

June 2008

CEO BONUSES - NOT BOARD PLAYTHINGS

Many Chief Executives have contractual entitlements to be considered for some form of incentive or bonus arrangement. These can include immediate cash payments, deferred or banked cash entitlements, profit share entitlements, share options or 'phantom' share options.

The rules of such arrangements will determine matters such as:

- What must happen for an entitlement to arise;
- When any entitlement will be provided;
- Whether there is a pro-rata entitlement;
- Whether the employer can change or amend the scheme and if so, when;
- Whether the employer can withdraw the scheme completely; and
- Whether certain behaviour will disentitle the employee.

The rules must be clearly thought through. Their aim must be understood. Clarity in their drafting is imperative.

Some schemes reward short-term achievements. Others are aimed at recognising longer term sustainable achievements. Many try to recognise and reward the realisation of both short term and long term objectives.

Employer/Board Dilemma – Flexibility v Certainty



The dilemma faced by employers generally, and Boards in particular, is in achieving a balance between flexibility and certainty. Managers want certainty. They want to know that if they satisfy certain Key Performance Indicators (KPIs) they will receive specified rewards. Employers and Boards realise that some certainty is necessary to provide motivation. They realise that an incentive arrangement that is simply at the employer's or Board's 'grace and favour' will not provide such motivation. Nevertheless, Boards and employers want the ability to vary or even withdraw schemes if the KPIs become out of alignment with the organisation's strategic objectives or if market conditions change significantly.

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ACHIEVING A BALANCE

To balance these interests, many schemes outline annual targets and KPIs, but couple these with a right for the employer or Board to review the arrangements and amend or withdraw them. Some schemes provide that this right can be exercised at any time. Other schemes provide that the terms are set for the year and can then be changed or withdrawn.

DISCRETIONARY BONUS

Another common approach is for employers and Boards to reserve for themselves an absolute discretion at the end of the day to decide whether or not to make an incentive payment. In order to make this a more attractive option for managers, employers and Boards often try to dress up the manager's rights with performance criteria and indicators whilst still reserving for themselves an absolute discretion whether payment will be made. Such hybrid approaches can provide traps for the unwary as several recent cases illustrate.

MICROSOFT ORDERED TO PAY HOLIDAY PAY ON MANAGER'S BONUSES

Recently in what was described by the *New Zealand Herald* as an unprecedented case, Microsoft was ordered to pay a senior manager holiday pay on the bonus payments he received over the 6 years prior to his resignation. The sum ordered to be paid exceeded \$20,000. Further, it may have opened the door for other New Zealand senior managers to pursue other claims as, like other multinationals, Microsoft operates a worldwide bonus scheme.

While Microsoft thought the payments were discretionary and therefore excluded from the calculation of holiday pay under the Holidays Act, the Authority held that the entitlement was a contractual one that Microsoft was obliged to pay. The various notifications and disclaimers used in the incentive scheme documentation were rejected on the basis they could not fetter Microsoft's contractual obligation to make the various bonus payments. – *Andrew Watson v Microsoft New Zealand Limited* (1 May 2008) ERA WA54/08.

REASONS REQUIRED WHEN EXERCISING A DISCRETION

Even when the employer or Board has genuine discretion as to whether to pay a bonus, the Court of Appeal in England has indicated that if requested, it should generally give reasons for its decision whether or not to pay. The Court held that an employer has an implied duty to maintain trust and confidence and this imposes a duty on an employer “*generally ...to give his reasons for the exercise of his discretion to pay or withhold a bonus and to identify the decision-maker*”. – *Commerzbank AG v Keen* [2007] IRLR 132.

With employment relationships in New Zealand being underpinned not only by the implied duty of trust and confidence, as so often stated by the Courts, but also being subject to a statutory duty of good faith (referred to in the *Microsoft* case), employers and Boards need to be very careful with bonus and incentive schemes.

PRACTICAL TIPS

- Have clearly and professionally drafted bonus or incentive arrangements;
- Review those arrangements regularly;
- Apply any criteria or indicators in a clear and even-handed manner;
- Identify the decision maker(s);
- Be prepared to give reasons for the decision whether or not to make a bonus or incentive payment;
- Be aware that payments may need to be included in the calculation of holiday pay; and
- Ensure that all bonus or incentive entitlements are addressed before concluding any full and final settlement arrangement.

AVOID

- Making public statements about withholding bonuses without knowing the applicable criteria;
- Forgetting that all records relating to the payment or non-payment of bonuses are likely to be discoverable documents if a challenge is made; or
- Forgetting to cross your 't's and dot your 'i's.

STOP PRESS— COURT OF APPEAL HOLIDAYS DECISION

The Court of Appeal on 11 June upheld an appeal by the NZ Tramways Union and the National Distribution Union about the annual leave entitlements of around 1000 bus drivers.

The unions were unsuccessful in arguing before the Employment Court that in light of the legislative requirement of 4 weeks' leave, a collective agreement that allowed 3 weeks' leave "in accordance with the provisions of the Holidays Act 1981" and a further week's leave "in recognition of the nature of the work" should be interpreted as allowing a total of 5 weeks' leave.

The majority of the Court of Appeal held that the Employment Court was wrong in its analysis of the Holidays Act and has remitted the case to be reconsidered by the Employment Court.

HIGH COURT UPHOLDS HEALTH AND SAFETY CONVICTION



In *Martin Simmons Air Conditioning Services Ltd v Department of Labour* the High Court recently considered an appeal against a conviction under the Health and Safety in Employment Act.

FACTS

The appellant was a company that sells and maintains air conditioning units. Some of the units it maintains are on the roofs of commercial buildings. The company's employees were servicing such rooftop units on 12 October 2005 when contrary to instructions, one employee, Mr Raeina, walked across a fibrolite roof which gave way under him. Mr Raeina fell 8.1 metres to the ground and subsequently died from his injuries.

PROSECUTION

The Company was prosecuted by the Department of Labour under sections 6 and 50 of the Health and Safety in Employment Act for failing to take all practicable steps to provide and maintain for employees a safe working environment.

DISTRICT COURT

The District Court found that in failing to hire a cherry-picker to access the front air conditioning unit, the Company had failed to take all practicable steps. It found that the only practicable step the Company took as regards the foreseeable risk of serious injury or death if an employee fell through the roof was its instruction to employees to walk on the nail lines when accessing the front unit. The District Court found that that was not safe practice in the absence of fall protection. The Court noted that *“While Mr Raeina failed to follow his employer’s instructions, that does not exculpate the defendant. Those instructions were inherently unsafe”*. The District Court found the charge proved, fined the Company \$60,000, and ordered it to pay reparation of \$45,000. The Company appealed.

HIGH COURT

Before the High Court, it was submitted that the District Court Judge reversed the burden of proof. The Court agreed that the burden of proving the charge was the Department of Labour’s. However, it also held that *“the risk of a fall and consequent severe injury, even death was well known”* to the Company, which had mentioned the state of the roof to its client 12 months before the incident. The Court found that there was ample evidence for the District Court Judge to have been satisfied beyond reasonable doubt that the cost of hiring a cherry-picker was not such as to rule it out. There was sufficient evidence to conclude that the hire of a cherry-picker was a reasonably practicable step.

The High Court went on to note that *“there may be situations where the potential harm is so severe (i.e. death) and the risk is so high that if the cost of avoiding the risk is too high then the task should not be attempted at all”*.

It was submitted on behalf of the Company that that there was no causal nexus between any failure to take a practicable step and the harm, being Mr Raeina’s death. It was therefore argued that the offence was not proved. The High Court rejected this argument, noting that the offence did not require a particular harm to have befallen an employee. All it required was a failure to take all practicable steps to provide and maintain for employees a safe working environment – a causative link between the failure and the harm was not necessary. The High Court dismissed the appeal.

FLEXIBLE WORKING ARRANGEMENTS

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 will on 1 July 2008 introduce various requirements as to requests for flexible working arrangements.

ELIGIBILITY

To request flexible working arrangements, a person must have been employed by their employer for 6 months and have *“care of any person”*. Although it was initially to have applied only to those caring for a child under 5 or a disabled child under 18, the regime as passed does not have such limitations.

NATURE OF THE REQUEST

An employee can request changes to his or her hours, days, and place of work. A request must specify the variation being sought, whether it would be permanent or temporary, when it would take effect, and (if it would be temporary) when it would end.



Employees must also explain how the variation will enable them to provide better care for those they are caring for and explain what changes, if any, may need to be made to their employment arrangements if the request is approved.

PROCEDURE FOR EMPLOYER

An employer must approve or refuse any request “*as soon as possible*”, but no later than 3 months from the date it is received. A request can be refused because the employee is ineligible to make it, or on one of the grounds listed in the Act, or both.

REFUSAL GROUNDS

The grounds for refusal include an inability to reorganise work among existing staff, planned structural changes, the burden of additional costs, and an inability to recruit additional staff. An employer is *required* to refuse a request if the employee is bound by a collective agreement that covers working arrangements and the requested new arrangements would be inconsistent with the collective agreement. If a request is refused for either of these reasons, the employer must notify the employee of the ground for refusal and provide an explanation of the reasons for it.

CHALLENGES TO REFUSED REQUESTS

An employee will have limited rights to challenge an employer’s refusal. Such challenge must only apply to an employer’s alleged failure to comply with the regime’s procedural requirements. An employee cannot seek a direction from the Authority as to whether the Employer’s refusal under one of the 9 listed grounds was reasonable. Any challenge must commence with referral to a Labour Inspector, and (other than by way of judicial review) can be taken no further than Employment Relations Authority.

SANCTIONS

If found not to have complied with the procedural requirements, the employer faces a penalty of up to \$2,000 which is payable to the employee. If the Authority determines that the employer wrongly determined the employee’s eligibility to make a request, the employer will be required to consider the request.

FOLLOW THE PROCESS

In light of the procedural (as opposed to substantive) focus of any challenge rights, the key for employers is to know the procedural requirements and then follow them. If in doubt after receiving a request, employers should get advice promptly. Don’t wing it as you may have been able with a little assistance to avoid any difficulty.

LEGISLATIVE CHANGES

Two other employment-related amendments are presently in the legislative pipeline, being considered by the Transport and Industrial Relations Select Committee.

EMPLOYMENT RELATIONS (BREAKS AND INFANT FEEDING) AMENDMENT BILL

The Employment Relations (Breaks and Infant Feeding) Amendment Bill would amend the Employment Relations Act to address two matters.

It proposes amendments in relation to breastfeeding to:

- require employers to provide appropriate facilities and breaks for employees who wish to breastfeed (including expressing breast milk), as far as is “reasonable and practicable” in the circumstances;
- provide that such breaks are unpaid unless agreed otherwise; and to
- provide that the Employment Relations Authority may impose penalties on employers who do not comply with the provisions of up to \$5,000 for individuals and \$10,000 for companies. The Authority may also order employers to comply with their obligations.

The Bill also proposes amendments to provide for paid rest breaks and unpaid meal breaks:

- one 10-minute rest break if an employee has worked 4 hours or less;
- one 10-minute rest break and one 30-minute meal break if they have worked between 4 and 6 hours; and
- two 10-minute rest breaks plus one 30-minute meal break if they have worked between 6 and 8 hours.

The rest and meal break requirements may align with what many assumed the law to presently be. Indeed the Minister of Labour has recently admitted that it has always been his assumption that such breaks were legislatively guaranteed. The Employment Relations Authority’s proposed powers in relation to breaches of the rest and meal break obligations are the same as those proposed in respect of breastfeeding.



HOLIDAYS (TRANSFER OF PUBLIC HOLIDAYS) AMENDMENT BILL

This bill has been introduced in response to the Supreme Court’s decision in the *New Zealand Airline Pilots’ Association Industrial Union of Workers Incorporated v Air New Zealand Limited* case discussed in our April newsletter. That case held that employers and employees cannot agree to transfer a public holiday from the day listed in the Holidays Act to another day.

Although the explanatory note to the Bill acknowledges that “*The original intention of the Holidays Act 2003 was to give employers and employees the flexibility to transfer a public holiday, from a day listed in the Act*”, the proposed amendment is a narrow one and does not in many respects restore the law to the way it was thought to stand prior to the Supreme Court’s decision.

If passed in its present form, the Bill will amend the Holidays Act to allow for a public holiday to be transferred in circumstances where an employee’s shift spans two calendar days. If one of those days is a public holiday, the parties may agree to shift the time that the public holiday begins and ends to another 24-hour period that begins or ends on the public holiday.

The example provided in the Bill is where an employee would normally work shifts from 10 pm on 24 April to 6 am on Anzac Day and from 10 pm on Anzac Day to 6 am on 26 April. Under the proposed amendments, the employer and employee would be entitled to transfer Anzac Day to a 24-hour period starting at midday on 24 April and ending at midday on 25 April. Such an arrangement would allow the employer's operation to shut down for the public holiday without the need to shut down (and restart) mid-shift.

As noted above, the Supreme Court's decision applied to circumstances considerably wider than those addressed by the Bill. In light of the apparent recognition that that decision did not accord with the intention behind the Holidays Act, it is perhaps surprising that the amendments proposed are confined to such a narrow set of circumstances. It is recognised in the Explanatory Note to the Bill that further amendment may well be needed to the Holidays Act in 2009. For many employers this 'quick-fix' does not resolve the majority of the problems created for them by the Supreme Court decision.

CONTRIBUTORY CONDUCT——

EFFECT ON REMEDIES TO EMPLOYEES

The Court of Appeal has recently issued its judgment on an appeal from a decision of the Employment Court in *Salt v Fell* which was discussed in our August 2006 newsletter. Leave to appeal was granted on the question of whether, in determining an employee's contribution when assessing remedies for a personal grievance, the Employment Court was permitted to take into account information the employer did not possess at the date of dismissal.



FACTS

The original case was a personal grievance claim brought by the Commissioner for Pitcairn Island. The relationship between the Commissioner (Mr Salt) and the Governor (Mr Fell) became difficult in relation to (amongst other things) historic sexual abuse investigations that were then ongoing. Mr Salt was eventually dismissed on the basis that the Governor no longer had the requisite

level of trust and confidence in Mr Salt's ability to discharge his functions as Commissioner. Mr Salt brought proceedings claiming that his dismissal was procedurally and substantively unjustified.

EMPLOYMENT RELATIONS AUTHORITY

The Employment Relations Authority held that Mr Salt was unjustifiably dismissed. It declined to reinstate him to his position, but awarded him reimbursement of salary and superannuation of \$20,706, reduced by 50% and compensation for distress of \$12,000, also reduced by 50%. The deductions seemed to have been made on the basis of evidence relating to a series of emails which came to light after the hearing.

EMPLOYMENT COURT

On appeal to the Employment Court, Mr Salt was successful in increasing his reimbursement of salary award to \$57,970, again with a 50% deduction from that sum for contribution. A distinct

issue in the Employment Court and subsequently the sole issue before the Court of Appeal was whether a 50% deduction was right. It was argued on Mr Salt's behalf that neither the Authority nor the Employment Court had the ability to make any deduction at all.

COURT OF APPEAL

After Mr Salt's dismissal, during their investigations in relation to possible criminal charges on Pitcairn Island, United Kingdom police came across private emails sent from Mr Salt to various recipients on the island. The emails contained highly disparaging comments about the Governor and other government officials. As the Court of Appeal noted:

"In dismissing Mr Salt, the Governor had, of course, apprehended at least a flicker of the flame of condemnation beneath the smoke attaching to what Mr Salt had been doing; the subsequently discovered emails indicated that there had been a veritable conflagration".

Amongst Mr Salt's emails was one stating "My source told me that the intention is to lay charges during April against six men on Pitcairn. Keep that completely confidential at this stage as there is still a possibility, remote though it may be, that we can engineer a change of decision". In another Mr Salt wrote "At that point I knew that I could never trust Fell, that he was lying and that he probably had some other agenda."

Section 124 of the Employment Relations Act provides that the Authority or the Employment Court must "consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance" and "if those actions so require, reduce the remedies that would otherwise have been awarded accordingly".

The majority of the Court of Appeal held that "The subsequently discovered information could not be taken into account under s 124", because the section only allows consideration of the employee's actions that contributed to the situation that gave rise to the personal grievance. As the Court noted, "only the actions of the employee about which the employer knows can have contributed towards the employer's wrongful decision to dismiss".

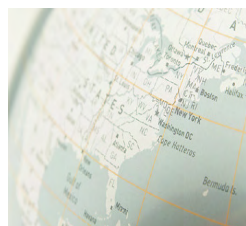
Despite that finding, the Court also held that in determining the extent of any remedies *at the outset* i.e. before any contribution is considered, the Authority or the Court could and should have taken the subsequently discovered information into account.

The Court of Appeal found that if that reasoning had been applied to the present case, it was inevitable that Mr Salt would have received less compensation than he did. However, since there was no cross appeal by the employer, it was held that the fairest course was to let matters stand as they were rather than remitting the case to the Employment Court for reassessment.

Most interesting is that in non-binding comments (obiter) the Court indicated misconduct that is discovered after the dismissal has occurred may be considered in deciding whether the decision to dismiss was justified. If that is so - **WATCH THIS SPACE!** It may lead to more post dismissal email searches, reference / qualification checks etc.

OVERSEAS SNIPPETS

REFUSAL TO SUPPORT CANDIDATE LEADS TO IMPROPER TERMINATION



It seems no one is immune from the influence of electoral politics during an election year in America, not least those employed in the public sector. In the recent case of *Gann v Cline*, the US Court of Appeals for the Tenth Circuit held that the plaintiff could bring a claim under the First Amendment of the US Constitution for improper termination based on “*political patronage*”.

The Court found that the employer preferred to hire those who supported his preferred candidates and to terminate those who did not. The employer claimed that a lack of political affiliation was not constitutionally protected and thus he could terminate the employee’s employment due to her refusing to support any candidate whatsoever.

AMBULANCE “TAXI” DISMISSAL JUSTIFIED

The UK Employment Appeal Tribunal recently upheld an Employment Tribunal decision that an ambulance control room employee who dispatched an ambulance to take a friend home was not unfairly dismissed. In *Gokce v Scottish Ambulance Service* it was held that the employer had reasonable grounds for concluding that the employee had committed serious misconduct.

Mrs Gokce was contacted by a friend through a telephone line normally used by clinicians and staff and asked for someone to take her friend home. Mrs Gokce arranged for an ambulance with a crew of 2 to attend the premises which turned out to be a nightclub where a very intoxicated friend was awaiting pick-up. Due to the use of the ambulance by Mrs Gokce’s friend, response to a genuine emergency callout was delayed by some 3 minutes.

In finding that the Employment Tribunal had not erred in ruling that Mrs Gokce had been fairly dismissed, the Employment Appeal Tribunal attributed weight to the fact that she had deliberately decided not to notify the duty officer of the dispatch as per normal operating guidelines.

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To keep Managers and staff up to date with developments in employment law and best practice Quigg Partners are offering Employment Law Toolbox sessions in 2008. These can be held in your workplace or in our private seminar rooms. Toolbox sessions that can be tailored to suit your needs cover:

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- Restructuring - avoid the credit crunch costing you even more
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ENQUIRE NOW

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Michael Quigg on 474 0766 or email michaelquigg@quiggpartners.com; or

Tim Sissons on 474 0758 or email timsissons@quiggpartners.com

SEMINAR PROGRAMME

In the coming months, Quigg Partners will be holding seminars on some of the more pressing employment law problems for New Zealand employers. Click [here](#) to register for any of these seminars.

Alternatively, please complete this form and return. Please **enclose** your cheque for \$85.00 (GST inclusive) per seminar or we can send you an invoice.

Seminars are held at Level 8, The Bayleys Building, 28 Brandon Street, Wellington and run from 12:15—2:00 pm.

Any queries please contact Evelyn Pong on (04) 474 0767 or email evelynpong@quiggpartners.com.

<p>Dealing with Difficult Employees - Tuesday 17 June 2008</p> <ul style="list-style-type: none"> • Poor Performance • Disciplinary Issues • Termination 	<input type="checkbox"/>
<p>Restructuring in More Challenging Times - Tuesday 29 July 2008</p> <ul style="list-style-type: none"> • Consultation • Selection Criteria • Redeployment 	<input type="checkbox"/>
<p>Contractual Issues - Tuesday 26 August 2008</p> <ul style="list-style-type: none"> • Drafting an employment agreement • Useful clauses • Total Remuneration • Fixed Term Agreements • KiwiSaver Issues 	<input type="checkbox"/>
<p>Election Special [Evening session date and time to be announced]</p> <ul style="list-style-type: none"> • Representatives of the major political parties will present and debate their employment policies. 	<p>No cost. Koha encouraged to benefit the Mental Health Foundation</p>

Name _____

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