CLEW'D IN

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

Issue 2017/5 – November 2017

NOTICES

Employment Agreements Update 2016/2017

If you are heading into bargaining in the next few months make sure you have checked out our publication '*Employment Agreements: Bargaining Trends and Employment Law Update 2016/2017*'.

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

Download the order form (PDF 154KB) from our website.

Postgraduate Diploma in Human Resource Management

Study while you work with part-time evening classes at our Pipitea campus in the heart of Wellington's business district. Apply here by 20 January to start study in March 2018.

Research services

CLEW is able to offer research services and to undertake specific research projects on collective bargaining and employee provisions; to review employee benefits; to develop employee engagement or workplace dynamics surveys.

If you are considering a research project involving your workforce or your membership contact us.

CLEW Contacts:

Centre Manager – Sue Ryall. Tel: 04 463 5143

Director – Dr Stephen Blumenfeld. Tel: 04 463 5706

Email: CLEW-events@vuw.ac.nz

NEW GOVERNMENT MOVES QUICKLY ON WORKPLACE CHANGES

Sue Ryall, Manager, CLEW

The Opening of Parliament last week in Wellington and the Speech from the Throne revealed an ambitious and 'aspirational' programme by the incoming Government. A number of changes are heralded for workplaces with a number of them to be in effect in 2018.

In general, the focus for the government is sustainable economic development, lifting wages and reducing inequality. Some of the key initiatives announced in the speech are:

1. The legislated minimum wage will increase to $20 by 2020 with first step an increase to $16.50 in 2018.
2. Increase in paid parental leave to 22 weeks in 2018 and 26 weeks in 2020 (already in the House under urgency).
3. Incentives for employers to take on apprentices.

Announcements to date from new Minister of Workplace Relations, Iain Lees-Galloway, but not included in the Speech from the Throne:

1. The Government will form a Joint Working group to replace the 'Hobbit" law 'to develop a durable framework for workplace relations in the sector.'
2. The Employment (Pay Equity and Equal Pay) Bill, introduced early in 2017 under the last government, will not proceed and work will start on new legislation 'that adheres to all the principles of the Joint Working Group on Pay Equity.

There have been no announcements to date on the Domestic Violence – Victim's Protection Bill, introduced by Jan Logie early last year, but it is expected to progress in the current term of government.

The Labour Policy to repeal the changes in the Employment Relations Act 2000 made by successive National coalition governments in the last 9 years is expected to also progress next year and possibly in the first 100 days if election campaign announcements can be believed.

Announcements on further changes to the ERA have yet to be made and are possibly not being considered as higher priority as the Pay Equity legislation, but it is likely that there will be a number of changes to legislation governing workplaces in the next three years.

Gordon Anderson's article in this edition of CLEW'd In discusses further the changes to the ERA.

LABOUR LAW REFORM: A TIME FOR RE-ESTABLISHING CORE VALUES

Gordon Anderson, Professor of Law, Victoria University of Wellington

The formation of the Labour-led coalition government is likely to be strongly felt in the area of labour law and labour relations. The promised reforms in the first 100 days are perhaps predictable and essentially involve restoring the status quo ante, taking the law back to where it was left when Labour lost office. Those reforms are important and the reversal of some of National's reforms are also symbolic: the repeal of the Hobbit law makes it clear that industries should not have personal exemptions carved out of labour law; the right to enter workplaces is important not for unions but the workers they service, a point that is often lost sight of. That reform, and the removal of the ability to deduct pay for non-stoppage strikes, make the point that workers have rights and that the ethos of master and servant law should be left in the past.

The interesting question will be how far beyond this Labour is prepared to go.–The Employment Relations Act (ERA) was far from revolutionary and Labour's reluctance to undertake more radical reforms when last in power meant that many of the laudable objects of the Act were never achieved. One key value introduced in that Act, the statutory obligation of good faith, has however become established as a central feature of New Zealand labour law and provides an example of the reform ethos that should be central to any ongoing reforms.

I would suggest that four reforms are required if the objects of the ERA are to be achieved during this period of Labour government.

UPCOMING SEMINARS

Setting the Tone: Ethical Business Leadership – a New Zealand Perspective

The Brian Picot Chair in Ethical Leadership at Victoria Business School is holding a public seminar from Philippa Foster Back, the Director of the London Institute of Business Ethics (IBE). The subject of the seminar is the title of the IBE publication that is being launched in New Zealand.

Based on key interviews, the report outlines that many business leaders in New Zealand place great importance on their personal values and that they believe their core ethical values are implicitly woven into the fabric of their business.

Wednesday 29 November 2017
Time: 12:30-1:30pm (Light refreshments will be available from midday)
Venue: RHMZ05, Mezzanine floor of Rutherford House, Victoria Business School, Pipitea Campus

Places are limited. RSVP to victoria.beckett@vuw.ac.nz

Transforming Workplace Relations 1976-2016

The CLEW 2018 seminar series launches on **1 March 2018, 9am-1pm, at Victoria University (Rutherford House)** with this seminar to explore some of the key themes included in the book edited by CLEW associate researcher, Gordon Anderson. The seminar will be opened by the new Minister for Workplace Relations, Iain Lees-Galloway and former Chief Judge of the Employment Court, Graeme Colgan, will chair the morning seminar.

If you would like to register your interest and receive the full programme and registration information directly email clew-events@vuw.ac.nz**.** The cost of the seminar is expected to be $85+gst.

First, all New Zealanders employed to personally perform work have the right to be protected by a set of minimum employment standards. Many modern employment practices are designed to avoid such protections and have had the effect that many workers who are indistinguishable from employees are not entitled to these protections. A priority of any reform must be to ensure that the floor of employment rights is extended to all persons who are contracted to personally perform work, whether or not as 'employees'. Such a reform does not undermine flexibility, it merely sets the minimum rights that society requires for any worker.

Second, employees must have the right to freely choose to be represented at work and have an effective voice at work. If workers are to have an effective voice in their workplace they need the right to effective representation though a trade union or through alternative mechanisms that allow the expression of worker voice. Most importantly employers must be obliged to maintain a position of partial neutrality in relation to union membership – it is not their business. In order to ensure that workers are able to freely exercise their choice, conduct likely to have the effect of placing unwanted or unreasonable pressure on individual workers should be prohibited. It is also important that union members, and indeed employees generally, should have the right to elect a workplace delegate with the rights necessary to represent the interests and concerns of those employees to management.

Obtaining decent conditions of work requires effective collective bargaining. The current provisions on good faith bargaining, with the restoration of the requirement to conclude a collective agreement, will provide a solid foundation for collective bargaining, but if they are to be effective further reforms are needed.

Third, obtaining decent conditions of work requires effective collective bargaining. The current provisions on good faith bargaining, with the restoration of the requirement to conclude a collective agreement, will provide a solid foundation for collective bargaining, but if they are to be effective further reforms are needed. One of the most obvious, but clearly contentious reforms is to define "employer" in economic and not legal terms: that is any group of companies operating as a single economic unit. Multi-employer bargaining should be defined as bargaining with economically independent employers.

Fourth, all workers are entitled to respect and the protection their personal dignity. Workers are first and foremost people – employees are a legal construction. Unfortunately this point is recognised only with reluctance by the common law, and many employers. The law, its origins rooted in serfdom and the primacy of property, regards employees as subordinate and having limited rights within the workplace and restricted rights outside. Human rights and the right to personal dignity should not stop at the workplace door. There is therefore considerable merit in developing a statutory provision to make it clear that employment relationships must respect and protect the dignity of workers and recognise their right to personal and family life including the right to participate in society as citizens. The Authority or Court should be given the power to declare invalid clauses or employer policies that are either harsh or oppressive or which constitute an unreasonable intrusion on the employee's privacy personal dignity, personal life, or rights as a citizen. The rapidly expanding practice of monitoring and controlling employee lives in great detail makes this reform a matter of urgency.

These principles reflect a pluralistic vision of labour relations in the context of the twenty-first century and reflect something of the pluralist vision that was the philosophical foundation of the arbitration system. Workers are not a commodity and that they are entitled to the full benefits and rights of citizens in a democratic country. For an expansion of these arguments see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064287 .

VOCATIONAL EDUCATION AND TRAINING UNDER THE NEW GOVERNMENT

Stephen Blumenfeld, Director, CLEW

For the past quarter century, New Zealand's industry training system has effectively operated as the country's largest vocational education and training (VET) program. Industry training provides formal recognition of skills and knowledge through both on-the-job learning activities and off-the-job education and training. It is government-subsidised workplace training that leads to qualifications on the New Zealand Qualifications Framework (NZQF), which is structured to be consistent with other established national qualifications frameworks around the world. Setting and assessment of the unit standards that comprise nationally recognised qualifications are the primary functions of Industry Training Organisations (ITOs), which are established by particular industries and recognised by the Associate Minister of Education (Tertiary Education) under the Industry Training Act 1992.

Qualifications attained through an accredited training programme range from certificates, which are typically completed in a relatively short period of time, to advanced diplomas, requiring two years of post-secondary schooling. The system covers a large number of careers and industries, including trades, retail, hospitality, office-work, and information and communication technology. Training is provided by registered and accredited training institutions, including both public and private providers. Industry training is subsidised by the government through the Industry Training Fund. In conjunction with any government subsidy, employers are expected to contribute by purchasing training for their employees, who may also be expected to contribute to those costs through the payment of course and administrative fees.

Industry training is subsidised by the government through the Industry Training Fund. In conjunction with any government subsidy, employers are expected to contribute by purchasing training for their employees, who may also be expected to contribute to those costs through the payment of course and administrative fees.

Apprenticeships, subsidised through industry training, lead to nationally recognized qualifications and include both practical and theoretical components. They are available to anyone of working age, regardless of previous education or other qualifications earned. New Zealand Apprenticeships offer trainees opportunities for training and study at a variety of qualification levels while working in a range of occupations, including traditional trades. An apprentice must be employed throughout the apprenticeship in the occupation for which they are training, and an apprentice must be supported by a training plan agreed by the apprentice, the employer and the organisation arranging the training. With nearly 150,000 industry trainees and apprentices - there are currently more industry trainees and apprentices than university students - employers are effectively the largest tertiary institution in New Zealand.

New Zealand's VET policies and practices have been subject to regular reform, the purported objective of which has been to reconcile that system with perceptions of skills deficiencies in the labour market. Closer examination of those reforms, however, suggests the shifts in the country's VET policy over the past twenty years have been driven more by political ideology than economic necessity. To that end,

New Zealand's VET policies and practices have been subject to regular reform, the purported objective of which has been to reconcile that system with perceptions of skills deficiencies in the labour market. Closer examination of those reforms, however, suggests the shifts in the country's VET policy over the past twenty years have been driven more by political ideology than economic necessity.

neo-human capital theory, which reflects a neo-liberal belief in a limited government role in deference to the efficiency of markets, increasingly came to dominate VET policy debates in New Zealand throughout the 1980s and, in turn, formed the basis of VET policy reforms during the 1990s. Crucially in this regard is that New Zealand's government is no longer tasked with being a direct provider of training and apprenticeships, in terms of either design or delivery of those programs. Rather, government's role has been limited to setting the policy framework and provide the necessary funding incentives and policy infrastructure, through various government agencies, to stimulate industry training. .

Importantly, a growing number of academics and independent researchers who've studied education policy, both in New Zealand and abroad, contend neo-liberal approaches to curriculum choices in the VET sector is alienating for VET educators, leaving them disoriented and unable to exercise judgement. There is, moreover, a growing consensus that a viable vocational qualification system must be open to all workers and ensure the provision of VET which is relevant to those skills needed and equivalent to other vocational training certificates at that level. Future investment in the Industry Training and Apprenticeships sector will help to deliver a highly skilled and productive workforce, which contributes to individual and collective wellbeing and economic success.

Key to sustaining competency standards which align with labour market needs, nevertheless, is increasing collaboration between relevant government agencies and key industry stakeholders, including representatives from industry, education and training practitioners, academics and other experts, professionals and community groups. What is also needed in terms of skill development policy is greater private sector involvement in skills development in terms of both identifying and filling training needs and stronger linkages between industry and VET institutions.

Key to sustaining competency standards which align with labour market needs, nevertheless, is increasing collaboration between relevant government agencies and key industry stakeholders, including representatives from industry, education and training practitioners, academics and other experts, professionals and community groups.

Yet, there are risks attendant to the expansion of market-based, industry-led VET systems in which there are few institutional mechanisms for transition from schooling to work. Primary among those risks is related to the inability of trainees and apprentices to finance their own training and skill development, coupled with the inability of employers to capture the full benefits of vocational instruction. There is also the fear that, without a careful mapping of skill supply with skill demand, where it takes time for a trainee to make the transition from learning into related employment, the skills one gains through VET may soon become obsolete. It is promising, therefore, that the Labour Party included apprenticeships and work-based training in its pre-election commitment to reduce the cost of post-school study.

Labour also affirmed during the campaign its commitment to minimising skills shortages across all sectors in New Zealand. It said it would achieve this, in part, by restoring skills leadership roles to ITOs, to reinstate the Skills Leadership Group, strengthening the role of ITOs as standard setting bodies for their respective industries, and promoting partnerships between industry and tertiary providers to deliver fit-for-purpose and responsive education to people of all ages and stages of their careers. It is further expected that the incoming government will seek to involve ITOs to a much greater extent in the provision of careers advice and guidance to prospective school leavers so they are exposed to information about a much greater range of employment and training options. Labour also pledged as part of its Election Manifesto, to remove the cap on ITO training above Level 5

of the Qualifications Framework, and to incentivise pathways between provider-based and work-based education.

..boosting apprentices and improving support for employers who take on apprentices is key to the success of these initiatives. In the end, VET is essentially a public good in that there is little incentive for individuals or employers to provide for its full cost and, more importantly, it serves the public interest to have a national VET system

Notwithstanding these structural changes, boosting apprentices and improving support for employers who take on apprentices is key to the success of these initiatives. In the end, VET is essentially a public good in that there is little incentive for individuals or employers to provide for its full cost and, more importantly, it serves the public interest to have a national VET system. It is telling in this regard that, during the recent election campaign, both major parties conceded that increased investment in apprenticeships and workplace learning is needed to meet the challenges posed by changing technology and shifting skill requirements. In other words, government must play a strategic role in VET, both in terms of providing financial support for learners and the sector alike and with regard to overseeing and monitoring its provision.

THE SUPREME COURT RULES IN TWO CASES

Peter Kiely, Partner, Kiely Thompson Caisley

Two of the cases in the latest edition of *Employment Agreements: Bargaining Trends and Employment Law Update 2016/2017*[1] have been appealed to the Supreme Court and the judgments have been delivered. The New Zealand Basing decision was reversed, while the AFFCO decision was upheld. The cases are summarised below.

Brown v New Zealand Basing Limited [2017] NZSC 139

In the 2017 edition of the Employment Law Update[2], we reported on the Court of Appeal's decision in *New Zealand Basing Limited v Brown*.[3] The case was about the application of New Zealand law to a foreign employment agreement. The matter was appealed to the Supreme Court and the decision of that Court has now been delivered.

The Court of Appeal found that the pilots, who were parties to Hong Kong employment agreements, could not rely on New Zealand law prohibiting age discrimination when they were asked to retire on the grounds of age. The parties' agreement that their employment relationship was to be governed by the laws of Hong Kong was upheld. The right not to be dismissed on the grounds of age did not exist under Hong Kong law and could not therefore be claimed by the pilots. This was despite the pilots being based in Auckland and commencing and finishing their work in New Zealand.

The Supreme Court disagreed with this conclusion, reversing the Court of Appeal and permitting the pilots to make their discrimination claim in New Zealand. The Court considered it significant that the Employment Relations Act 2000 did not have an explicit territorial limitation.

---

[1] Blumenfeld S., Ryall S. and Kiely P. (2017) *Employment agreements: Bargaining Trends and Employment Law Update 2016/2017*. Wellington, Centre for Labour Employment and Work

[2], ibid. pp 123-126.

[3] *New Zealand Basing Limited v Brown* [2016] NZCA 525.

The Court concluded at [71] that it was "*satisfied that the right not to be discriminated against on grounds of age is not limited to employment relationships where the employment is governed by New Zealand law*."

The Court also noted at [91] that "Given the statutory purpose, the nature of the rights involved (that is, to be protected from unlawful discrimination) and the indication in the statute of the territorial application, it would be very odd to construe the 2000 Act to allow discrimination in the employment context in relation to persons in the [pilots'] position, solely on the basis of the parties' choice of law" (Hong Kong).

As a result the pilots can bring their discrimination claim in the New Zealand.

Affco New Zealand Limited v New Zealand Meat Workers and Related Trades Union Inc [2017] NZSC 135

In this year's Employment Law Update[4], we also reported on the Court of Appeal's decision in *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc*.[5] The case was about whether seasonal meat workers were unlawfully locked out of their employment before the start of the new season. The Court of Appeal found that although the employees were terminated during the off-season, they were still locked out unlawfully because they had an expectation of re-employment and were "*employees*" for the purposes of the lock out provisions of the Employment Relations Act.

AFFCO appealed that judgment to the Supreme Court. That Court has now delivered its decision.

The Supreme Court unanimously agreed with the Court of Appeal, and upheld the decision that AFFCO had unlawfully locked out its employees. Even though it agreed that the workers were not employed during the off-season, the Court held that the employer continued to have contractual obligations towards these workers.

The Supreme Court unanimously agreed with the Court of Appeal, and upheld the decision that AFFCO had unlawfully locked out its employees. Even though it agreed that the workers were not employed during the off-season, the Court held that the employer continued to have contractual obligations towards these workers. Unlike ordinary workers who have been laid off, the AFFCO workers were owed a contractual duty of re-hire when the new season started. Therefore they were not "*strangers to the employer*", fell within the definition of employees and were unlawfully locked out.

As the Court explained at [78]:

"*It is not the case that an employer who refuses to hire a new employee because the two are unable to agree terms of employment will, for that reason alone, have locked out the potential hire. As we have emphasised, the second respondents in this case were not, in contractual terms, strangers to the employer. Rather, they were people who had previously worked for AFFCO and to whom AFFCO owed contractual obligations, including as to re-hiring, even though their employment had terminated at the end of the previous season and they were seeking to be re-engaged for the new season. That feature of termination plus re-engagement under the umbrella of a number of continuing obligations distinguishes this case. Like the Court of Appeal, we consider that the relationship between AFFCO and*

[4] Blumenfeld S., Ryall S. and Kiely P. (2017) pp 170-173.
[5] *AFFCO New Zealand Limited v New Zealand Meat Workers & Related Trades Union Inc* [2016] NZCA 482.

the second respondents was sufficiently close to bring the latter within the scope of the word "employees" in s 82(1)(b)."

The Supreme Court therefore dismissed AFFCO's appeal.

LEGAL NEWS: 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

The conference theme is on labour law in transition and encompasses new developments and emerging areas in labour law. The call for Abstracts is now open.

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

RECENT PUBLICATIONS: NEW BOOK REVIEWS 40 YEARS OF INDUSTRIAL RELATIONS

Transforming Workplace Relations in New Zealand 1976-2016 (Victoria University Press, Wellington, 2017) edited by Gordon Anderson with Alan Geare, Erling Rasmussen and Margaret Wilson.

This collection of essays was published to mark the 40th anniversary of the publication of the first issue of the *New Zealand Journal of Industrial Relations*.

In the late 1960s New Zealand's industrial relations entered the most turbulent era in its history. The following three decades witnessed the decline and eventual repeal of the century-old arbitration system and culminated with the Employment Contracts Act in 1991, internationally the most rapid and radical neo-liberal labour market reform of that era of reform.

A decade later that the Employment Relations Act 2000 provided, if not a consensus, at least some broad agreement on the regulation of labour relations resulting in almost two decades of relative stability.

In this book a wide range of academic commentators reflect on this revolution in labour relations and speculate on the future of work relationships in a world again being challenged by newly evolving forms of work and employment. Contributors include both those who lived through the last 40 years as well as those who, in another 40 years, may again look back over a much changed employment landscape.

The book was published on 9 November. For further details and for on-line purchases see http://vup.victoria.ac.nz/transforming-workplace-relations-in-new-zealand-1976-2016/

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.

Contact person: Dr Geoff Plimmer
Tel: 04 463 5700
Email geoff.plimmer@vuw.ac.nz

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?

Contact person: Dr Stephen Blumenfeld
Tel: 04 463 5706
Email:
stephen.blumenfeld@vuw.ac.nz

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.

Contact person: Dr Noelle Donnelly
Tel: 04 463 5704
Email: noelle.donnelly@vuw.ac.nz

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

Centre for Labour, Employment and Work