

THE ERA 2000

Part 4 – Employment relationship problems, mediation and personal grievances

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To complete my series of four articles on the Employment Relations Act 2000 (ERA), I want to return to where I started and focus on the different emphasis in the Act from previous legislation. The dominant emphasis of the ERA is to help make employment relationships better. It assumes they will be long lasting (Tipples, 2001a). Consequently it highlights the need for better foundations for the employment relationship, a need highlighted in Part 2 (Tipples, 2001b) of my series under the subtitle realistic recruitment. Also, the ERA addresses the need for resolving any employment problems which do arise. Such problems could occur sector-wide through all the cultures making up primary industry, in small businesses or in large ones, or through any part of the supply chain (Tipples, 2001a).

Some conflict is natural

That some employment problems should arise, no matter how well the relationship is set up is not surprising for as Peter Boxall has pointed out, the employment relationship is characterised by a mixture of co-operation and conflict (Boxall, 1995, p.10). Those employers who recognise and manage this tension most effectively obtain the best outcomes. Deeks and Rasmussen recognise the conflict between employers and employees particularly over pay and conditions as both natural and legitimate in employment, and that there is a place for appropriate ways of resolving those differences. They believe also that there needs to be a shift in attitudes on the part of capital and labour, employers and employees, towards a more co-operative approach to employment. Both parties should work co-operatively to ensure the economic competitiveness of businesses and their long-term survival. As they put it, while the physical technology of business is often futuristic today, "...much of our people management is feudal" (Deeks and Rasmussen, 2002, pp. 32-3). They recognise that government has a legitimate role in facilitating this improvement, which is the major focus of this fourth article.

Resolving grievances

The ERA puts in place institutions and processes for resolving employment problems without being prescriptive. It does not direct those with problems to procedures as did the Employment Contracts Act 1991. However, it must be said that many agreements still use the type of procedure laid out in Schedule 1 to the Employment Contracts Act 1991, with systematic and regular meetings between the parties. Walsh has evidence of more than two-thirds of collective agreements

having formal disputes or personal grievance procedures (Thickett et al., 2002).

It is useful to remember that the personal grievance procedures have operated since 1970 and that one of the reasons why they were not abolished in 1991, despite the urgings of the Business Roundtable and Employers' Associations, was that Federated Farmers asked for them to be continued. They did not seem to want dairy factories, meat works, the wharf and other parts of the supply chain disrupted by disputes or grievances that could be easily taken right out of the workplace by a legal procedure (Tipples, 1995, p. 100). While the ERA does not have such procedures, it is operating in a different employment environment in which employers and employees are encouraged to deal with employment problems as close to their source as they possibly can, informally, before seeking outside assistance.

Using the web and other sources

This new strategy is well supported through the Employment Relations Service of the Department of Labour. This support comes in whatever form the parties wish to access. Since 2000 the Employment Relations Service has developed access to appropriate information through a range of different media. State of the art web pages give access to most Employment Relations Services through infolines. By following linkages, the enquirer can access advice on self-help and whether they need assistance or a representative, on whether a dismissal or unfair treatment has taken place, on how to resolve potential grievances and on how to use the employment institutions – the Mediation Service, the Employment Authority and the Employment Court. Questions may also be asked on the infoline. Besides the world wide web, more traditional systems via phone or fax also operate. Alternatively there is a range of very useful little booklets in A5 format, with eye-catching orange covers. Unfortunately the orange colour does not work well with white print and some parts are difficult to read. Such good material deserved far better from its designers.

Two booklets are particularly useful in relation to employment problems. One is concerned with setting up the employment relationship: *A Guide for Employers – hiring new employees in the employment relations act environment – where to start, pitfalls to avoid, practical examples*. The other is *Employment relationship problems – what they are, how to prevent them, how to fix them*. Both can be obtained from the Employment Relations infoline on 0800 800 863. Neither substitutes for expert consultancy advice. For those wanting a more legal and detailed approach, which is still user friendly, there is Richard Rudman's *New Zealand Employment Law Guide*, 2002 Edition.

What is a problem?

What is an employment relationship problem? According to the Employment Relations Service it is '...anything that harms or may harm an employment relationship' (Employment Relations Service, 2001, p.5). Examples include –

Unjustified dismissals,

- Disputes about what a term in an employment agreement means
- Disagreements about whether a warning should have been issued
- A claim of discrimination or sexual harassment
- A dispute about holiday pay owing or paid.

They may be individual problems or apply to several staff.

In terms of what can be done about such problems, the first preventative measure is found with the parties acting at all times 'in good faith' (Tipples, 2002a). While acting in good faith is common sense for most employers and a requirement of the Act, it can clearly help prevent problems. However, we should bear in mind what Mark Twain is reputed to have said about common sense: 'There is nothing as uncommon as common sense. There will still be employment problems, may be just as a result of a simple misunderstanding from poor communication rather than some Machiavellian plot. What can be done then, if the parties decide they have a problem?

Is there a problem?

The ERA lays down that every employment agreement must contain a plain language explanation of the processes available for finding solutions to employment relations problems. However, the Employment Relations Service also points out that focusing too much on procedure can actually be a problem in itself in resolving the problem. Any procedures must be fair and enable the parties to obtain explanations about matters of concern. For example, if employees are treated inconsistently, or if an investigation is not conducted in an open-minded manner, then the problems can be made worse not better. In a worse case scenario, a poor procedure executed inadequately could lead to personal grievances.

Before raising problems both parties need to establish the facts as to what the problem is supposed to be. They may need to take advice about whether there is really a problem, how it should be handled, and who initial questions should be directed towards. Also, they should be careful to avoid saying anything in the heat of the moment which they may later regret because it makes the problem worse not better. But that can be very difficult in emotional situations, so a support person or union delegate may be very useful, especially if they can be more objective. Putting questions in writing may help clarify the nature of the problem and, perhaps, possibilities for solutions. It may also help to prevent misunderstandings. Both sides also need to raise problems promptly to avoid the issue festering and making other situations worse. Furthermore all parties need to be treated with respect, whether or not they represent views reprehensible to the other party. Employers can be penalised for

causing employees avoidable stress with damages being awarded for 'humiliation', if a personal grievance ensues.

Using a mediator

If employer and employee cannot resolve their problem themselves, they can ask the Employment Relations Service for help from a mediator. This is a free Department of Labour service. Mediators now have a central role in the processes of resolving disputes. They do not represent one party or the other. Their first priority is to help the parties resolve the problem for themselves with appropriate information and advice. If a settlement is reached, the mediator's signature makes it final and legally binding. However, if a settlement cannot be reached either the mediator can be asked to make a decision, in writing, which becomes final and binding, or the issue can be taken to the Employment Relations Authority. Mediator's decisions cannot be appealed to the Employment Relations Authority or Employment Court. If the mediator is asked to make a decision, the mediator is, in effect, taking a mediation and arbitration role. However, if the issue cannot be resolved and for the mediator to make a decision is not acceptable, the issue can go to the Employment Relations Authority.

The Employment Relations Authority

The Employment Relations Authority is a unique body as it has full investigative powers, as well as being a court. These are new powers in New Zealand employment law. In addition, it has '...exclusive jurisdiction to make determinations about employment relationship problems generally' (s. 161, Employment Relations Act, 2000). In effect what this means is that any issue referred to the Authority becomes subject to a new process of investigation and resolution. What a mediator had previously established but not signed off on is irrelevant. The Authority investigates afresh on its own behalf. Because the Authority starts again, the chance to get the mediator to arbitrate is very appealing to parties who do not want to have to go through all the issues again, perhaps under cross-examination. This is a very valuable opportunity to speed up the processes of resolution, which may actually help achieve the primary remedy for employment problems, for example, achieving reinstatement of a party who has been dismissed unjustifiably.

Personal grievances

Under the ERA (Part 9, ss. 101-128) personal grievances may be taken for unjustifiable dismissal; being disadvantaged in employment; or being discriminated against, for example on grounds of race, colour, ethnic or national origin, age, sex,

religious or ethical belief, disability, political opinion, employment, marital or family status, or sexual orientation; or for being sexually harassed by the employer, their representatives, employees, clients or customers, or racially harassed; or for being placed under duress to either join or not to join an employee organisation like a trade union. Grievances may be taken by employees, or by any person who has received and accepted an offer of work – those intending to work. Also, it should be noted that while the Employment Contracts Act 1991 extended the range of people who could take a grievance to all employees, the ERA retains that possibility. A grievance must be lodged within 90 days of the problem becoming known, and now can be lodged on behalf of a dead person's estate.

The procedure for taking a personal grievance which was expressly laid out in Schedule 1 to the Employment Contracts Act 1991 is abandoned in the ERA. An application is simply made to the Employment Authority, which is duty bound to refer the issue to mediation unless it is convinced that that would be unhelpful. The overall effects of the changes introduced by the ERA has been the increased use of mediation, which has reduced the number of grievances coming forward for resolution, particularly to the Employment Authority and speeded up those being dealt with by the Authority (Thicket et al., 2002).

Awarding costs

The Employment Authority, like the Employment Tribunal, was established to be a low level, informal and speedy mechanism for resolving employment problems. However, the investigative role of the Authority is different. Both have the power to award costs along the following lines laid down by the Employment Court –

1. Costs are discretionary
2. The discretion is to be exercised in accordance with principle and not arbitrarily
3. Costs should follow the event unless there are special circumstances indicating it would be fair to depart from the general rule
4. An award of costs can be made in equity and good conscience
5. Consideration should be given as to whether all or a portion of a party's costs are unnecessary or unreasonable
6. Costs are to compensate the party that has been put to expense
7. Costs should not be illusory or oppressive
8. As a guide... the multiplier to calculate the appropriate preparation time for which a successful party may be compensated is approximately two or three times the hearing time.
9. Other considerations relevant to the exercise of the Tribunal's discretion are –
 - a. The ability to pay
 - b. The complexity of the case
 - c. The length of hearing
 - d. The importance of the case

- e. Whether it is a test case
- f. The consequences of the result
- g. The amount of time required for effective preparation. (Employment Institutions Information Centre, 2002, pp. 12–13).

While the principal remedy for a personal grievance is reinstatement, it can also involve reimbursement of wages lost, compensation for humiliation, loss of dignity, injury to feelings, and for losses of benefits whether or not monetary; and in the case of harassment, orders about future behaviour. However, if the grievant's claim was compounded by their own behaviour compensation may be reduced. Since the introduction of the investigative powers of the new Authority, there seems to have been little change in the overall scale of costs awarded, although that might have been anticipated (Employment Institutions Information Centre, 2002).

The law relating to employment problems is not static. A recent decision of the Court of Appeal overturning an Employment Court decision on the meaning of 'consultation' (Coutts Cars Limited v. Baguley, Unreported Court of Appeal CA 102/01 21 December 2001) may be revisited by an amendment to the Act more in keeping with what the government expected consultation to mean. Alternatively, as a result of a change in the composition of the Court of Appeal, an alternative decision may be reached on what 'consultation' really means. Whatever evolves, members would be well advised to keep themselves up to date with significant legal decisions on employment matters.

References

- Boxall, Peter (1995) *The Challenge of Human Resource Management – Directions and Debates in New Zealand*. Longman Paul: Auckland.
- Deeks, John and Rasmussen, Erling (2002) *Employment Relations in New Zealand*. Pearson Education New Zealand Limited: Auckland.
- Employment Institutions Information Centre (2002) "Costs awarded by the Employment Relations Authority and the Employment Tribunal in personal grievance cases". *Employment Cases Summary*, June, pp.12-16.
- Employment Relations Service (2001) *Employment relationship problems – what they are, how to prevent them, how to fix them*. Department of Labour: Wellington.
- Thicket, Glen; Harbridge, Raymond; Walsh, Pat and Kiely, Peter (2002) *Employment Agreements: Bargaining Trends & Employment Law Update 2001–2002*. Industrial Relations Centre: Victoria Univ Employment Relations Service of Wellington.
- Tipples, Rupert (1995) "The re-regulation of farming employment relations in New Zealand", *Sociologia Ruralis*, vol. XXXV, No. 1, pp.93-109.
- Tipples, Rupert (2001a) "The Employment Relations Act 2000 and *Primary Industry Management*. Part 1: More than just farmers!" *Primary Industry Management*, vol.4, no. 2, June.
- Tipples, Rupert (2001b) "The Employment Relations Act 2000 and *Primary Industry Management*. Part 2: Impacts on farmers!" *Primary Industry Management*, vol.4, no. 4, December.
- Tipples, Rupert (2002a) "The Employment Relations Act 2000 and *Primary Industry Management*. Part 3: Good faith behaviour". *Primary Industry Management*, vol.5, no. 2, June.