

CLEW'D IN

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

Issue 2016/2 – April 2016

NOTICES

Workplace Health and Safety Seminar

CLEW is holding a seminar on Workplace Health and Safety following enactment of Health and Safety at Work Act 2015 in April. The seminar will look at how well the new environment realises the vision presented in the Taskforce report of 2013 and present a range of industry perspectives and case studies on Improving performance on workplace health and safety.

Date: Thursday April 28

Time: 9am-1pm

Venue: Lecture Theatre 1, Old Government Buildings, Victoria University of Wellington

Cost: \$120+gst

The programme and a link for registrations are available on our [website](#).

In this issue of CLEW'd IN the CLEW Director, Dr Stephen Blumenfeld, discusses the role of HR in the light of research published in the UK; Professor Gordon Anderson provides an update on changes to the minimum employment standards included in a range of new legislation; Dawn Duncan, a PhD student in the Faculty of Law, examines the inadequacy of our current legislation and compensation for those who suffer mental harm at work; and the team at Kiely Thomson Caisley over the changes brought about in the Employment Relations Amendment Act 2016.

We also have news on upcoming seminars and conferences.

RESEARCH UPDATE: The Future of the HR Profession

Dr Stephen Blumenfeld, Director, Centre for Labour, Employment and Work (CLEW)

In November of last year, while visiting the European Work and Employment Relations Centre (EWERC) at the University of Manchester, I had the opportunity to hear Ian Roper from Middlesex University-London report to the Manchester Industrial Relations Society on findings from a study focusing on the professional nature of human resource management (HRM) in the UK. The research was conducted by Associate Professor Roper, in association with his academic colleagues Dr Paul Higgins and Dr Sophie Gamwell, and was supported by the UK's Economic and Social Research Council (ESRC) and the Research Grants Council (RGC) of Hong Kong's Joint Research Scheme. It culminated in a report published in January as part of a book edited by Adrian Wilkinson, Donald Hislop, and Christine Coupland and entitled *Perspectives on Contemporary Professional Work: Challenges and Experiences*.

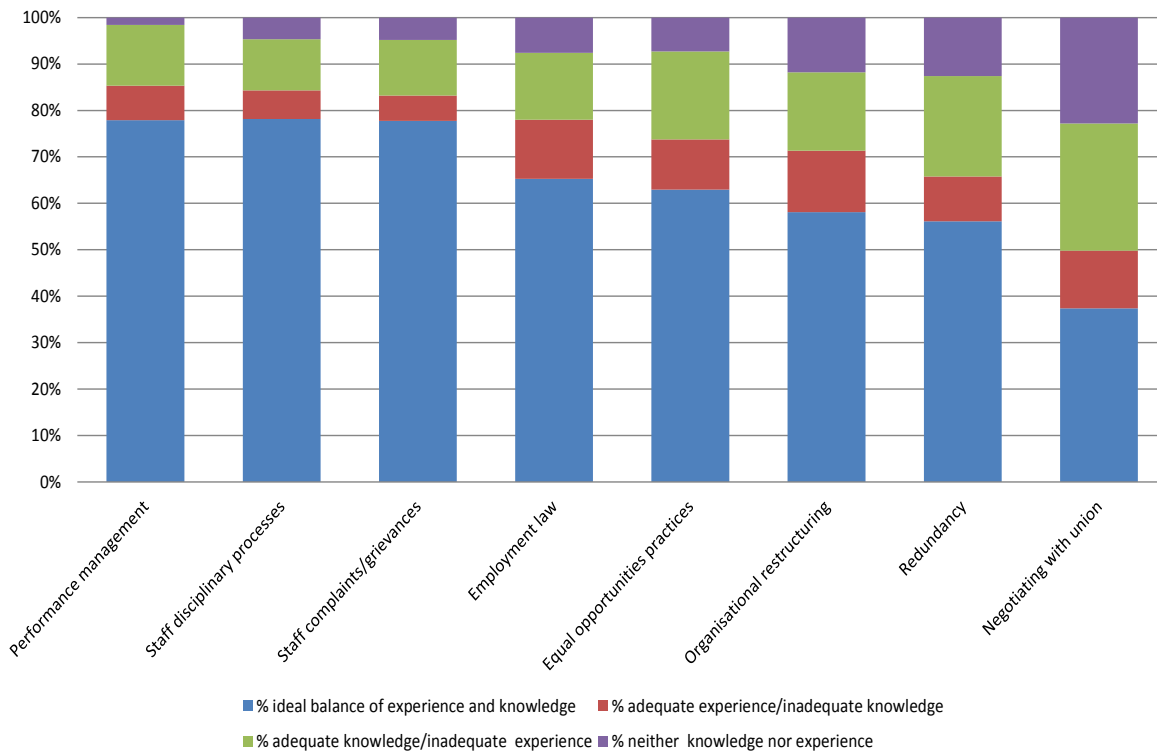
The study itself focuses on what the researchers refer to as 'four dilemmas' facing the HRM profession. These are posed as a series of 4 questions which drive this research.

1. What is the scope for professional discretion?
2. Is HR being fragmented and does it matter?
3. Does devolving HR decision-making lose influence for HR?
4. Who is HRM for?

The data used in this study were gathered in three parts. First, ‘elite interviews’ with national level ‘stakeholders’ in the UK were conducted; this involved a total of 14 interviews, covering 12 organisations, including employers’ associations, unions, the Trades Union Council (TUC), the Confederation of British Industry (CBI), and the Chartered Institute of Personnel and Development (CIPD). New Zealand counterparts to these organisations are, respectively, the New Zealand Council of Trade Unions (NZCTU), Business New Zealand, and the Human Resource Institute of New Zealand (HRINZ). Findings from this component of this research suggest that the somewhat understated role played in the area of organisational conflict is a primary source of professional legitimacy for HR practitioners in the UK.

The second part of the data collected for this research involved a survey of CIPD members (N=920), in which questionnaire items were linked to professional standards at different membership levels. As shown in the table below, when asked how well suited are HR practitioners to various activities associated with their role in the organization, more than three-quarters of CIPD members who responded to this survey indicated that their HR professionals manifest an ideal balance of experience and knowledge in the areas of performance management, staff disciplinary processes, and handling complaints and grievances.

“How suited are they to the activity they are doing?”



On the other hand, respondents to this survey typically pointed to activities related to IR/ER as being those about which HR practitioners are least knowledgeable and experienced. Nevertheless, since most organizations in the UK have no direct dealings with trade unions, most HR professionals are not required to have any knowledge or experience negotiating with a union. Yet, other ER-related skill areas in which HR practitioners are also frequently deficient – employment law, EEO, and redundancy and restructuring – are relevant to *all* employers, regardless of whether or not they have any dealings with unions. This suggests that – at least, in the UK – there is a need for greater preparation in ER than is currently offered through HRM academic programs.

Finally, in the third and final component of this study, a total of 36 interviews were conducted with HR practitioners and non-HR managers representing multinational and large national companies, a development agency, organisations in hospitality, transport, and technology, as well as local government and higher education institutions and consultancies in

the UK and Hong Kong. When asked, “*What HR activity is the least capable of being done by a non-HR generalist or external consultant?*” those interviewed offered the following observations:

I think certainly in terms of employment law you need to have that, you need to have a firm basis in employment law. I think without that you could get yourself in a lot of trouble. (HR Manager: Hotel Chain)

I think the biggest thing is legislation, from an HR perspective, is having somebody that is up on all of that and somebody who can remain a step away from the operation, if you look at hotel wise. Yes, some of it could be a management consultancy exercise but, you know, if you're dealing with people, you need to have somebody that's good at dealing with people and sometimes management consultants are more about numbers (General Manager: Hotel Chain)

...can (non HR managers) manage training themselves? Absolutely! Can they do the nice, fluffy meetings? Here's a certificate: I'll help you with these questions, absolutely. What if someone raises a 17 page grievance, going into different, various discriminations they have suffered at various points and one day, you need someone with the background that understands that to go over that? (HR Officer: Hotel Chain)

The authors of this study conclude with the observation that, while absorbing the dominant discourse of managerialism, markets, entrepreneurialism and flexibility should ensure legitimacy for the HR profession, the primary source of that legitimacy is organisational conflict. That is, although HRM needs to be seen to be ‘business savvy’ to be credible, the consistently reported activity that managers exclusively depend on from HR is their role in the resolution of conflict. Yet, because this role is counter to the dominant discourse in the UK on the professionalisation of HR management, the ‘reactive’, ‘firefighting’ role of HRM is unwisely disregarded in the clamour to achieve a strategic role for HRM.

SEMINARS: Trends in Employment Agreements and Employment Law Update 2015/2016

Don't miss out on this year's update seminars and the opportunity to catch up on the latest research on employment agreement provisions. The Employment Court Judges will again chair the seminars in Auckland, Christchurch and Wellington and will share their thoughts on the trends in employment law cases.

Dunedin: Wed. 27 July, 9am-12.30pm, Scenic Hotel Southern Cross

Christchurch: Thur. 28 July, 9am-12.30pm, Chateau on the Park Hotel

Hamilton: Wed. 3 August, 9am-12.30pm, Novotel Tainui

Auckland: Thur. 4 August, 9am-12.30pm, Victoria University Campus, Kichener St

Wellington: Tues. 9 August, 9am-12.30pm, Amora Hotel

For further details of the programme and registrations go to our [website](#).

Employment Agreements Update 2014/2015 still available

If you are heading into bargaining in the next few months and you can't wait for our update seminars to get the latest book we still have copies of '*Employment Agreements: Bargaining Trends and Employment Law Update 2014/2015*'.

The annual update of the book is seen as the essential reference for employment relations experts and the only source of information on current provisions in employment agreements.

The 2015/2016 update will be available in late July. Download the [order form \(PDF 155KB\)](#) for both books from our website.

LEGAL UPDATE: Reinforcing and Enforcing New Zealand's Minimum Employment Standards

Professor Gordon Anderson, Faculty of Law, Victoria University of Wellington

New Zealand labour law remains largely based on the neoliberal proposition that individuals should be free to contract on whatever terms they deem appropriate and that power imbalances are either non-existent or irrelevant. This position is largely reflective of the common law – parties are free to contract on whatever terms they wish and as long as the contract is entered into freely the law should not be concerned with the adequacy of the bargain or its terms. There are of course some protections even at common law – a contract obtained by duress, undue influence or misrepresentation may be held unenforceable and some specific terms such as excessive restraint of trade clauses may be unlawful for reasons of public policy.

In real life of course power relationships are abused and in the absence of legal constraints many workers, especially the more vulnerable, are heavily exploited. Indeed even where there are legal constraints exploitation is far from unusual. In New Zealand protection from exploitation relies on two mechanisms, the legislated minimum employment standards and informed consent to the terms of the employment agreement.

To deal with informed consent first - the Employment Relations Act (ERA) provides that a potential employee is entitled to be fully informed of the key terms of the proposed employment agreement and has the right to seek advice on those terms. If the employee elects to accept the terms offered the law has little further interest. Neither the common law nor

the ERA are much concerned with the actual terms of an employment agreement. Indeed the ERA did not re-enact s 57 of the Employment Contracts Act 1991 that allowed an employee to challenge “harsh and oppressive” terms in a contract. Likewise there is no equivalent to the (admittedly limited) provisions relating to unfair contract terms in s 26A of the Fair Trading Act 1986. Unfair bargaining for an employment agreement is limited to the relatively narrow situations

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set out in s 68, primarily some form of diminished capacity or the use of oppressive means.

The second mechanism is the set of minimum legislative employment standards that set a basic floor for all employment agreements applicable to all employees within New Zealand's jurisdiction. The Ministry for Business Innovation and Employment (MBIE) in *Playing by the Rules* (2014) defined these standards as the Employment Relations Act 2000, Holidays Act 2003, Minimum Wage Act 1983, Wages Protection Act 1983, Parental Leave and Employment Protection Act 1987, Equal Pay Act 1972 and the Volunteers Employment Protection Act 1973. With the arguable exception of the level of the minimum wage, these standards set a reasonably acceptable floor of employment conditions. While occasional breaches of these standards may be expected it has become increasingly obvious over recent years that they are being systematically and deliberately violated by at least some employers. Most typically are those employing vulnerable workers who are unable to adequately protect their own interests, often migrant workers but by no means exclusively. Issues such as abuse of corporate structures to deny employees their legitimate entitlements in particular is a much broader problem.

Over the last few years a number of legislative initiatives, the most recent coming into effect on 1st April following the enactment of the various amendments to the above Acts included in the Employment Standards Legislation Bill, have been taken to address this problem. These recent amendments would seem to largely complete the Government's reform programme in this area as the enhanced protections have been generalised after first being focussed on particular groups.

The first two rounds of reforms were directed first at the specific problems in the fishing industry and then undocumented and short term visa workers.

The fishing industry: The problems with working conditions on chartered boats fishing in New Zealand's exclusive economic zone have been of long-standing but received broad publicity following the publication of *Not in New Zealand's Waters, Surely?* (Stinger, Simmons and Coulston, New Zealand Asia Institute, 2011) which documented the degree to which the crews of foreign charter vessels were subject to gross violations of both employment and human rights. Following lengthy governmental procrastination and attempts to utilise voluntary solutions the Government finally saw that only clear legislative action was likely to alleviate these problems. The Fisheries (Foreign Charter Vessels and Other Matters) Amendment Act 2014, the key provisions of which will come into force on May 1st this year, requires all vessels fishing in New Zealand waters to be New Zealand flagged and therefore subject to New Zealand maritime and employment legislation.

Vulnerable migrants: The second group of reforms related to the particular problems experienced by undocumented migrant workers and workers on short term visa workers. These reforms were implemented by way of amendments to the Immigration Act 2009 s 351 which deals with the exploitation of "unlawful employees and temporary workers" and deal with two problems - "serious" breaches of the Holidays Act, Minimum Wage Act and the Wages Protection Act; and engaging in a range of actions used to prevent or hinder the employee from leaving the employer's service, leaving New Zealand, ascertaining their entitlements or disclosing the circumstances of their work. The Act lists examples such as taking possession of passports or travel documents, blocking access to a phone, or preventing the worker leaving premises or

doing so unaccompanied. A person convicted of a breach of s 351 is potentially liable to 7 years imprisonment or a \$100,000 fine. These penalties are criminal in character and therefore guilt must be established beyond reasonable doubt, by no means and easy matter. In other than most egregious cases enforcement agencies may find the remedies noted below more accessible.

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General reform: The final group of reforms, those in the Employment Standards Legislation Bill, will reinforce minimum standards for all employees by a combination of measures that increase penalties and which facilitate more effective enforcement. The provisions concerned are contained in detailed amendments to the relevant Acts but can be summarised as follows.

1. **Sanctions for serious breaches:** The penalties for a "serious" breach of the minimum entitlements are substantially increased, a point reinforced by vesting the jurisdiction for such breaches directly in the Court. The amendments allow a Labour Inspector to apply to the Court for a declaration that there has been a serious breach of a minimum entitlement. If such a breach is established the Court may grant a range of remedies including a pecuniary penalty order (with insurance for such penalties being unlawful), compensation orders or a banning order or all three. The maximum amount of a pecuniary penalty order is substantial, the greater of \$100,000 or three times the financial gain made by the breach if a body corporate and \$50,000 if an individual. The liability for breaches is also widened to include officers of corporate entities and persons able to "exercise significant influence" over the person in breach. A banning order is a new remedy and may be awarded against persons (corporate or natural) who have "persistently" breached minimum standards. Such an order may prohibit such a person from being an employer, an officer of an employer, or involved in the hiring or employment of employees for up to 10 years.

2. **Enhancing enforcement:** The other changes relating to enforcement are aimed not so much at serious violations of the relevant Acts as increasing the effectiveness of enforcement mechanisms overall. The obligations on employers in relation to record keeping are enhanced requiring an employer to keep records in an easily accessible form and in sufficient detail to demonstrate that they complied with minimum entitlement provisions. The powers of Labour Inspectors are enhanced through the power to issue enforceable infringement notices where breaches have been detected. Beyond this the role of mediation is reduced so that in general only breaches that appear to be “minor or inadvertent” need be referred to mediation before being considered by the Authority or Court.
3. **Zero-hours contracts:** While short term and casual employment agreements have long been common in New Zealand the use of the more pernicious zero-hours contract has been a relatively recent development. Such contracts are typified first by a significant disparity in obligations and second by the complex range of formalised secondary terms included in the contracts. Such contracts typically require an employee to be available for work whether generally or for specific periods but impose no reciprocal obligation on the employer to provide work or guarantee payment for a minimum number of hours. Such contracts are also likely to contain a range of clauses that place severe restrictions, in addition to those imposed by the availability clause, on an employee being able to find secondary work. Typically such clauses include (probably unenforceable) restraint of trade clauses, conflict of interest provisions or general or specified prohibitions on secondary employment. The commercial justification for such contracts is often difficult to see – one of the primary users of zero-hours contracts was fast-food chains who almost certainly know their labour requirements in considerable detail!
4. The amendments will partly ameliorate these disparities of obligation by requiring, among other matters, that an “availability” clause only be used if there are genuine reasons based on reasonable grounds for including such a clause; guaranteed hours of employment must be specified; compensation must be provided for the employee being “available” and, if shifts are cancelled without reasonable notice, compensation must be provided. Secondary employment restrictions are also subject to detailed reasonableness provisions.

Comment: The suite of reforms described above are of course to be welcomed, especially the strong measures devised to protect some of the most vulnerable groups of workers. However the success of these reforms has yet to be seen and will be conditional on a number of factors. These vary with the reforms in question but include the following.

First is the willingness to enforce the provisions, something that will only occur if the funding and resources of the labour

inspectorate are increased to be commensurate with the task allocated. Strong, but inadequately resourced, legislative reforms make for good political publicity but little effective action. Given that the more substantial penalties can only be sought by a Labour Inspector proper funding will be critical. A recent international study (Kanbur and Ronconi (2016) *Enforcement Matters: the effective regulation of Labor*, Discussion

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Paper No. 11098, Centre for Economic Policy Research) suggests that New Zealand’s effective enforcement of labour standards – measured by the number of labour inspections – is low by international standards. Interestingly this is not an exception as the study suggests there is a negative correlation between strong labour law (on which New Zealand ranks highly) and enforcement. The New Zealand ranking is in the same approximate space as Australia, Canada and Britain.

One positive feature is that the most recent sanctions are civil in character and established to the civil standard of proof. The new offences in the Immigration Act, in contrast, are criminal and may be difficult to establish. Similarly the reforms to fishing may be successful if applied to New Zealand flagged vessels with New Zealand crew but are likely to be less so where foreign crew are employed and who are therefore vulnerable to unlawful pressures in their home country.

A second weakness is uncertainty. Ideally minimum standards should be clear and unambiguous so as to allow effective enforcement. The greater the level of uncertainty the higher cost of enforcement. Unfortunately many of the reforms appear to have this character. For example the reforms to the Wages Protection Act, intended to limit pay deductions for matters outside the employee's control such as service station drive-aways, only prohibit "unreasonable" deductions, a highly open notion. Specific deductions require the employer to "consult" with the employee – again a provision that is likely to be largely ineffective. The term "reasonable" is also found in a number of the other provisions, for example the availability and secondary employment provisions intended to prevent zero-hours contracts. The class of employee typically exploited by such clauses is unlikely to have either the will or the funding to pursue their remedies given the room for argument over such terms.

Finally avoidance of the new provisions, especially through dubious independent contractor arrangements or other devices, has not been adequately addressed. The Minimum Wage (Contractors Remuneration) Amendment Bill sponsored by David Parker is perhaps indicative of this problem. This writer has recently viewed so-called independent contractor agreements that seem to replicate most of the features of zero-hours contracts and volunteer – internship agreements that provide little if any benefit to the intern but major economic benefits to the "host".

WORKPLACE HEALTH AND SAFETY ISSUES

The Mental Health of Workers: New Zealand Still in Need of Major Reforms

Dawn Duncan, PhD student, Faculty of Law, Victoria University of Wellington

The new Health and Safety at Work Act 2015 is set to commence this month, implementing a major part of the "Working Safer Reform Package."¹ The reform package expands the scope of legal duties, creates greater powers for the regulator, tougher penalties, and a national target to reduce serious injuries and fatalities.² While these new measures are a step forward, they will do little to address the looming problem of poor worker mental health. Internationally, mental illness is "now the leading cause of sickness absence and long-term work incapacity in most developed countries."³ Yet, our health and safety and accident compensation laws are still primarily designed for the "accidents" of 20th century, factories, mines and workshops.

¹ Ministry of Business, Innovation and Employment *Working Safer: Blueprint for New Zealand's Health and Safety System* (August 2013).

² Ministry of Business, Innovation and Enterprise *Working Safer, Reducing Work-Related Fatalities and Serious Injury by 2020: Progress Towards Target* (March 2015).

³ Samuel Harvey, Sadhbh Joyce, Leona Tan, Anya Johnson, Helena Nguyen, Matthew Modini and Markus Groth *Developing a mentally healthy workplace: A review of the literature* A report for the National Mental Health Commission and Mentally Healthy Workplace Alliance (November 2014).

The Changing Nature of Work and the Impact on Worker Mental Health

The 2014 *New Zealand Sectors Report* highlights the fact the majority of New Zealanders are now working in the broadly described “services”, health, education, or government sectors.⁴ Changes in the nature of work mean changes in the types of working hazards people are exposed to. Jobs in these sectors tend to have hazard profiles associated with a greater risk of developing mental health problems and stress-related disease, than accidental injury. Workers in these “mental” jobs, however, receive less favourable treatment under New Zealand’s ACC and health and safety laws than workers in other types of work. For example, the hazards associated with building work expose builders to injuries such as falling from a ladder and breaking a leg, or crushing their fingers between pieces of wood. A social worker working with children who have suffered abuse and neglect would be exposed to the hazards of traumatic information, emotional exhaustion or threats of violence. The builder’s broken leg or crushed fingers would have ACC cover, and require the notification of Worksafe, whereas the social worker’s anxiety disorder or depression would not. While these workers would be treated equally for the same injuries (e.g. if they both had broken legs), the reality is that the social worker’s job has a low risk of falls from height, and a high risk of developing depression, and the social worker would not receive the same treatment for the health problems that arise more commonly from the type of work that he or she does.

ACC Reform: Cover for Work-Related Mental Health Problems

The area in most need of urgent reform is the cover provisions of the ACC scheme. Presently, the vast majority of mental health problems arising from work are excluded from ACC cover.⁵ Since 2008 there has been some cover for narrowly defined single incident trauma (e.g. a train driver whose train hits a suicidal person and develops post-traumatic stress disorder), but this has only very limited reach.⁶ There is still no



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cover for chronic work-related mental conditions, such as a police officer who develops a traumatic stress disorder as a result of multiple traumatic events over the course of a career,⁷ occupational overuse syndrome or pain syndromes as a result of repetitive work⁸ (ACC treats these as mental), stress-related mental illnesses such as depression or anxiety,⁹ or any stress-related physical illness, that at its most expansive, includes heart attack, stroke and alcohol and other drug addiction resulting from stressful work.¹⁰

The Consequence of Exclusion: A Rise in Stress-Related Personal Grievances

If an employee suffers from a work-related health problem that is excluded by ACC their only option is to sue their employer for compensation, usually through a personal grievance for unjustifiable disadvantage, (the disadvantage being the employer’s failure to meet their health and safety obligations to the employee). These actions require the employee to prove the employer is at fault, which the New Zealand Court of Appeal has described as posing “formidable obstacles” to employees making these claims.¹¹ The exclusion of mental health problems from ACC means that employers are also

⁴ Ministry of Business, Innovation and Employment *New Zealand Sectors Report 2014: An Analysis of the New Zealand Economy by Sector* (April 2014) at 39-50.

⁵ There is cover for mental injuries that arise “because of a physical injury” under section 26(1)(c) and those caused by certain criminal acts listed in Schedule 3.

⁶ Fiona Thwaites “Mental Injury Claims Under the Accident Compensation Act 2001” (2012) 18 *Canterbury Law Review* 244.

⁷ *ETN v ACC* [1998] NZACC 227 (27 Oct 1998); *Gable v ACC* [2003] NZACC 212 (27 Aug 2003).

⁸ *Meikle v ACC* [2008] NZACC 158 (11 July 2008); *Teen v ACC and Telecom Ltd* [2002] NZACC 244 (3 Sept 2002)

⁹ *Nilson-Reid v AG* (In respect of Dir. Dept. of Conservation) [2005] 1 ERNZ 951 (EC); *Rosenburg v Air New Zealand Ltd* (unrep. ERA, AA 311/09, 1 Sept 2009); *Davis v Portage Licensing Trust* [2006] ERNZ 286.

¹⁰ *A-G v Gilbert* [2002] 2 NZLR 342

¹¹ *Ibid*, at [87].

exposed to the risk of litigation and compensation claims for the mental health problems of their staff, in a way they are not with physical injuries. The lack of regulatory guidance as to what constitutes “all practical steps” in relation to worker mental health has made it harder for employers to know how to prevent mental health problems arising, or how to defend against personal grievance claims when they are brought.

If an employee’s personal grievance claim is successful, their remedies are usually limited to reimbursement of lost wages (generally capped at 12 weeks’ ordinary time) and compensation for “humiliation, loss of dignity, and injury to the feelings.”¹² This type of compensation is rarely generous, or equivalent to that available under ACC, as it does not provide for treatment, on-going income support for incapacity, or rehabilitation. If unsuccessful in their claim, the employee has

only the benefit system to fall back on. In 2013 research was conducted into the socioeconomic impact of the difference in financial support (ACC versus the support provided through WINZ) on a group of people of a similar age and level of functional impairment.¹³ The study concluded that those in the illness group (not covered by ACC) had “considerably poorer socio-economic outcomes,” did not return to work as early, and were the “most vulnerable for decline into poverty and ill health.”¹⁴ The current ACC cover provisions leave a large number of workers without support or assistance for their work-related health problems.

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A Lack of Data: A Lack of Action

In New Zealand work-related harm statistics come primarily from ACC administrative data, which means where there is no ACC cover, there is no resulting data. The lack of cover from chronic mental health problems means a lack of statistical information about worker mental health, rendering the problem largely invisible. This makes it difficult to understand the size and nature of the problem, limiting future research, policy development and enforcement activity. The lack of information is a recognised problem by Worksafe¹⁵ and is likely part of the reason for the exclusion of occupational disease from the current national *Working Safer* targets. Targets drive decisions about resources and enforcement activity, and the exclusion of occupational disease (including mental health) from the national targets creates a real risk of continued exclusion from policy priorities. Simply, until policy makers can see the problem, they are unlikely to take any real action to solve it.

A Lack of Detail: The Need for Regulatory Standards

Whether the new legislation can have any positive impact on worker mental health depends on the regulatory standards and enforcement activity sitting beneath it. A key lesson from the prior Health and Safety in Employment Act 1992 is that widely drafted

Whether the new legislation can have any positive impact on worker mental health depends on the regulatory standards and enforcement activity sitting beneath it. A key lesson from the prior Health and Safety in Employment Act 1992 is that widely drafted general duties can be undermined by a lack of regulatory detail and enforcement activity.

¹² Employment Relations Act 2000, section 123(1)(c)(i).

¹³ S McAllister, S Derret, R Audus, P Herbison and C Paul “Do different types of financial support after illness or injury affect socio-economic outcomes? A natural experiment in New Zealand” (2013) 85 *Social Science & Medicine* 93.

¹⁴ Ibid.

¹⁵ Ministry of Business, Innovation and Enterprise *Working Safer, Reducing Work-Related Fatalities and Serious Injury by 2020: Progress Towards Target* (March 2015), at 20.

general duties can be undermined by a lack of regulatory detail and enforcement activity. Since 2004, the law expressly included “physical or mental harm caused by work-related stress”¹⁶ within employers’ health and safety obligations. The general duties did not distinguish between mind and body, or injury and disease, but the regulations, guidelines and ACOPs certainly did. Anyone looking for concrete direction as to what “all practicable steps” were required to ensure the mental health of employees would have found very little help. There has been minimal enforcement activity under the former legislation for mentally unsafe work practices¹⁷ and the position of the Ministry of Business, Innovation and Employment was to encourage employees to address mental harm issues through mediated settlement.¹⁸ There is a real risk of this pattern continuing under the Health and Safety at Work Act 2015. While the new section 36 duty is drafted widely, clearly requiring action to ensure the mental health of workers, there is a remarkable lack of attention to worker mental health in the proposed regulations and a notable absence of mental health directed enforcement tools and policies.

A Different Approach Needed to Regulating for Mental Health

Regulating for work-related mental health requires a shift in thinking from “safety” to “health,” and an awareness that the nature of work, and the workforce, has changed a great deal from that which existed when earlier regulations were designed. Regulating to ensure mentally healthy work requires a very different type of regulation, with a different mode of operation and enforcement. It also requires us to accept the need to regulate working conditions that lead to poor worker

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mental health, including potentially management practices, job design, working hours, social interaction, worker autonomy and participation, performance and remuneration systems. The *Working Safer* reforms continue to place primary control of health and safety in the hands of employers, declaring that an overly prescriptive approach would stifle the innovation and creativity needed to grow new businesses.¹⁹ However, regulating for worker mental health does not need to look like, and nor should it look like, prescriptive 20th century regulations for factories and mines. There are better ways of regulating to ensure mentally healthy work.

Time for Action

More New Zealand workers are working in jobs with hazards associated with the development of mental illness and stress-related diseases. These workers deserve regulations designed for the type of work they do, and compensation for the health problems that arise from that type of work. While New Zealand’s injury and fatality rates are inexcusably high and rightly deserve attention, addressing our failures in relation to worker safety should not excuse us continuing to ignore our even greater failures in relation to worker mental health.

This article introduces the issues in a larger paper on the regulatory reforms needed to respond to poor worker mental health in New Zealand. For access to the full paper email: dawn.duncan@vuw.ac.nz

¹⁶ Health and Safety in Employment Act 1992, s 2.

¹⁷ The only prosecution action taken is that of *Department of Labour v Nalder & Biddle (Nelson) Ltd* [2005] NZHSE 20.

¹⁸ See Department of Labour Guideline *Healthy Work: Managing Stress and Fatigue in the Workplace* (June 2003).

¹⁹ *Working Safer: Blueprint for New Zealand’s Health and Safety System*, at 3.

EMPLOYMENT LAW UPDATE APRIL 2016

Zero Hour Contracts “Banned” – the Employment Relations Amendment Act 2016

Peter Kiely, Partner, and Elise Robinson, Solicitor, Kiely Thompson Caisley

The Employment Relations Amendment Act 2016 (the Amendment Act) came into force on 1 April 2016. This Act originally started life as the Employment Standards Legislation Bill in late 2015 and was introduced to “*make workplaces fairer and more productive, for both employers and employees*”.²⁰ The Bill sought to achieve this by amending the law in relation to parental leave, by prohibiting certain employment practices and by strengthening the enforcement of employment standards through a new sanctions regime.

Zero hours contracts

One amendment that has gained significant media attention is the change under the Bill “*banning*” zero hour contracts, which were common in the fast food industry in particular.²¹ Under such contracts, an employer does not have to guarantee any minimum hours to an employee, but the employee has to work if requested to do so.

The Amendment Act now defines an ‘*availability provision*’ as an arrangement where the performance of work by an employee is conditional on the employer making work available to the employee, and the employee being required to be available to accept any work the employer makes available.²² Such a provision may only be included in an employment agreement that:

- Specifies agreed hours of work and that includes guaranteed hours of work among those agreed hours; and
- Relates to a period for which an employee is required to be available that is in addition to those guaranteed hours of work.²³

Furthermore, an availability provision must not be included in an employment agreement unless:

- the employer has genuine reasons based on reasonable grounds for including the availability provision and the number of hours specified in that provision; and
- the availability provision provides for the payment of reasonable compensation to the employee for making themselves available to perform work under the provision.²⁴

If an availability provision does not comply with these requirements, it is unenforceable.

The Amendment Act also sets out factors which an employer must consider in assessing whether there are genuine reasons based on reasonable grounds for including an availability provision, namely:²⁵

- Whether it is practicable for the employer to meet business demands for the work to be performed by the employee without including an availability provision;
- The number of hours for which the employee would be required to be available;
- The proportion of availability hours in relation to the agreed hours of work.

²⁰ (Report from the Transport and Industrial Relations Committee, 12 February 2016).

²¹ <http://www.theguardian.com/world/2016/mar/11/zero-hour-contracts-banned-in-new-zealand>

²² Section 67D(1), Employment Relations Act 2000.

²³ Section 67D(2), Employment Relations Act 2000.

²⁴ Section 67D(3), Employment Relations Act 2000.

²⁵ Section 67D(5), Employment Relations Act 2000.

An availability provision may be practicable for an employer in the hospitality industry where someone is required to cover a shift on short notice, such as a waitress who has phoned in sick. In these circumstances it may be impracticable for the employer to employ someone on a casual basis because the employee would not have an obligation to come to work when requested. This type of arrangement would be likely to constitute a genuine reason.

In determining the compensation which should be paid under the availability provision, an employer must have regard to all relevant matters, including:²⁶

- The number of hours for which the employee is required to be available;
- The proportion of availability hours in relation to the agreed hours of work;
- The nature of any restrictions resulting from the availability provision;
- The rate of payment under the employment agreement for the work for which the employee is available;
- If the employee is remunerated by salary, the amount of the salary.

If the employee is remunerated by salary, the parties can agree, that the salary includes compensation for the employee making themselves available for work.²⁷ If the provision does not provide for the payment of reasonable compensation, the employee is entitled to refuse to perform work in relation to those availability hours.²⁸

New Zealand's ban of zero hour contracts has gained media attention worldwide, as it is a practice common in other Commonwealth countries including the United Kingdom. However this ban is not intended to prohibit employers from engaging employees on genuine casual arrangements where employers have no obligation to offer work and employees have no obligation to accept any work offered to them. It is only intended to prohibit the type of arrangements where there is a lack of mutual obligation, in particular where the employee does not have equal rights in the employment relationship.

Compensation for shift workers

The Amendment Act also introduces an obligation to pay reasonable compensation to shift workers if their shift is cancelled without the required notice.

An employer must not cancel a shift unless the employment agreement specifies:²⁹

- A reasonable period of notice that must be given before the cancellation of a shift; and
- Reasonable compensation, which must be paid to the employee if the employer cancels a shift without giving the specified notice.

In cancelling a shift, the employer must give the employee the notice specified under the employment agreement or pay the employee the specified compensation.³⁰

The period of notice to be given must be determined having regard to all relevant factors including:³¹

- The nature of the employer's business;
- The nature of the employee's work; and

²⁶ Section 67D(6), Employment Relations Act 2000.

²⁷ Section 67D(7), Employment Relations Act 2000.

²⁸ Section 67E, Employment Relations Act 2000.

²⁹ Section 67G(2), Employment Relations Act 2000.

³⁰ Section 67G(3), Employment Relations Act 2000.

³¹ Section 67G(4), Employment Relations Act 2000.

- The nature of the employee’s employment arrangements, including whether there are agreed hours of work in the employment agreement and if so, the number of guaranteed hours of work among those agreed hours.

The Amendment Act also sets out matters which must be considered in determining the amount of compensation to be specified:

- The period of notice specified in the employee’s employment agreement;
- The remuneration the employee would have received for working the shift;
- Whether the nature of the work requires the employee to incur any costs in preparing for the shift.

If the shift is cancelled and the employment agreement does not comply with these requirements, or the employee was not notified of the cancellation until the start of the shift, or the shift has begun but is cancelled, an employee is entitled to what they would have earned for working the shift.³²

There are many other significant changes made by the Employment Standards Legislation Bill which will affect employers and employees. Employers should obtain appropriate advice to ensure they are complying with their obligations, and understand what, if any, changes they may need to make to their business to ensure compliance.

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:

<p>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.</p> <p>Contact person: Dr Geoff Plimmer Tel: 04 463 5700 Email geoff.plimmer@vuw.ac.nz</p>	<p>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?</p> <p>Contact person: Dr Stephen Blumenfeld Tel: 04 463 5706 Email: stephen.blumenfeld@vuw.ac.nz</p>	<p>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.</p> <p>Contact person: Dr Noelle Donnelly Tel: 04 463 5704 Email: noelle.donnelly@vuw.ac.nz</p>
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³² Section 67G(6), Employment Relations Act 2000.