CLEW'D IN

Newsletter of the Centre for Labour, Employment and Work (CLEW)

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NOTICE

New Zealand Labour Law Society Conference 2017

24–25 November 2017
School of Law, University of Canterbury, Christchurch

Conference Theme: Labour law in transition in a globalised world

See the conference website for further information on the programme and registrations.

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RESEARCH UPDATE: PHYSICAL AND VERBAL ABUSE AT WORK: WHEN THE PERPETRATOR IS THE CLIENT

Clara Cantal and Geoff Plimmer

In September 2014, a masked gunman walked into the Work and Income offices in Ashburton, and killed two staff members. The gunman was a client of that office who had previously had issues with staff.

This tragedy shocked those working in the public sector, particularly those working in frontline, client service positions. In particular, it raised the issue of the safety and security of frontline staff who deal with vulnerable and stressed clients. The Minister for Social Development, Paula Bennett, ordered an urgent independent review of security for frontline offices. The Ministry of Social Development (MSD), set up an external group to review of security for frontline offices. The NZ Public Service Association (PSA) both lent support to employees after the Ashburton tragedy, and provided support to MSD with its review of the tragedy. Among the recommendations from the review were more security guards, more controlled access to buildings and more awareness of the need to identify clients at risk.

MSD subsequently pleaded guilty to 'failing to take all practicable steps' and the Judge concluded that 'the chance of client-initiated violence was predictable'. A physical barrier 'to delay a client who was attempting to assault and employee' would have been helpful.

Client violence does happen to frontline staff, and it does not only happen in New Zealand. Late in 2016, for instance, a man shot a lawyer who had previously represented him in a court case in Miami, US.

Following on from increased awareness of client abuse, two questions focused on this issue were included in the 2016 Workplace Dynamics survey. The survey, commissioned by the PSA to the Centre for Labour, Employment and Work at Victoria University of Wellington, and including 14,125 PSA members, questioned participants about the frequency in which they had been 1) physically and 2) verbally abused by clients in the previous year. While 5.1% of the participants pointed out that they had been physically abused at least every six months, almost nine times this percentage (43.4%) reported they had been verbally abused in the same timeframe.

This is unfortunate, as workplace abuse is positively related to anxiety, depression, burnout, frustration, deviance and physical symptoms; and negatively related to self-esteem, and job and life satisfaction (Bowling & Beehr, 2006).

Contact or call-centre workers, inspection or regulation workers, machinery operators and drivers, managers, registered social professionals and unregistered service workers were particularly at risk. Members working in public service departments, district health boards, local government bodies and community public service organisations were all at risk of verbal abuse by clients.

Unfortunately, those that had experienced verbal abuse perceived significantly less organisational support, and for their organisations to be less active in making sure they were psychologically healthy. Managers were rated as more 'laissez-faire', and less responsive and constructive in their leadership behaviours.

These analyses show that as well as physical safety through guards and secure barriers, organisational leadership, along with climate and culture within the organisation are also important. If the environment outside frontline staff offices is not always manageable, the internal environment is generally more manageable. Organisations need to ensure managers are responsive to employees and 'there' for employee's needs, which would include support to employees on occasions in which they feel abused by clients. Systems also need to be in place to assist employees to 'debrief' and report incidents in which they experienced verbal and/or

Notices

Seminars: Employment Agreements Update 2017.

Dunedin – Wed 26 July
Christchurch – Thur 27 July
Hamilton – Wed 2 August
Auckland – Thur 3 August
Wellington – Wed 9 Aug.

All sessions: 9am-12.30pm

Full registration $465+gst; Earlybird (by June 10) $420+gst.

For course details and registrations visit our website http://cms.victoria.ac.nz/som/clew

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Bargaining Workshops

We are presenting workshops on **Collective Bargaining and Pay Equity** in Christchurch, Wellington and Auckland in the afternoon following our seminars.

The three hour workshop will take participants through a simulated collective bargaining activity providing practical negotiation experience with a focus on the impact of recent legal and policy changes relating to pay equity.

For course details and registrations visit our website http://cms.victoria.ac.nz/som/clew

physical abuse, and organisations need to have clear systems for dealing with reports.

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TOWARD A NEW EMPLOYMENT CLASSIFICATION FOR WORKERS IN THE GIG ECONOMY

Esme Cleave, PhD Candidate, Victoria Business School

The perceived desire for flexibility drives the *gig economy* – an economy structured around networks rather than traditional institutions (Sundararajan, 2016), and this disrupts our traditional understandings of organisational accountabilities. Companies that operate in the gig economy ensure most of their flexibility by relying on independent contractors for the provision of their on-demand services (Friedman, 2014).

Gig economy advantages companies and consumers

Through the flexible management of workers, companies in the gig economy are able to '*unlock the commercial value in underused personal assets*' (Kenney & Zysman, 2016, p. 62) in a fluctuating, on-demand manner. Independent contractor arrangements aid this flexibility by allowing on-demand 'just-in-time' strategies, where workers can be utilised only when there is money to be made (Moran, 2009). This saves costs because companies do not need to spend money on benefits, training and development, compensation for time (regardless of outputs), and other personnel costs like employment protections and severance payments (Yamada & Maltby, 1997; Moran, 2009). Independent contractors are often only compensated for their outputs, not for related time and resources associated with achieving these outputs (Moran, 2009). These cost-cutting mechanisms are good for companies like Uber, who are '*attempting to turn a profit with little overhead*' (Carboni, 2016, p. 9).

The flexible labour arrangements can be good for consumers too. For Uber riders, prices are low, response times are usually quick, and the rating system offers perceived safety, and quality. However, background checks on drivers are becoming less rigorous, arguably widening the gap between regulated taxis, in terms of safety and security.

But does it advantage workers in the gig economy?

The inherent flexibility of independent contracting does benefit workers in some circumstances. Proponents of the gig economy argue that gig workers are 'micro-entrepreneurs' that can essentially be their own boss with flexible hours (to an extent), and free from the explicit control of an 'employer' (Carboni, 2016). Although this works for some, those who are financially precarious, or who have few alternatives are vulnerable.

Workers who end up in the gig economy out of financial desperation are likely to suffer most from the independent contractor arrangements. These already vulnerable individuals embody the characteristics of what Standing (2012) calls a *precarian*. Precarians lack work-related securities of the more privileged, such as medical coverage, sickness leave, long-term employment contracts, and job security (Friedman, 2014; Standing, 2012). These conditions are likely to exacerbate their financial insecurity and affect the health of the individual, their close surroundings, and eventually, society. Standing (2012) explains that as a result of living under these isolating and insecure conditions, workers lack an occupational identity and the ability to conceptualise and strive for career goals. Fluctuating work arrangements means fluctuating incomes. No guaranteed or anticipated fixed weekly income puts pressure on families, communities and welfare systems (Muntaner et al., 2010).

Are gig economy workers independent contractors or employees?

Gig economy companies treat their workers in ways that suggest they are not *primarily* independent contractors. In fact, evidence points more to an employer-employee arrangement (Aloisi, 2016). By applying available information on the work status of Uber drivers, we find that most cases tend to favour the employee 'classification', but in fact the reality is that their status lies somewhere in between that of employees and independent contractors. The case of O'Connor v. Uber Technologies, Inc. is insightful in this regard.

Gig economy companies treat their workers in ways that suggest they are not *primarily* independent contractors. In fact, evidence points more to an employer-employee arrangement

Three drivers alleged, on behalf all California Uber drivers, that they were misclassified as independent contractors. Uber denied their potential misclassification and maintained that they were not employees because they exercised minimal control over them. The plaintiffs responded that Uber in fact exercised considerable control over the 'methods and means' of the provision of their service. The Court then employed work status tests to determine their classification. These took into account the level of control Uber had over the drivers. They were inconclusive: some work characteristics suggested significant control, while others showed control was minimal. Another test revealed that because drivers provide an essential service to Uber, they should be seen as employees (US District Council California, 2015; Ross, 2015).

The idea of control seems particularly salient in the example above, so it is appropriate to elaborate on the ways in which Uber is deemed 'controlling', like an employer. Research by Stark and Rosenblat (2016) gives insight beyond case law into the nature and degree of control Uber workers experience. From interviews with Uber drivers, it was revealed that Uber's seemingly indirect control through the surveillance and monitoring via the online platform was actually representative of an intense form of managerial control (Stark & Rosenblat, 2016). Much like Uber's own employees, drivers' performance is measured through a rating system via their account on the online platform. The authors explain that when drivers are monitored through the online platform and their results in the form of ratings are given to them on a weekly basis, like a routine performance evaluation, it represents "a remote threat and a tangible nudge to drivers to be in compliance with workplace expectations" (Rosenblat & Stark, 2015, p. 6).

Furthermore, Uber claims drivers have control of their hours and the times they choose to work, but the Uber Driver Handbook states: '*We expect on-duty drivers to accept all [ride] requests; [we] consider a dispatch that is not accepted to be a rejection, and we will follow-up with all drivers that are rejecting trips; we consider rejecting too many trips to be a performance issue that could lead to possible termination from the Uber platform*' (Seaquist et al., 2015).

A new classification for gig economy workers?

Uber's employer-like control over independent contractors has become a de rigueur practice - a reference point for other deregulated services. However, the classification of workers in the gig economy needs to be reconsidered, because in fact they are neither employees nor independent contractors.

Liebman – a former chairwoman of the National Labor Relations Board (US) –argues that '*some people are clearly independent contractors and some are clearly employees, but a third [worker] category becomes necessary when you have people who are borderline*' (Liebman, in Weber, 2015). This proposed new, alternative classification would help protect Uber drivers from the precarious conditions of their current independent contractor status.

'*some people are clearly independent contractors and some are clearly employees, but a third [worker] category becomes necessary when you have people who are borderline*' (Liebman, in Weber, 2015)

A number of scholars recommend the development of a new legal classification of worker for the gig economy - the *dependent contractor* – who has some but not all the legal protections afforded to employees. (Carboni, 2016; Hass, 2015; Seaquist et al., 2015; Weiss (2015).

What these additional protections and entitlements could be, however, is worth considering. Lamare, Lamm, McDonnell, & White (2015) claim that the working conditions and pay of dependent contractors '*are often exploitative, compared to contractors who are not reliant on one client*' (p. 76). Also, there is the risk is that dependent contractors will be deprived of both protections and entitlements of employees, along with the flexibility and other benefits experienced by independent contractors (Walker et al., 2011). It is therefore essential to recognise that the dependent contracting arrangement could be possibly be more, exploitative than independent contracting without provision of mandatory rights and entitlements.

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Regardless of whether the dependent contractor status is the most appropriate classification to afford gig economy workers, it prompts thought on the need for wide-spread engagement in ways to improve the current system, where worker exploitation increases as capital grows. Rapid change makes it easy to overlook issues like the ones raised in this piece, but this only normalises Uber's behaviour which could lead to proliferation of similar practices in the future. If we are to have social and economic cohesion, where work is decent enough for people to engage actively in our economy, we need to start looking at new ways of responding to the gig economy.

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NEW CHAIR IN ETHICAL LEADERSHIP AT VICTORIA BUSINESS SCHOOL

Professor Karin Lasthuizen, the inaugural Brian Picot Chair in Ethical Leadership at Victoria University of Wellington, is highly regarded in Europe for her research and consultancy work in ethical leadership and ethics management, as well as her innovative research in the methodology of corruption and organisational misbehaviour.

The Brian Picot Chair in Ethical Leadership was established in November 2016 and sits naturally amongst other Professorial Chairs within Victoria Business School who lead research on important contemporary issues and strengthen the Business School's capabilities in training, researching and supporting stakeholders. The Chair is supported by a strong team of experts who make up the Advisory Board, they include Lyn Provost as Chair, business man John Sax, Rob Everett - Financial Markets Authority, Suzanne Snively - Transparency International, Mike Ross - Lecturer Te Kawa a Māui at Victoria University of Wellington, corresponding member Philippa Foster Back - Director of the Institute of Business Ethics in the UK, John Brocklesby - Head of the School of Management and Ian Williamson the newly appointed Dean of Victoria Business School.

The Chair has been established to improve ethical practices in business, government and community organisations and will work towards facilitating a transparent and ethically sound business sector across New Zealand.

The Chair has been established to improve ethical practices in business, government and community organisations and will work towards facilitating a transparent and ethically sound business sector across New Zealand. The Chair's initial research project, The Ethical Leadership Challenge in New Zealand, aims to explore the meaning of ethical leadership and its role in addressing the main ethical issues in New Zealand, and tries to identify the potential role for the Chair and University to contribute in this area. Around 30 high profile business people will be interviewed as part of the project. They will be asked 4 key questions: 1. How would you describe or define ethical leadership? 2. What are - in your professional opinion - the main ethical issues in New Zealand that should be addressed by ethical leadership? 3. What is the potential role of university – and in particular the Brian Picot Chair in Ethical Leadership– to contribute in this area? 4. What is your – personal or professional – experience with ethical leadership, if any?

Members of the Chair's Advisory Board have already been interviewed, including ex-Auditor General, Lyn Provost and Barry Jordan, Lead Forensics at Deloitte. Each had quite different yet extremely valid analogies of what Ethical Leadership is which we hope to build on with other interviews over the coming

months. The information from this research will be used in a booklet to further promote the work of the Chair and will inform a series of seminars and workshops next year.

Professor Lasthuizen is also interested to speak with potential PhD students who would like to study ethical leadership, particularly from a specific cultural perspective, or in international business.

More information about the Brian Picot Chair in Ethical Leadership can found at http://www.victoria.ac.nz/ethical-leadership or by telephoning the Chair's Administrator, Victoria Beckett, on 04 463 6464. If you would like to be added to the Chair's e-mail distribution list for information about upcoming seminars and workshops or you feel that your organisation (or you personally) can contribute to the work of the Chair or The Ethical Leadership Challenge in New Zealand project, please email victoria.beckett@vuw.ac.nz

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'ACHIEVING PAY EQUITY' SEMINAR – DEALING WITH A COMPLEX ISSUE

Notes as compiled by Sue Ryall

Sue Ryall, Centre Manager at the Centre for Labour Employment and Work (CLEW) organised a seminar on Pay Equity for 28 April 2017, not knowing that the settlement for the workers who took that case to court and the draft legislation would be announced in the same week. "It was perfect timing and the range of speakers, all of whom have been closely involved with this issue, provided an excellent overview of both the case and what needs to happen in the workplace to achieve pay equity."

These notes cover the presentations in the first part of the seminar. They outline the work of the Joint Working Group on Pay Equity and the principles for pay equity established by the group as well as the implications for the draft legislation and the future work in the workplace. A summary of Izi Sin's presentation on her research on measuring the gender pay gap is also included.

A further article for the next CLEW'd IN will be developed from the notes on the application of the principles in workplace as presented by the speakers.

Session 1: What has happened and what has changed?

Presentation 1: The Joint Working Group on Pay Equity

Phil O'Reilly – Director, Iron Duke Ltd

The 1972 Act was developed under a different industrial relations environment but rather than change the legislation following the Appeal Court decision in '*Terranova*' the Government chose to set up the Joint Working Group (JWG). The group had representatives from the NZ Council of Trade unions, the key unions (E tū, NZNO and the PSA) the Ministry of Health, MBIE, SSC and Business NZ. The group was chaired by Dame Patsy Reddy.

Phil O'Reilly commented that it is unusual in the current environment for the Government to undertake a tri-partite process. It was common under the Labour-led government but rare over the last nine years of the National-led government. But the agreement on the principles required by the court had to be negotiated by the three social pa

The group was there to agree principles that were fit for purpose in the world that we live and in the context of current legislation, not develop law.

The group was there to agree principles that were fit for purpose in the world that we live and in the context of current legislation, not develop law. The JWG met for a much longer time than originally planned and were allowed to do so by the officials. The focus was the first principles – not what is but what could be and what was agreed rather than what was opposed. The employment relations principle of 'good faith' was the basis for discussion and decision-making and a constructive social dialogue that displayed the maturity of the relationship between the parties.

There was a lot of consultation back to the constituent groups – union members, employer parties and government agencies. There was consideration of other jurisdictions such as the UK and EU, Canada and Scandanavia. From the business perspective nothing seemed to fit and it was agreed that they needed to find a New Zealand solution. The social partnership framework is not well developed in New Zealand as compared with European and Scandinavian countries but there is a strong relationship between Business NZ and the NZCTU.

The principles that were agreed:

1. Agreed that pay equity is an important issues needs to be resolved
2. Agreed that we would bargain to outcomes. This is unique to New Zealand as elsewhere a Tribunal decides the outcome with unlimited arrears. This means that the cases can go on for years.
    a. So reach a settlement - not have a winner and loser
    b. Settlement can be staged.
    c. The workplace is in control of the outcome (through the bargaining process) not a tribunal who have no idea of the workplace.
3. Once a deal is made, it is a deal.
4. The definitions around pay equity, equal pay etc. are to be clear but not prescriptive and limiting.
5. No *compulsory* arrears in the draft legislation. The focus is the future rather than arguing over what has gone before. Arrears can still be bargained.

There was debate over the relevance of comparators - if comparators should be proximal (in the industry) or can go outside to include work that has similar demands, working conditions and skill-base.

O'Reilly commented that the level of expertise of workplace actors in bargaining will vary and favoured the provision of specialist expertise to assist to offer advice. Possibly a special unit in MBIE, possibly alongside the labour inspectorate, could take responsibility for publishing good practice, settlements. This role sits in Government.

Presentation 2: After the Task-force – what's next?

Erin Polaczuk – General Secretary, NZ Public Service Association

Erin was one of the union representatives on the Joint Working Group.

The JWG was working on the settlement of part of the Bartlett case. Erin endorses the work of the JWG and it was a great outcome.

But what wasn't achieved?

1. An industry wide solution – the settlement was only for the publicly funded part of the industry and not the privately funded. The unions were aiming for rates for all of the industry (like an award or an industry-wide agreement).
2. Cohesion and coordination of claims – an agency to provide this service that is not just employer based. The agency would notify other employers in the industry when claims are made.
3. The resourcing of equal pay claims with quick processing systems through mediation and the courts.

An historic consensus has been achieved and it will reduce gender discrimination. The Principles were what the unions would have taken to court and they reflected what the court had come to – assessed on skill, effort, experience/service, responsibility and work conditions.

The delays by the Government in adopting the principles was frustrating and the Cabinet added a further principle of '*proximity of the comparator*'. This was a surprise and limits what can be used as often there is no comparator in an industry. The Unions are concerned that this is a roadblock – it creates a barrier. It was also against what the Court had determined – while there was a need for a male comparator, proximity was not a requirement, particularly in female-dominated industries.

The delays by the Government in adopting the principles was frustrating and the Cabinet added a further principle of '*proximity of the comparator*'. This was a surprise and limits what can be used as often there is no comparator in an industry. … It was also against what the Court had determined

The key principle of a bargained settlement means that the comparator(s) will also be agreed in the bargaining process. There may not be one perfect comparator but rather a range reflecting different aspects of a role/occupation. The PSA and the Crown brought different comparators for the Bartlett case but that did not mean that a settlement couldn't be reached. The need to determine the comparator prior to bargaining would have been an impediment to the process.

The PSA has cases under way for DHB Clerical and Admin workers, CYFs social workers and negotiations with State Services Commission around collective agreement provisions that will prevent further gaps developing.

We did not ask for a new Equal Pay Act – the new draft Act is more limiting and the Bartlett case has proved that a settlement is possible without getting stuck on comparators. The tripartite process where social partners work together is key and that will also apply to any changes in the Act.

Presentation 3: The legal case and the implications for future law

Peter Cranney - Partner, Oakley Moran (lawyer for Christine Bartlett and SFWU)

The 1972 Equal Pay Act contained a definition of work of equal value that had not been recognised by the Courts until 2014. This definition has been retained in the new Bill. There are, however, issues with the proposed legislation, in particular, it limits access to equal pay cases by narrowing section 3(1) b (Criteria to be applied) of the Equal Pay Act. In Cranney's view, these limitations also reflect the current limitations on collective bargaining.

The settlement was made under the 1972 Act which, as previously commented on by Phil O'Reilly, was under a different industrial relations system and which provided for Arbitration.

The settlement was made under the 1972 Act which, as previously commented on by Phil O'Reilly, was under a different industrial relations system and which provided for Arbitration. The Government knew they had to reach a settlement or the Authority or Court would determine the settlement and it would be outside their control. The existence of Arbitration ensured a bargained settlement and this provision in some form needs to be in any new Act. The statute is effectively the biggest collective employment agreement in New Zealand.

Some key aspects of the settlement:

1. It is a staged settlement – a compromise to achieve all that was required.
2. In the new statute employers will be defined as those who are funded by the Crown. This includes 1100 employers.
3. The rates are protected by statute for 5 years. It is effectively a statutory minimum rate for the sector.
4. Workers can move up levels to get different pay rates either by service or qualification.
5. Employers will be required to provide upskilling and a new type of PG will allow workers to appeal when this is not happening.

This process began with Judy McGregor in 2011 and her investigation that resulted in the *Caring Counts* report (2012). It exposed the plight of aged care workers. While there is more social dialogue needed we have come to a uniquely New Zealand solution that will now give a huge boost the achievement of equal pay.

Session 2: What does the gender pay gap look like?

Izi Sin – Motu Economic and Public Policy Research; School of Economics and Finance, Victoria University of Wellington

The median hourly wage gap has tended to increase after 2010. Some of the features of the gender wage gap:

1. More than half of the gap cannot be explained by hours of work, industry, qualification levels etc.
2. The wage gap is larger in the higher income levels and this has even fewer explanations.
3. Most of the wage gap is not explained by industries or firms where women work.

Fabling, Sin and Stillman (2017) explored if productivity differences were driving the wage gap. By exploring the firm level data from Statistics NZ they could compare firms in the same industry, similar size and other characteristics. They explored how the firm level output varied with the fraction of female employees; the variation in the total wage bill with fraction of female employees; and then used these two sets of data to calculate the % to which women are paid less for the same work. They found that in all cases.

The findings showed that women are receiving 82% of men's wages and there is an unexplained wage gap of 16%. In all cases there is a substantial pay gap unexplained by productivity differences. Further, there are differences by industry in the unexplained wage gap, with a higher level wage gap in industries that are more profitable, have more high-skilled workers and where firms have little competition in their product markets. Sin suggested that profits that accrue to employees (by way of, performance payments, profit shares and bonuses) are accrue at a higher level for male employees.

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Sin is currently undertaking further research on the impact of birth and child care on women's earning and the contribution this makes to the gender pay gap.

CLEW – WHO ARE WE?

The Centre for Labour, Employment and Work (CLEW) is situated in the School of Management at Victoria University of Wellington. Our research and public education programme are centred on three pillars of research:

Organisational dynamics and performance - What happens in organisations matters. From strategies, business processes, management practices, worker experiences to knowledge sharing, collaboration, innovation, productivity, engagement and trust – these all impact how individuals and organisations perform.

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Employment rights and institutions - What is the role of trade unions and of collective bargaining in New Zealand's contemporary economy and society? Is the current system of employment rights and the institutions and processes for enforcement of those rights in New Zealand still relevant? Is it efficient, and does it contribute to overall productivity growth?

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Changing nature of work and the workforce - Rapid and increasing change in the external environment of organisations has fundamentally changed the world of work. Factors shaping how we organise and participate in work include rapid technological development, intensifying environmental and resource pressures, globalised markets, mobile workforces and changing demographics.

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VICTORIA UNIVERSITY OF WELLINGTON
TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
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