so she was subsequently dismissed.

She will challenge her dismissal in the ERA claiming that her dismissal was unjustified. Westpac's General Manager of Customer and Technology Services, David Boyes, acknowledged that although mistakes happen from time to time the *"standards of accuracy are important for any bank to uphold."* We will keep you updated of any developments.

## Bus Driver Caught Smoking Pot

A bus driver for Go Bus Transport Limited ('Go Bus') recently challenged a decision of the Employment Relations Authority which declined her claim that she was unjustifiably dismissed for serious misconduct — specifically, smoking marijuana on the job. In the Employment Court Ms Kereopa also claimed that she had suffered unjustified disadvantage due to being suspended before her dismissal.

### The Facts

Ms Kereopa commenced employment as a bus driver in 2006. Allegations of smoking marijuana on duty and giving small bags of marijuana to passengers were made against Ms Kereopa. At an investigation meeting Ms Kereopa was informed of the allegations against her and suspended on full pay while the investigation took place.

Investigations ascertained that the son of another bus driver (C), was the person alleged to have smoked marijuana with Ms Kereopa. C was interviewed and said that Ms Kereopa had given him two bags of "weed" and on another occasion had stopped the bus, pulled out a "cone" and told C to have a "hit".

Another person (D), who was with C on the bus trip, provided a written statement admitting that she had also smoked marijuana with Ms Kereopa on the bus. Ms Kereopa refuted the allegations and claimed that she had found a pipe on the bus and had given it to C. She denied that it



contained marijuana it in when she gave it to him or when she got it back. Ms Kereopa was later invited to attend a disciplinary meeting. At the conclusion of this meeting she was found guilty of serious misconduct and dismissed.

Ms Kereopa claimed in the Employment Relations Authority that she had been unjustifiably dismissed. The ERA dismissed her claim.

### Appeal to Employment Court

On appeal Ms Kereopa argued that D was a fictitious person and alleged that C's mother had written D's statement. Ms Kereopa also argued that her collective agreement did not provide for summary dismissal for serious misconduct and consequently Go Bus had breached her agreement.

### The Decision

C provided convincing evidence to the Court that he had seen D write her statement—the Court rejected the claim that D was fictitious. The Court found that Go Bus had interviewed C extensively and had also relied on D's statement when deciding to dismiss.

The Court found Go Bus' representative's to be credible witnesses and accepted their evidence in totality. The Court was satisfied that Go Bus

had discharged the burden of carrying out its investigation in a fair and reasonable manner. The conclusion that a bus driver provided a passenger with a marijuana pipe and shared the contents with that passenger amounted to serious misconduct that went to the heart of the contract.

The Court stated that *'it would be a most unusual collective agreement which expressly excluded the right to dismiss for serious misconduct which had destroyed the essential trust and confidence implied into every employment agreement'*. In the circumstances, how Go Bus acted and what it did, was what a fair and reasonable employer would have done at the time of the dismissal.

## STOP PRESS! MINISTERIAL ADVISORY GROUP REPORT ON HOLIDAYS ACT

The Ministerial Advisory Group's Report on the Holidays Act 2003 has been handed to the Minister of Labour, Kate Wilkinson. It contains several recommendations from both employer representatives and union representatives. One of those recommendations, the ability of employees to 'cash-up' their fourth week of annual holidays, has already been adopted by the Minister and will be legislated for in early 2010.



### **Further recommendations of the employer representatives include:**

- The adoption of a single rate of pay for all types of leave using a formula based on a 52-week average (currently there are three different formulae used to calculate different leave entitlements);
- A change to the way leave is accrued – going from counting days worked to hours;
- No longer providing employees who work on a public holiday with a whole alternative holiday, but instead having the amount of hours they worked on a public holiday added to their leave balance (currently an employee gets a whole day no matter the amount of hours worked);
- Employees get 40 hours sick leave per twelve months, rather than the current five-day entitlement; and

- A change to sick leave entitlements to make them pro-rated – employees who work less than 40 hours a week would get less sick leave.

The recommendations above were met with opposition from the union representatives on the Advisory Group, who consider that the changes will actually lead to cuts in sick leave and annual leave entitlements for thousands of workers.

A spokesperson for the Labour Minister said that Ms Wilkinson was yet to make a decision on the other employer recommendations about accrual of leave and how it should be taken.

When legislation is introduced in 2010 any proposed changes will go to a select committee and the public will have the ability to submit their comments.

## OVERSEAS SNIPPETS



### AUSTRALIA: Prison Guards Criticise Boss on Facebook

Six prison guards from New South Wales are taking the Corrective Services Department to the Industrial Relations Commission alleging that they were threatened with the sack. The guards allege that after the Department became aware of their Facebook comments relating to the planned privatisation of jails, the Department threatened the guards with dismissal. The comments on Facebook criticised Ron Woodham, the Corrective Services Commissioner, about the proposed changes. The case is set to be heard by the Industrial Relations Commission and may set a precedent regarding employees' use of social networking websites and the ability of employers to discipline their employees for derogatory comments made on them.

### UNITED KINGDOM: Retirement Age Confirmed as 65

The long awaited decision of the European Court of Justice in the Heyday case recently confirmed 65 as the "default retirement age" in the UK. It was argued that there is no consistent social policy objective for having a default retirement age and that by setting one, the Government had merely succumbed to pressure by business organisations.

The Court rationalised that while the Government was interested in promoting employment, tax revenues, self sufficiency and reducing the burden placed on the retirement pension, there was also the need to maintain competitiveness, assist career planning, reduce the social cost of regulation and ensure that there were jobs for people of all ages. The Court thus ruled that the Government had sufficient policy aims underlying the default retirement age to justify it, including work-force planning and encouraging employees to save for retirement.

Interestingly, the Court did consider whether 65 was the appropriate age for default retirement. While there were strong arguments to justify raising the default retirement age, the Court noted that before the Age Regulations were introduced 65 was the age that people became eligible for the state pension. The Court noted that had the Government not announced that it would review the default retirement age in 2010, it would have found that 65 was not proportionate.

Given the recent murmurs concerning New Zealand's national age of superannuation, this case only highlights the fact that the issue of an ageing population (not only in New Zealand), and how Government's deal with this issue, is here to stay.

#### **AUSTRALIA: Court Allows Employee to Work for Direct Competitor**

The Victorian Supreme Court recently emphasised the special care that employers need to take when drafting post-employment restraint clauses. *Integrated Group Limited v Dillon* involved an account manager who had resigned from Integrated and commenced employment with a direct competitor only two weeks later. Two clients of Integrated transferred their business to the competitor after the employee left. Integrated alleged that the ex-employee had solicited these clients and assisted them in transferring their business to her new employer and accordingly sought injunctive relief to prevent further losses.

The Court considered the employee's individual employment agreement, which provided that she would not for a period of 12 months (or if unenforceable six or three months) after the conclusion of her employment; solicit clients, business or patronage of Integrated or encourage or solicit any employee or agent of Integrated. The clause also provided broad restrictions preventing her from competing with Integrated after her employment ceased.

The Court stated that while it can sever (reduce or 'read down' a restraint) unreasonable restraints if those restraints are clearly severable, it expressed concern in severing unreasonable restraints where the severance assists the employer to enforce what was originally an unjustifiably wide restraint. The Court held that the prohibition on soliciting clients and business of the company was too broad to be enforceable. 'Business' and 'patronage' were not defined and if enforced would have prevented the employee from soliciting business or patronage from Integrated's related corporations (some of which operated overseas).

#### **ENGLAND: Private Profiles A Prudent Option?**

Facebook, MySpace, LinkedIn, Twitter. An account on any one of these social networking sites could be the difference between landing a dream job and facing unemployment. A recent survey by CareerBuilder revealed that approximately 45% of employers use social

networking sites to research and investigate prospective employees. The survey concluded that 35% of employers chose not to hire certain applicants based on their findings. Deterrents to employers included provocative or inappropriate photographs, content concerning irresponsible alcohol/drug use and negative comments in relation to previous or current employers.

Whilst these types of 'background checks' are not illegal, many employees feel that it is an invasion of privacy and that their personal profiles are not representative of their attitude or aptitude as employees. Social networking sites can provide employers with information that would otherwise not be available during the recruitment process.

The concern here is that information which should not influence an employer's decision, such as race, religion or age, could become determining factors when deciding on a successful applicant. Employers who are influenced by information gained through social networking sites risk facing claims of discrimination if it is proven that their decision was influenced by irrelevant criteria.

## **SAN FRANCISCO: Checkout Worker Awarded \$218,000 After Wetting Herself at Work**

A checkout woman in San Francisco was awarded \$218,000 in damages after she urinated on herself while working at the check out counter. The woman had repeatedly asked for permission for a bathroom break but was denied each time by her supervisor. The woman was receiving treatment for cancer and she was required to drink water constantly. She had understood that the store managers would cover for her during her bathroom breaks. However, a new supervisor denied her three requests to use the bathroom and consequently she urinated on herself, which caused her to feel considerable shame.

After the incident she contemplated suicide and was committed to a psychiatric hospital for several days. The Court of Appeals heard that the woman was already in a fragile state due to her battle with cancer and she had also suffered trauma as a result of growing up in war-torn El Salvador. The jury found that the supermarket was at fault due to their failure to inform the new supervisor of the woman's need for constant bathroom breaks. The woman was consequently awarded \$18,000 in lost wages, \$43,000 in medical expenses and \$161,000 for emotional distress.



### 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 2010 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

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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](mailto:michaelquigg@quiggpartners.com)

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