CLEW'D IN

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

Issue 2016/1 – February 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

Details of the programme and a link for registrations will be available on

Future of Work Conference

The Labour Party's Future of Work Commission has announced the headline speakers and details of their Conference to be held in Auckland on March 23 (pm) and 24 (am). The line-up of speakers and contributors has attracted considerable interest with Professor Robert Reich, former US Secretary of Labour as keynote speaker along with Professor Guy Standing, author of the widely read 'The Precariat' and 'The Precariat Charter'.

For further information and registration details click here. We hope to cover discussion papers on the key issues raised at the conference in a future CLEW'd IN.

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Tel: 04 463 5143
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Web: http://www.victoria.ac.nz/som/clew

Welcome to the new year at CLEW and our first edition of CLEW'd IN for 2016.

In this issue we publish a review of redundancy notice and compensation provisions in collective agreements across the period 2003-2015. The results may surprise you! Our Director Dr Stephen Blumenfeld reports in from his research and study leave in the UK and Europe with some observations on employment relations law changes. We also provide a brief update on where things are at with the NZ Meat Workers' Union and AFFCO New Zealand in their seemingly endless disputes.

Redundancy provisions – trends in the period 2003-2015

Report from Sue Ryall and Dr Stephen Blumenfeld, Centre for Labour Employment and Work.

Redundancy protection for employees has assumed greater prominence since the start of the 2008-09 recession. It is particularly important at a time when an increasing number of workers are being dismissed without notice or redundancy compensation. Unlike most other OECD countries, though, New Zealand's employment legislation does not establish a regime for dealing specifically with employees affected by redundancy. What little protection employees have outside of their employment agreements derives from common law.

As we've noted in the past, the Courts in New Zealand have taken quite an active – some have suggested 'activist' – role in shaping the law regulating redundancy and affording to all workers some entitlements in the event their job is declared redundant. Yet, the status quo in New Zealand appears to be, unless such protocols are set out in the relevant employment agreement, there is relatively little protection for employees who lose their jobs as a result of redundancy.

Although rarely found in individual employment agreements, collective employment agreements (CEAs) negotiated in New Zealand typically include provisions dealing with the employer's obligations and employee's entitlements arising from redundancy. To this end, as we've reported in our annual publication *Employment Agreements: Bargaining*

Trends and Employment Law Update, in each of the last twelve years there has been little change from one year to the next in the redundancy provisions for employees covered by collective agreements.

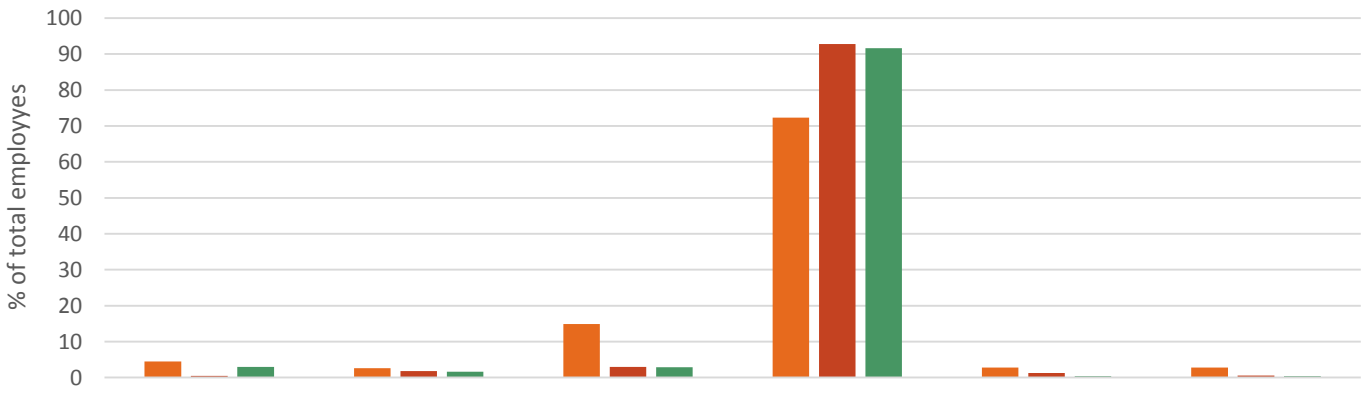
Despite this, an examination of redundancy clauses of our data across that timeframe shows, in fact, there have been some interesting changes in redundancy compensation entitlements which took place between June 2003 to June 2015. The specific years selected for comparisons (2003, 2009 and 2015) were selected for the following reasons:

- By 2003, all collective agreements that had been settled under the *Employment Contracts Act 1991* were expired.
- In 2003, New Zealand was led by a Labour Government, which was supportive of union organisation and collective bargaining, and it was a time of strong economic growth.
- 1 June 2009, the cut-off date for data entry into our database of CEAs for that year, fell during the global financial crisis (GFC) and recession in New Zealand (2008-2009), a period when many companies faced financial difficulties and redundancies ensued.
- During 2014-2015, New Zealand was in a period of economic growth and showed signs of having long-before recovered from the impact of the GFC and recession, and the Government enacted major changes to the ERA which are aimed at weakening collective bargaining.

Type of provision

As shown in Table 1, by June 2003, most employees were covered by collective agreements that included redundancy clauses with notice periods and specification of compensation payments (including that no payment will be made) in the event of redundancy. But, by June 2009, with 93 percent of collectivised employees knowing what their notice period and level of compensation would be in the event that they were made redundant, this had become the standard and it remained so in 2015.

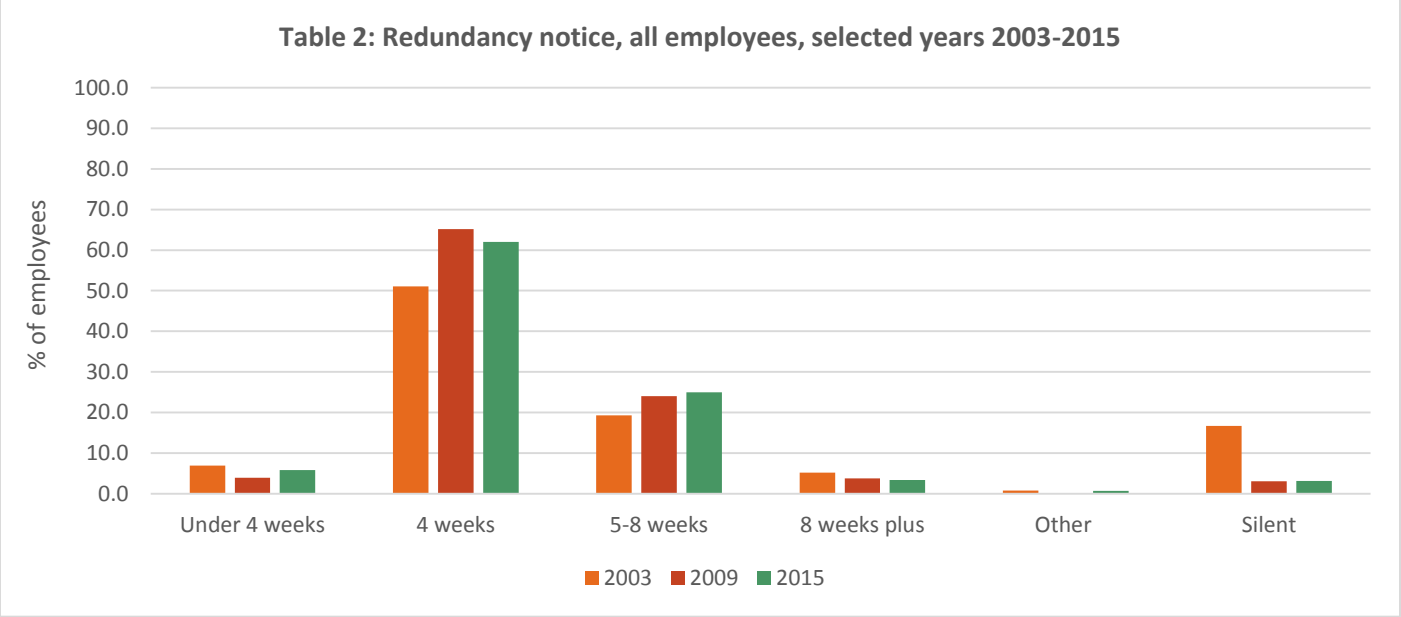
Table 1: Type of redundancy provision selected years



The changes in the type of redundancy provision in collective agreements to inclusion of both notice period and compensation suggests that, rather than leaving it up to the discretion of the Employment Authority or Employment Court to arrive at a 'fair and reasonable' quantum of pay and notice period, many employers opted for the certainty of negotiated entitlements.

Redundancy notice

Across the period 2003-2015, 4 weeks' notice became the standard provision for employees in the event of redundancy. As depicted in Table 2, in 2003 it was more likely that an employee covered by a CEA would have no notice period specified in that agreement. This was particularly the case for people employed in central government, where 27 percent –compared with 17 percent of all employees covered by a CEA– had no notice period for redundancy specified in their employment agreement.



The Courts in New Zealand have previously determined that, if no notice period is specified in the relevant agreement, the notice period will be what a 'reasonable' employer would give in the same circumstances. It would appear, therefore, that a notice period of 4 weeks was subsequently adopted as the 'standard' and included thenceforth in collective agreements. By June 2009, close to two-thirds of employees were covered by agreements with 4 weeks' notice for redundancy, a level that has generally held through to June 2015. It is also noteworthy that, by June 2015, a significantly larger share of public sector employees on collectives than was the case in June 2003 were covered by agreements with a period of redundancy notice of longer duration than 4 weeks. Currently, a third of the country's public sector workers on collectives are entitled to a notice period of 5-8 weeks.

Redundancy compensation payments

Where CEAs provide for redundancy compensation payments, the quantum is typically determined according to a formula that provides for:

- 'x' weeks' salary or wages in recognition of the first year of service, plus
- 'y' weeks' salary or wages for each subsequent year of service.
- An upper limit can be set on the amount paid, sometimes as a dollar amount, or more frequently based on a maximum number of weeks' salary or recognition of a maximum period of service with the employer.

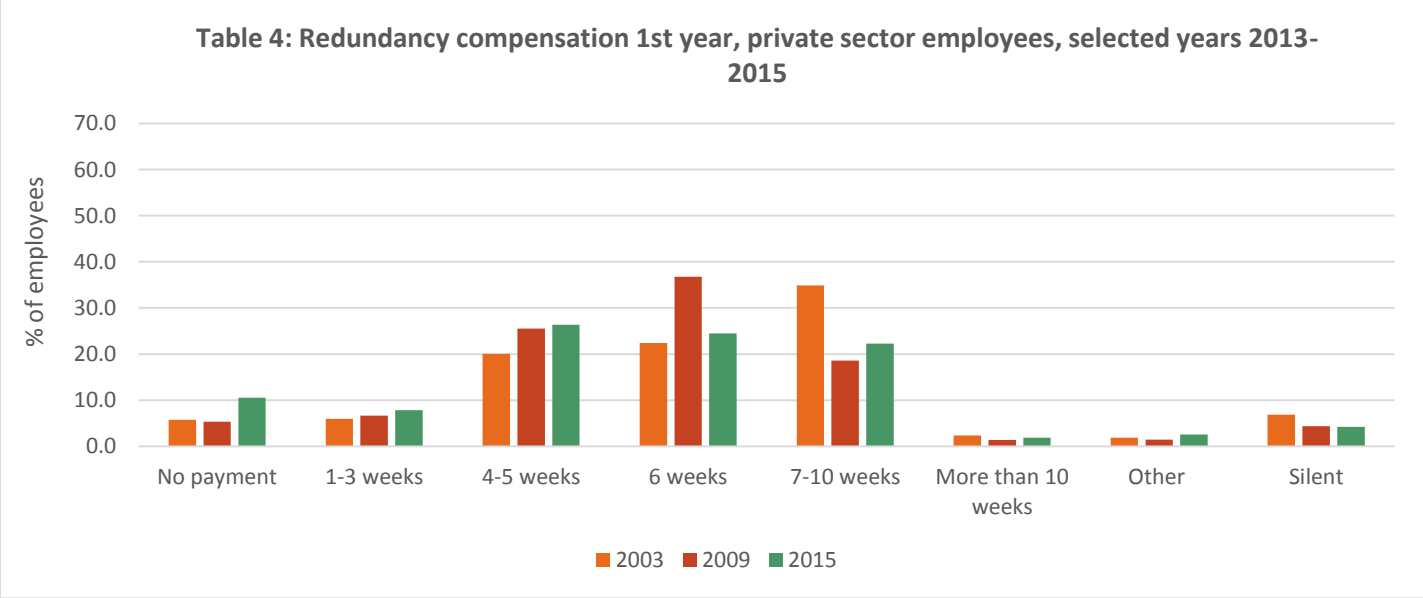
Redundancy compensation for first year of service

Unlike the notice period, no 'standard' level of financial compensation in the event of redundancy has been established (see Table 3). In June 2003, collectivised employees commonly received redundancy compensation for their first year of

employment equivalent to 7 to 10 weeks' pay. However, by June 2009, close to a half of such employees received 6 weeks' compensation for their first year of employment; only 22 percent were entitled to between 7 and 10 weeks suggesting a significant cut back in entitlements around the recession period. In 2015, there appears to be a restoration, at least for some employees, of the higher level of entitlement, with 29.5 percent of employees now entitled to between 7 and 10 weeks payment.

This pattern is evident for both private and central government employees, with both sectors' employees now more likely to have lower levels of entitlement for the first year of employment than was available in 2003. For central government employees, though, the entitlement is currently most likely to be 6 weeks' pay (46 percent of such employees), while the pattern is more varied in the private sector. Only 24.5 percent of private sector employees have entitlement to 6 weeks' compensation with the most frequent entitlement (for 26 percent of private sector employees on CEAs) now 4-5 weeks compared with 7-10 weeks in 2003 (35 percent of such employees). Less than one quarter (22 percent) of private sector employees retain entitlement to 7-10 weeks' pay for their first year of employment, should they be made redundant.

Of most interest in 2015, perhaps, is the rise in the proportion of employees in the private sector who are covered under collective agreements which stipulate that no payment will be made to employees made redundant (see Table 4 below).



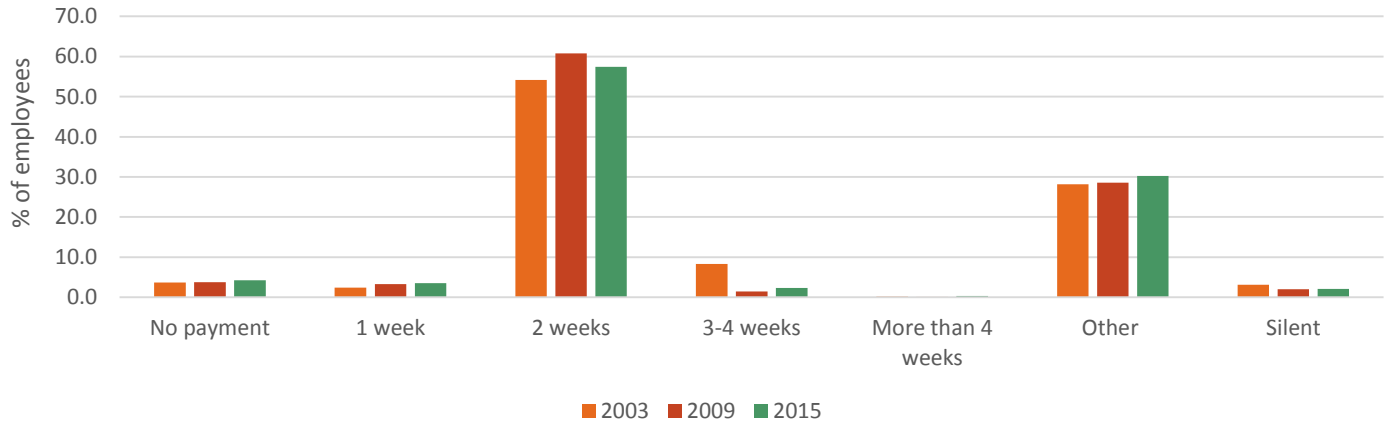
This group now makes up 11 percent of private sector employees on CEAs, compared with 5 percent in 2009 and 6 percent in 2003. In contrast, less than 1 percent of both central and local government employees have no entitlement to a payment in the event of redundancy.

In contrast to the other two sectors, local government employees have seen an increase in their entitlement to redundancy compensation after their first year of employment. In 2003, 44 percent of such employees were entitled to 6 weeks' pay following a redundancy affecting their employment. Moreover, as the trend moved from agreements being silent on redundancy compensation to specification of entitlements (from 2003 to 2009), it became more common (53 percent) for collectivised employees in local government to have entitlement of 6 weeks'. However, in 2015, that entitlement for these employees is most commonly (42 percent of these employees) 7-10 weeks' pay.

Redundancy compensation for subsequent years of service

Compensation for employees with service beyond the first year has remained relatively flat across the review period (see Table 5 below). Two weeks' pay for each year of service beyond the first year, up to any stipulated maximum, was provided for a majority of employees (54 percent) covered by collective agreements in 2003 as it does in 2015 (57.5 percent). Despite this, there continues to be in 2015, as there was in 2003, a reasonably high proportion (currently 30 percent) of employees whose redundancy compensation is not linked to a standard formula of weeks of pay for each year of service. This compensation may be in the form of flat dollar amounts or a different type of formula related to years of service.

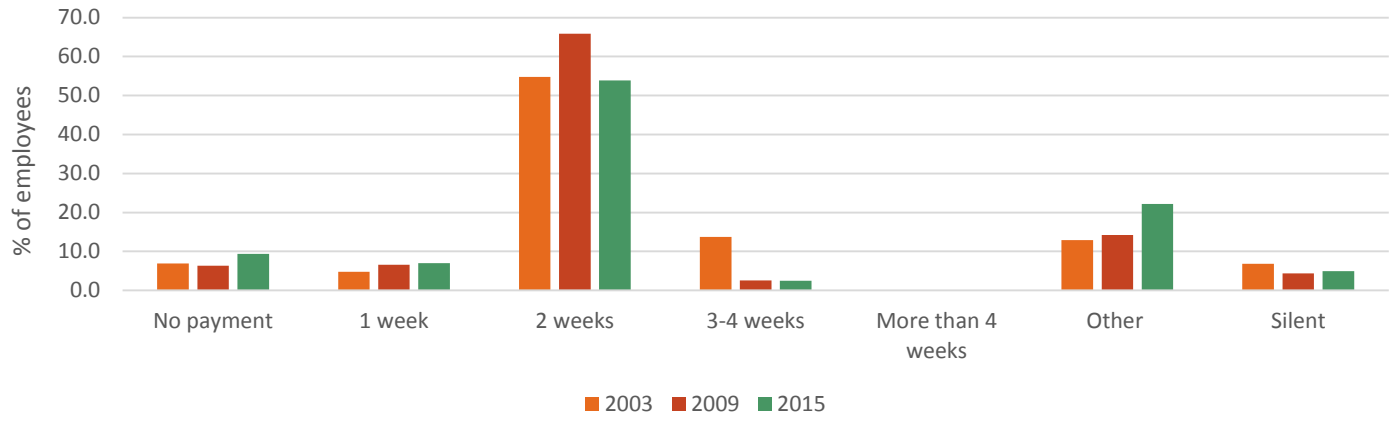
Table 5: Redundancy compensation for subsequent years, all employees, selected years 2003-2015



While the predominance of 2 weeks' pay for each year of service after the first year is evident in all three sectors, the 2008/2009 recession appears to have impacted on the availability of high levels of compensation, particularly in the private sector (see Table 6 below).

In 2003, 14 percent of such employees were entitled to more than 2 weeks compensation for the subsequent years of service, but by 2009 only 2.5 percent of private sector employees had such provision and this is where it remains in 2015. It seems that employers moved to the lower level of provision (2 weeks for each year of subsequent service) during the GFC and the proportion of private sector employees who were entitled to 2 weeks compensation rose from 55 percent in 2003 to 66 percent in 2009. However in 2015, the proportion entitled to this 'standard' level has now dropped in favour of specification that no compensation payment will be made in redundancy or some form of 'other' provision that is not expressed a weeks of pay for each year of subsequent service.

Table 6: Redundancy compensation for subsequent years, private sector employees, selected years 2003-2015

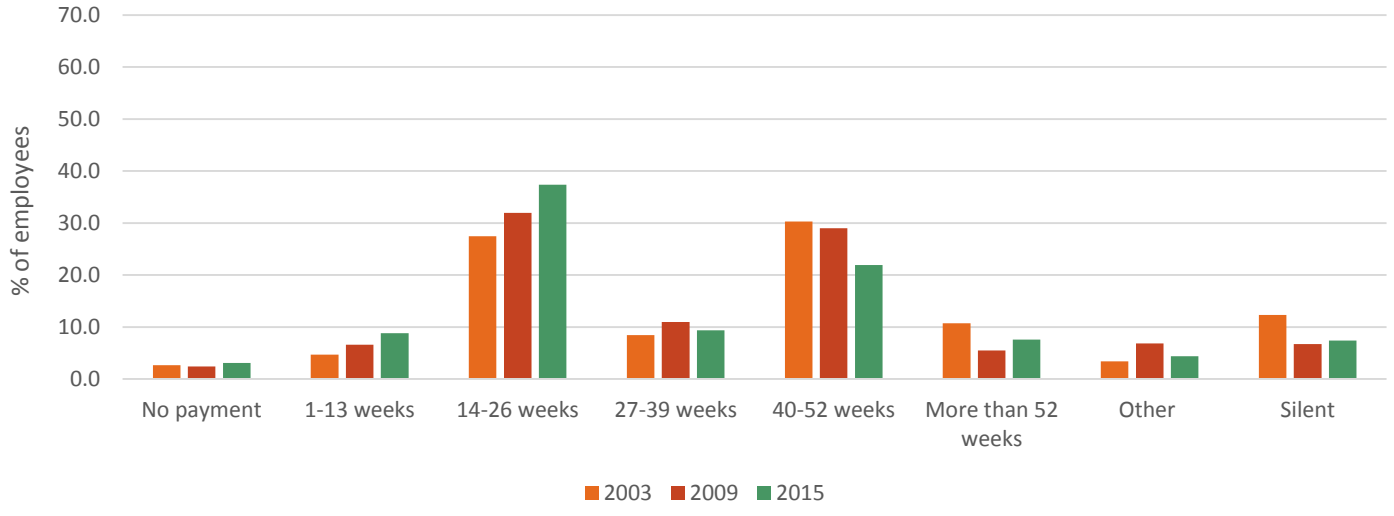


In contrast, the proportion of collectivised central government employees who are entitled in the event of redundancy to 2 weeks' pay for each year subsequent to the first (until they hit the maximum provision) has remained steady at slightly over half, across the period 2003-2015. However, it is more common in the central government sector than either of the private or local government sectors for employees to be compensated using some other means than the standard formula of weeks for each year of service. It is not possible to determine why this is, but it may be linked to the limitations on budgets in the central government sector and such formulas may be easier to keep restraints on payments. The 2 week 'standard' is most evident in the local government sector where in 2015, almost all local government employees (91.5 percent) have this entitlement.

Maximum compensation for redundancy

In the period under review (2003-2015), employees' maximum entitlements in the event of redundancy have decreased, and it is clear that the period of the economic recession, 2008-2009, contributed to this decline, as shown in Table 7.

Table 7: Maximum redundancy compensation, all employees, selected years 2003-2015



In 2003, 41 percent of employees in our sample of collective agreements were entitled to 40 weeks or more in redundancy compensation. By 2015, however, this figure had fallen to 29 percent. At present, it is more likely that an employee will

receive up to 26 weeks' pay as a maximum payment, with the largest proportion (37 percent) entitled to the equivalent of 14 to 26 weeks' pay in the event of redundancy.

In 2009, there was an increase in the proportion of employees who were entitled to a maximum redundancy payment equivalent to between 27 and 39 weeks' pay. This appears to be a consequence of employers moving away from offering higher levels of compensation, as companies struggled through the GFC and recession. Nonetheless, in the years between 2009 and 2015, the levels of entitlement to redundancy compensation have further decreased, even as the economy moved out of recession and into a growth period.

Importantly, though, when we examine the trends in each of the sectors, different patterns emerge. As shown in Table 8, the reduction in maximum entitlements in the private sector primarily occurred in the period 2003-2009 and in particular there was a dramatic drop in employees entitled to more than 52 weeks' maximum compensation largely in favour of between 14 and 26 weeks' entitlement. By 2015, with the country in a more stable economic position, the proportion of employees entitled to the higher levels had increased, albeit not to the levels of 2003.

Table 8: Maximum redundancy compensation, private sector employees, selected years 2003-2015

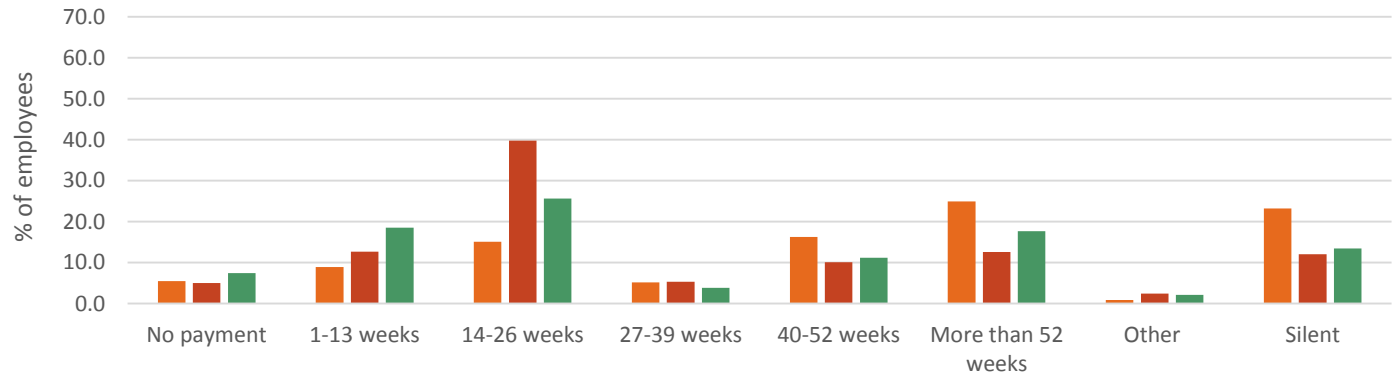
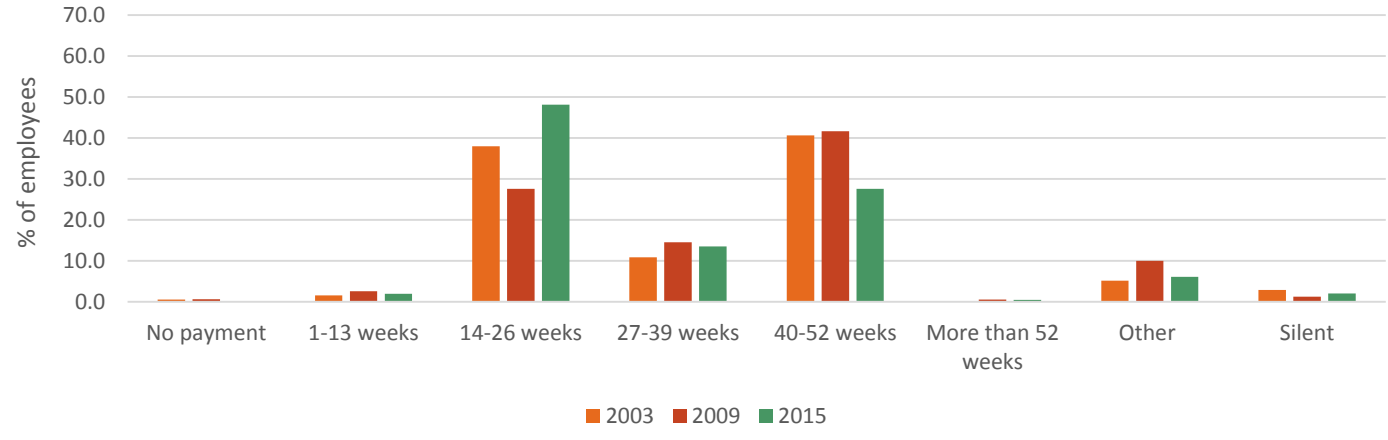


Table 9: Maximum redundancy compensation, central gov't sector employees, selected years 2003-2015

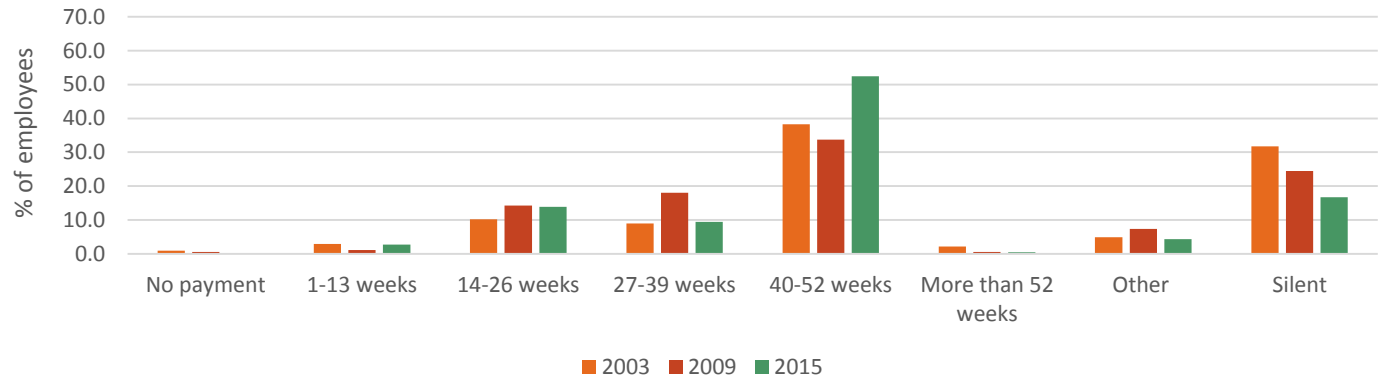


In contrast, Table 9 shows that the central government sector saw a reduction in entitlements only since 2009, following the GFC and recession and the election of an austerity-minded National-led Government. In the six years preceding then, maximum compensation thresholds negotiated in collective agreements in New Zealand had increased, both in terms of

their average level and, to a lesser extent, their prevalence. In 2003, 52 percent of central government employees had their entitlement to redundancy compensation capped at a level equivalent to more than 6 months' pay. By 2009, the share of collectivised employees in New Zealand with at least this redundancy compensation threshold had increased to 57 percent. But, by 2015, only 42 percent of central government employees on collectives had this level of entitlement, with half of that group having entitlement to less than 6 months' maximum redundancy pay.

Unlike the other two sectors more than half of local government employees included in our sample of collective agreements in 2015 have a maximum payment entitlement of 40 weeks or more in the event of redundancy (see Table 10). The trend across the sector is to increase levels of maximum entitlement, accompanied by movement away from coverage by agreements that are either 'silent' – suggesting local authorities have defined a limit on the compensation for which they are liable rather than possibly have 'no limit' on maximum entitlement – where the quantum of redundancy compensation continues to increase along with the affected employee's length of service to the organisation. As in the private sector, the proportion of employees with the higher levels of compensation dropped between 2003 and 2009; however, by 2015, the most common redundancy provision in local government collectives had returned to 40-52 weeks.

Table 10: Maximum redundancy compensation, local gov't sector employees, selected years 2003-2015



The Future

Across all sectors, the share of employees in New Zealand on collective employment agreements that specify no compensation in the event of redundancy is on the rise. Nevertheless, the period of redundancy notice provisions have settled into a standard of 4 weeks' and the compensation payment for each subsequent year of service to the employer beyond the first appears to have standardised at 2 weeks. It also appears that thresholds for compensation for years worked with an organisation will persist for the time being at comparatively low levels, at least in the private sector, where maximum compensation equivalent owed to an employee in the event of a redundancy is most commonly set at between 1 and 13 weeks'. This lowering of the maximum entitlement threshold appears also to be flowing through to the central government sector, where the norm for employees covered by collective agreements is now 14 to 26 weeks' maximum redundancy compensation.

Employment Agreements Update 2014/2015 still available

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 2014/2015'*. The book is seen as the essential reference for employment relations experts and the only source of information on current provisions in employment agreements. It includes information wages/ salaries, term of agreements, all forms of leave, work hours and penal/overtime rates, redundancy, superannuation/ kiwisaver, union provisions and much more.

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

UK and European governments take different approaches to employment relations

Observations from Stephen Blumenfeld, Director of CLEW, currently on research and study leave in the UK and Europe

Although the viability of collective bargaining rests primarily on the autonomy of trade unions and employer organisations, government can and frequently does alter its rules. This is perhaps most true in parliamentary systems of government, in which the executive branch derives its legitimacy from and is accountable to the legislative branch, Parliament. In the UK, for instance, as in New Zealand, labour law seems to be a constantly moving feast, shifting along with the tides of electoral politics. Changes enacted to the UK's employment laws in recent years under David Cameron's Conservative Government include extending the qualifying period for unfair dismissal claims from 1 year to 2 years employment with the employer; dramatically increasing the fee required to commence proceedings in an Employment Tribunal, a public body with statutory jurisdiction to hear disputes between employers and employees; and, cutting the number of workplace visits made by health inspectors.

In the UK, for instance, as in New Zealand, labour law seems to be a constantly moving feast, shifting along with the tides of electoral politics.

Last month, the UK Government's Trade Union Bill, which promises to bring sweeping changes to the country's collective bargaining regime, had its Second Reading in Parliament. Among other things, the Bill includes plans to:

- introduce a 50 percent turnout requirement for industrial action ballots, and – for "important public sector services", including the health service – require at least 40% of all eligible members to vote in favour of action;
- lift the ban on using agency workers to replace permanent staff during strikes; and
- stop union subscriptions being collected straight from members' salaries.

The Bill, due to become law in the northern summer, would also impose several new restrictions on strikers in the UK. Trade unions will be required to appoint a picket supervisor, who must wear a badge, armband or other item that readily identifies the picket supervisor as such, and supply that supervisor with a letter of authorisation, which the supervisor must show to a police constable or to any other person who reasonably asks to see it. Failure to comply with any of these obligations will mean that the union loses legal protection for the picketing, that an injunction can be granted to stop the

picketing, and that damages to cover any losses it causes may subsequently be claimed. Under the Bill as it stands, the government will also be able to limit public sector employees' time devoted to union activities while at work.

Finally, the legislation proposes to change the way trade unionists pay into their union political fund, the only source from which unions can give money to the Labour Party. The changes mean each union member will have to agree in writing every five years to opt into paying the political levy, as opposed to opting out via the current system. The new rules will apply to all 4 million existing political levy payers in unions affiliated to the Labour Party, and those who are not. The bill gives the unions only three months to get a union member's signature agreeing to the levy payment. The change in the trade union bill would cut the Party's income, both from the drop in annual union affiliation fees and a reduction in the size of grants from the government.

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The Bill has been widely criticised by trade union leaders, Labour and Liberal Democrat politicians, as well as by human rights groups, which contend the reforms included in the Bill represent a "major attack on civil liberties". For one, the ILO limits restrictions of the right to strike in essential services to services "the interruption of which would endanger the life, personal safety or health of the whole or part of the population". This would appear to exclude transport services, public transport, port authorities, postal services, public education, and other groups of public service employees.

In addition, the UK already has among the most restrictive strike laws in the European Union, and the rules concerning strike ballots are open to such wide interpretation that employers are prone to seek injunctions for suspected minor infringements. The current law also imposes strict conditions on picketing, including limiting it to at or near the picketer's own place of work and for the purposes of "peacefully obtaining or communicating information or peacefully persuading any person to work or refrain from working."

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Yet, following a vigorous campaign against the Bill, trade unions and the TUC won some notable concessions in the House of Commons. Among these, for instance, the Tory government has dropped its proposal to require that unions give notice of their planned public protests and use of social media during the course of labour disputes. Furthermore, a report released last month by the Equality and Human Rights Commission (EHRC), the Conservative government's own human rights watchdog found that by imposing "potentially unlawful" restrictions on the right to strike, the Trade Union Bill may violate the British government's obligations under international human rights treaties.

Collective bargaining and wage-setting in the rest of the EU have also undergone considerable change subsequent to the GFC. Perhaps the most noteworthy these changes is the decentralisation of collective bargaining, in particular in the private sector, in many EU member countries where national and multi-employer bargaining were for many decades the predominant wage-setting mechanisms. This would include France, Italy, Germany and Spain, among others, although this decentralisation has taken various forms – both organised and unorganised – across the EU, and notwithstanding that collective bargaining in Belgium and Finland has recently recentralised. In the 11 EU member states in which the process of wage-setting has now been decentralised, however, agreements concluded at lower levels are typically restricted to making only improvements on the standards established by higher level agreements.

Another major change affecting collective bargaining across the EU has occurred in the public sector and is a consequence of governments in most EU member states embarking on unyielding fiscal austerity programmes to help rid themselves of the deficits they incurred during and in the aftermath of the GFC. EU governments generally responded to the crisis by freezing or even cutting public sector wages, hence declaring an end to wage bargaining with the public sector unions before it had begun. This, in turn, served to minimise those unions' role in public sector governance, thereby limiting their ability to influence those governments' responses to the crisis.

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Public sector collective bargaining rights in the EU received a recent boost, though. In particular, before adjourning for the end-of-year holidays, the European Social Dialogue Committee for Central Government Administrations adopted a landmark agreement on information and consultation rights of central government employees in Europe. The agreement was reached following months of discussions between the EU social partners. It sets out a general framework of common minimum standards for the rights of workers and their trade union representatives to be informed and consulted.

Given this agreement, central government employees across the EU will now have input on key workplace issues, including proposed restructurings or changes in working time. The agreement will also allow those workers to propose health and safety or work/life balance improvements. The European Commission is now tasked with turning the agreement into a Directive for adoption in the European Council.

LEGAL UPDATE: The NZ Meat Workers Union & AFFCO New Zealand Limited keep the Employment Court busy

Carol Jess, PhD Student, Victoria University of Wellington

Subsequent to the judgment in NZ Meat Workers & Othrs v AFFCO New Zealand Limited[1], finding that the lockout of workers at AFFCO plants were unlawful, and that the company had failed to act in good faith during collective bargaining, further proceedings have been taken by the Union. The new court action relates to the way in which the locked out workers at the Wairoa plant are to return to work; as the lockout was found by the Court to be unlawful the workers should be returned to the position which should have pertained, but for that lockout. This has resulted in the reporting of a hearing in Chambers on 8 December 2015[2] in front of Chief Judge Colgan followed by a hearing on an application for interim injunction before the Court on 21 December 2015[3]. The interim injunction was denied, partly on the ground that a hearing on the substance of the claims was put down for the week beginning 25 January 2016. At the time of writing that judgment has not yet been reported.[4]

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1 [2015] NZEmpC 204 EMPC 152/2015 which was reported in CLEW'd In Issue 8 December 2015

2 New Zealand Meat Workers & Related Trades Union Inc, and Roberta Kerewai Ratu and Others v AFFCO New Zealand Limited [2015) EmpC 219

3 New Zealand Meat Workers & Related Trades Union Inc, and Roberta Kerewai Ratu and Others v AFFCO New Zealand Limited [2015) EmpC 233

4 Update 12 Feb: The decision delivered yesterday (Feb 11) was in favour of the union claims. The full decision will be considered in subsequent issues of CLEW'd IN.

The case arises from AFFCO having offered the locked out workers a return to work on an afternoon shift, as opposed to the day shift. The normal practice, it is alleged, is for seniority to be applied, and those with seniority to be engaged on the day shift. The Union argues that if seniority were to be applied the locked out workers would return to the day shift. It is also contended that the offers of re-engagement on the afternoon shift are discriminatory and impose disadvantage on those workers. The disadvantage of the afternoon shift is alleged to be due to its shorter duration at the peak of the season, and because it requires workers to be available at times when they have never worked for AFFCO before.

AFFCO has asserted that it is entitled under the expired collective agreement to engage those Union members on an afternoon shift as opposed to a morning shift, on individual employment agreements based on the expired collective agreement. AFFCO, also argued that those who had not returned to work on the terms offered were either on strike, or had abandoned their employment. The argument that the workers were on strike was not developed in the case heard on 21 December, but the judge did reject it, and did not consider the circumstances to constitute a strike.

Evidence was led by both parties before the court in the week commencing 25 January 2016 to allow the Court to consider the interpretation of the collective agreement on which the individual employment agreements offered to the locked out workers were based. The judgment will be considered in full in CLEW'd in when it is reported. Additional cases relating to this dispute remain outstanding, including an application from AFFCO for a declaration that bargaining is at an end. The Union has counter-claimed with an application for facilitation, and a subsequent application under s50J of the Employment Relations Act to fix the terms and conditions of a collective agreement between the parties. These actions are all adjourned sine die. AFFCO's counsel has also indicated that they will apply to the Court of Appeal for leave to appeal the judgment of 18 November 2015.

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
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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?

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