



# EXECUTIVE LOSES JOB FOR FAKE CV

## EMPLOYMENT TEAM MEMBERS



Many will have forgotten about the demise of John Davy as CEO of Maori Television arising from the discovery of his fake CV. Even top executives fail to learn at times.

The latest to suffer the same fate is a top executive of the InterContinental Group. Last week Patrick Imbardelli quit his \$786,000 job as head of the Group's Asia Pacific chain.



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The sins of Mr Imbardelli were embellishing his tertiary qualifications. He claimed 2 degrees from an Australian University and 1 degree from another in the United States. He attended both universities but failed to graduate from either. He successfully climbed the internal corporate ladder. This led to a whistleblower disclosing his historical embellishment.

As the company rightly pointed out in stating no compensation would be paid “*The fundamental basis of trust was undermined*”.

Despite the false qualifications being unrelated to Imbardelli's seemingly well deserved and popular rise his fall was immediate. Whilst met with sadness and shock the false CV was seen as a “*time bomb waiting to go off*”.

### Comment:

1. A false CV is a disaster waiting to happen.
2. Remember, it still pays to have a clause in employment agreements expressly stating that the employer relies on all representations made by the employee in support of the application for employment and may face termination for any misrepresentation or material omission.

## WORKPLACE STRESS PROSECUTION LOOMS

It has been over 2 years since the Blenheim firm of accountants Nalder & Biddle pleaded guilty to workplace stress charges and were fined \$8,000.00.

Nalder & Biddle's guilty plea meant that the case did not reveal many insights into such matters as the threshold tests to be applied and how this would occur.

Now a second prosecution looms. This time the fish is much larger. On the Department of Labour's hook is the Bay of Plenty District Health Board (“DHB”).

### QUICK REFERENCE

Executive Loses Job	1
Workplace Stress	1
KiwiSaver	2
State Sector Code of Conduct	3
Revenge the Sweetest Medicine?	4
Restraint of Trade	5
Too Old to Fly?	7

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The DHB is currently defending the charge with the case being heard further in the Whakatane District Court on 18 July next.

At issue are actions of the DHB in allegedly failing to take all practicable care to ensure the safety of its Nursing Manager who collapsed on 21 March 2007.

The case is bound to attract widespread interest as employers endeavour to ascertain where the Court is likely to set the criminal bar for the employer's vigilance in terms of safeguarding employees from workplace stress. Likely to arise in the case are issues such as:

- The contribution of non-workplace stressors
- Whether the employee was particularly susceptible to stress
- If so, whether the DHB knew or should have known
- Whether this Manager was treated any differently to other Managers in terms of workload, assistance, time off, support etc
- What signs did or should the DHB have recognised.

We will report on developments.

## **KIWISAVER – REKINDLING THE TOTAL REMUNERATION DEBATE FOR MANAGERS**

### **The Debate**

It was at least 10 years ago when employers were debating the issue of whether to provide managers 'total remuneration' packages or 'salary plus benefits'. The issue centred on whether the "*hidden*" costs of total remuneration packages (in terms of the total cost to employers) was properly understood or appreciated. This was particularly so when employees considered other job opportunities.



### **Total Remuneration**

The concept is simply that the total cost to the employer of the benefits made available to the employee including paying Fringe Benefit Tax ("FBT") is costed. The manager's package is say worth \$200,000. Of that the manager can choose (usually 6 monthly or annually) how it is apportioned eg:

<b>Base Salary</b>	\$160,000.00
<b>Motor Vehicle (cost to employer including FBT)</b>	\$20,000.00
<b>Car Park (cost to employer including FBT)</b>	\$5,000.00
<b>Superannuation (cost to employer including FBT)</b>	\$10,000.00
<b>Health Insurance</b>	\$5,000.00
<b>Total Remuneration</b>	<b>\$200,000.00</b>

After FBT was introduced total remuneration arrangements have held less attraction. What made the situation more complex was that under this arrangement Managers often had other contractual

benefits linked to their base salary eg the calculation of compensation, or retirement long service leave.

There was a move to cash up benefits completely by Managers at any time when redundancy loomed as a possibility. For these reasons there was a move to cash up benefits previously provided under a total remuneration package.

### **Salary Plus Benefits**

Historically there have also always been a number of senior employees securing payment of salary plus benefits eg \$200,000 salary plus a company car with full private use, medical insurance etc. These were the select few and the increasing trend was at salary review time to weigh their costs to the employer on a total package (ie total cost to the employer) basis. The other downside of the salary plus benefits concept is that Managers often take for granted the benefits and do not take their value into account when comparing the worth of their current role to some future position with a complete cashed up remuneration.



### **Employer Subsidised KiwiSaver**

There is now to be a tax incentive on employers to contribute to employees' KiwiSaver plans. If employers do so, to take advantage of the tax concession, whether to keep in step with competitors in a tight labour market or simply because they support the concept it may give rise to the same issues that arose in the total remuneration v salary plus benefits debate 10-15 years ago.

KiwiSaver is currently particularly attractive to a certain group of employees. It is less attractive to older employees with their own home who have, current super arrangements etc. If employers do contribute say 4% or 8% to KiwiSaver for employees who chose to join, should other employees in similar positions have the cost to the employer added to their salary to preserve the relativity?

This will be a particularly important issue for employers who may consider that they need to contribute to remain a viable force in their market in terms of recruiting the right talent. Should those who have already provided for their own super needs be relatively worse off or indeed are they if they choose not to join KiwiSaver and their remuneration remains unchanged?

## **CODE OF CONDUCT FOR STATE ENTERPRISES**

A new Code of Conduct is to be launched this week covering 110,000 State workers. It is to be the subject for further consultation before it formally takes effect at the end of the year.

The Code will cover all public service departments, crown agencies, autonomous Crown entities and independent organisations such as the Commerce Commission and the Law Commission as well as District Health Boards. It is anticipated that in the future it may cover schools.

Its implementation will be worthwhile observing given the number of recent cases that have relied on the wording of the employer's policies and Codes of Conduct.

# REVENGE THE SWEETEST MEDICINE?

- *CHIEF EXECUTIVE OF UNITEC INSTITUTE OF TECHNOLOGY V HENDERSON*

## FACTS

This case was heard by the Employment Court on appeal following an Employment Relations Authority determination. It demonstrates the potential for trouble when not one but three employees of the same entity are caught up in a messy relationship breakdown.



Kathleen Henderson was a senior lecturer at Unitec. She had a relationship with David Nummy, a fellow staff member. They worked in the same building. So did Mr Nummy's wife, Pamela.

Mrs Nummy eventually learned of the affair. The resulting melee eventually led to Ms Henderson's dismissal in June 2005.

The incidents referred to by the Court included charges of assault laid against Mrs Nummy and her son after a fight with Ms Henderson. The fight occurred after Mrs Nummy discovered her husband with Ms Henderson, and resulted in Ms Henderson's hospitalisation.

The affair between Ms Henderson and Mr Nummy ended, and Ms Henderson applied for a restraining order against Mrs Nummy. However, the affair later re-commenced, lasting a further three months.

Ms Henderson then sent two anonymous letters to Mrs Nummy, intended to convince Mrs Nummy that the affair had been started by her husband, rather than Ms Henderson. The first consisted of a print-out what the Judge described as an "*intimate and amorous e-mail*" sent by Mr Nummy to Ms Henderson. Mr Nummy intercepted and hid this letter.

The next week, Ms Henderson sent a second letter, listing 300 emails between herself and Mr Nummy. Mr Nummy also intercepted this letter, but then showed both letters to his wife. Subsequently, both Nummys wrote to Unitec to complain about Ms Henderson's actions.

This led to an investigation resulting in Ms Henderson being dismissed for serious misconduct.

## THE ISSUES

The Authority had found that Mrs Henderson had been unjustifiably dismissed but ruled that she was not entitled to a salary increase she claimed she was entitled to.

On appeal to the Employment Court, the issues were whether Ms Henderson's dismissal was substantively and procedurally justified, and whether she was entitled to a pay increase during the latter part of her employment.

## DECISION

The Court held that while Ms Henderson's use of emails could not reasonably have constituted misuse of Unitec's email system (one of the grounds for her dismissal), her act of posting the emails to Mr Nummy's wife was harassment of another staff member and therefore constituted serious misconduct. The Court described Ms Henderson's conduct as an "*insidious campaign*" against the Nummys.

Accordingly, it was held that Ms Henderson's dismissal was substantively justified. However, the Court held that Unitec's procedure was flawed in that it failed to provide Ms Henderson with access to information relevant to decision to dismiss her, before decision was made. Nevertheless, the Court concluded that even if the process had been carried out correctly, Ms Henderson would have been dismissed anyway.

## RESTRAINT OF TRADE UPHELD

In March of this year, the Court of Appeal released its decision in *Fuel Espresso v Hsieh*.

Fuel Espresso Limited ("Fuel") had applied for an interim injunction against Mr Hsieh, a former employee. It sought orders that Mr Hsieh cease working for or operating a coffee cart named "Beangrinding" in Tory Street, Wellington until 7 April 2007, on the basis that Mr Hsieh had breached a restraint of trade clause in his employment agreement.



The Employment Court heard the case under urgency. Although the Judge was not at all impressed with Mr Hsieh's actions, the application was dismissed on the ground that no consideration had been given for the restraint, meaning it was unenforceable.

Fuel sought leave to appeal to the Court of Appeal and an urgent determination by that Court, on the basis that the restraint at that stage only had a month to run, and damages would be very hard (and probably impossible) to calculate.

The Court of Appeal granted leave to appeal, releasing its judgment the day after hearing the case.

## FACTS

Fuel espresso carts and outlets are a familiar sight in Wellington. Fuel employs baristas to make and sell coffee. These baristas are offered training programmes.

Mr Hsieh began working for Fuel on 7 November 2005. His employment agreement was described as "reasonably standard", and included a restraint of trade provision. This provided that Mr Hsieh could not for 3 months after the termination of his employment

- Work in a competing espresso bar/café or coffee company within a 100 metre radius of a Fuel operation; and/or
- Set up a similar competing business within 5 kilometres of an existing Fuel operation.

Mr Hsieh resigned on 7 January 2007. He started at Beangrinding on 15 January 2007, operating through a company called Formosa Mansion Limited, which leased the coffee cart off Beangrinding Limited for a licence fee. Mr Hsieh worked as the barista.

The Beangrinding cart was 70 metres from Fuel's Holland Street premises, and was therefore well inside the area covered by the restraint of trade.

## **EMPLOYMENT COURT DECISION**

Despite finding that the restraint was not too broad, and that Fuel had a proprietary interest to be protected, the Employment Court Judge considered that extra consideration was a prerequisite for an enforceable restraint of trade, finding that this could be either set out expressly in an amount of dollars being paid to buy the restraint of trade, or by extrinsic evidence, or reasonably inferred from the agreement. None of these were found to be present in this case. Accordingly, no arguable issue of law had been raised to support an injunction, in that there was no consideration for the restraint of trade provision.

## **COURT OF APPEAL DECISION**

The Court of Appeal noted that the traditional definition of consideration “*requires that there be something of value which must be given, and that consideration is either some detriment to the promisee or some benefit to the promisor.*”

However, it also noted that the law does not enquire into the *adequacy* of the consideration or require an extra “premium” for a restraint of trade clause. It noted that even mutual promises can be consideration for each other.

The Court of Appeal accordingly found that the Employment Court Judge was wrong as a matter of law – there *was* consideration in this case. The Court held:

*“The restraint is plainly reasonable. Agreements are made to be kept.”*

While noting that the matter might have required an exercise of the Court's discretion in an extreme case (such as perhaps a low salary set against a harsh restraint), no issue of that sort arose here.

Accordingly, the appeal was allowed, and an injunction was issued against Mr Hsieh.

# TOO OLD TO FLY?

## AIR NEW ZEALAND AND AGE DISCRIMINATION

The Employment Court has recently released its decision in a case concerning the retirement of airline pilots. Air New Zealand had a policy preventing pilots aged 60 or over from holding certain positions. The case concerned whether the policy was discriminatory and therefore unlawful.

### THE FACTS

The case was taken by David McAlister, a pilot with the rank of captain of the Boeing 747-400 fleet as pilot-in-command ('PIC'). He was also a 'standards captain' and flight instructor. Most Air New Zealand 747 flights either land in US territory or over-fly US airspace.

Having reached the age of 60 in September 2004, Mr McAlister was removed from his position as flight instructor, ceased to hold the rank of captain, and under protest was relegated to the rank of first officer. Air New Zealand's decision was based on its policy that:

*No pilot who has attained age 60 can hold the position of pilot-in-command on the 747 and 767 aircraft while the predominant operation of these aircraft is to or through territories and alternates that have adopted the ICAO and FAA regulations in relation to the age of pilots-in-command.*

Mr McAlister's protests were not accepted by Air New Zealand, and he took a personal grievance claim alleging discrimination on the basis of age and unjustifiable disadvantage.

### AVIATION LAW

The International Civil Aviation Organisation ('ICAO') regulates civil aviation in contracting states. One ICAO standard imposes an age restriction on pilots, stipulating that instructors cannot act as a PIC engaged in scheduled international air services or non-scheduled international air transport operations once they reach the age of 60.

New Zealand has not adopted the standard, having filed a 'difference' with the ICAO. Although this stance is shared with a number of other countries, it is not shared with all countries that Air New Zealand flies to, including (relevantly) the United States. A pilot who has reached his or her 60<sup>th</sup> birthday accordingly cannot act as PIC in or over US territory in accordance with the standards of the ICAO and the US Federal Aviation Authority ('FAA').



Following Mr McAlister's complaint, Air New Zealand sought advice on issue from the FAA. The FAA confirmed its view that an instructor aged 60 or over could not act as a PIC engaged in scheduled international air services or non-scheduled international air transport operations. Relying on that advice, Air New Zealand took the stance that once an instructor turned 60, he or she would lack the licence and rating to act as a PIC.

Whilst it was agreed that systems *could* be put in place to enable Mr McAlister to continue performing his essentially previous role (albeit flying to different destinations), Air New Zealand said that the resulting changes to its rosters would be unreasonable, would lead to a loss of goodwill from other pilots, and could have potential for operational risks such as the danger of breaching the rules affecting foreign territories. Steps to avoid these risks were said to possibly involve extra fuel costs of more than \$4,000 per flight.

## **DISCRIMINATION?**

Air New Zealand contended that there was no discrimination because no detriment to Mr McAlister arose because of his age: it maintained that what occurred in Mr McAlister's case was only as a result of the IAOC / FAA terms. However, the Court held that:

*“on the face of it the question of Mr McAlister's age was an express and relevant factor in Air New Zealand's decision ... The fact that Air New Zealand did not intend (and I find that it did not intend) to actively discriminate on the basis of age, does not detract from the fact that but for his age, Mr McAlister would not have been limited in the range of flying activities which he could undertake.”*

Accordingly, it was found that the substantial reason why Mr McAlister's position was downgraded was his age, and was therefore based on a prohibited ground of discrimination.

## **APPROPRIATE COMPARATOR?**

Section 104(1)(b) of the ERA (which concerns discrimination) requires an inquiry into whether other employees employed by Air New Zealand in the same work were subjected to the same detriment. The Court held that the appropriate comparison was between a flight instructor/PIC who had reached age 60 and the flight instructors/PICs under 60 doing the same work. It held that it was clear that the comparator group had not suffered the same detriment as Mr McAlister, since they continued to enjoy the privileges of their position, while he could not.

The Court therefore found that after he turned 60, Mr McAlister received different, disadvantageous terms of employment and conditions of work by comparison with the younger group of flight instructors/PICs and was therefore *prima facie* discriminated against.

## **EXEMPTION?**

Section 30 of the Human Rights Act provides an exception to some of the ERA's discrimination provisions in circumstances where being of a particular age is a genuine occupational qualification for the relevant position.

Whilst the Court accepted that Air New Zealand had developed its policy believing that it amounted to a genuine occupational qualification, the Court held that an objective assessment of the occupational qualifications for a PIC/flight instructor showed no relationship to age.

Despite the Court's acknowledgement that the limitations on where Mr McAlister could fly would restrict the extent to which he could be rostered, it held that this was an operational *difficulty*, rather than an occupational *qualification*, and accordingly the exemption did not apply.

## DISADVANTAGE?

The Court also found that Air New Zealand's unilateral changes to Mr McAlister's employment and failure to properly discuss the available (if slightly unconventional) accommodation of his situation with Mr McAlister, resulted in unjustified disadvantage to Mr McAlister.

## REMEDIES

The matters were considered on a liability basis only, and accordingly no remedies were ordered by the Court in this decision.

## LESSONS

- Retirement policies will always be problematic in terms of human rights legislation.
- This case demonstrates that even a very strong reason justifying a *prima facie* discriminatory practice may fail if challenged at the Employment Court.

The Court of Appeal has recently granted Air New Zealand leave to appeal this decision.

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