PROGRESSIVE CONSULTING
Human Resource Professionals

Janet Copeland Law
employment lawyers

September 2007

AN EXCITING FRONTIER - JCL TAKES ON DUNEDIN!

Janet Copeland Law is expanding into Dunedin, and is opening a new office in association with WHK Taylors. Rachel Brazil, our new Senior Employment Lawyer will be taking the reins in our Dunedin office, which is open as of 24th September 2007.

Rachel has been working solely in the area of employment law for the Otago-Southland Employer's Association for the last 3 years, as well as providing volunteer assistance at the Dunedin Community Law Centre since 2002. This work has included providing HR and legal support for large, medium and small businesses throughout Southland and Otago. Rachel has extensive experience in all areas of employment, such as:

- Preparing and implementing individual employment agreements,
- Managing incapacity issues, or disciplinary and performance issues,
- Negotiation of collective agreements,
- Assisting a business through restructuring and redundancy situations.

With Janet Copeland Law working out of the WHK Taylors offices, Rachel will be available to provide clients in Dunedin and surrounding areas with a wide range of employment law services, including legal representation and advice on the interpretation and application of employment law, as well as supporting employers through any challenging situations they may face with the Employment Authority and the Employment Court. Rachel also has a background in social work that has been utilized in helping support clients to improve their working relationships with staff and to help them improve business productivity by achieving healthier and more productive relationships in their personal and professional lives.

Rachel will have access to support and resources from our Invercargill and Queenstown based practices, and also will be able to connect clients with general human resources support from Progressive's HR consultants.

Rachel looks forward to meeting our clients over the next few months!

To contact Rachel at Janet Copeland Law in Dunedin:

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NEW FACES - KELLY GOUGH & LUCIA VINCENT

Kelly Gough joined us in late August in the role of Executive Secretary, stepping into this role following Hanneke Ferreira's move back to Ashburton with her partner Daniel.

Kelly arrived back to Invercargill in April last year, after spending the previous five years working in the travel & tourism sector. Since July last year she has been working and studying full time towards the New Zealand Diploma in Business, with a keen interest in the Human Resources field and will achieve this qualification in February 2008.

Kelly is looking forward to opening up new doors with the completion of her diploma and the commencement of her degree next year.

Lucia Vincent has just joined our Invercargill Janet Copeland Law team as a solicitor after recently graduating from Otago University. A passion for performance prompted her decision to complete a Bachelor of Arts with Honours, majoring in Theatre Studies, alongside a Bachelor of Laws. Lucia hails from Gore originally and feels privileged and excited about being back in the area and working in Southland.

Lucia replaces Angela Morgan-Roberts who has moved on to a role in family law. Lucia will be assisting Janet with employment law matters, and if you have been dealing with Angela recently, either Lucia or Janet are happy to help you with any future matters.

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CASUAL STAFF - ARE THEY REALLY, TRULY 'CASUAL'?

There can at times be a grey line between which employees are genuinely 'casual' and which are actually working for you on a permanent basis. Often we see employers who are employing staff on a casual basis when their actual status under the law is part-time permanent.

Casual staff are those whose employment is ***irregular, occasional or infrequent***. This is often characterized by:

- the employee and the employer both having the right to decline work;
- work performed ***not*** being on consecutive weeks.

Employment on consecutive weeks, even irregular shifts, may be seen as establishing a 'pattern of work' which could be construed as permanent employment. If a pattern of work has become established for an employee who was originally taken on as a casual worker, it is recommended reassessing how you are utilizing them and checking if they remain truly casual.

If an employee is not truly casual, they should be moved onto a Fixed Term or Permanent employment agreement as soon as possible, so that those conditions of employment written into the employment agreement which protect the employer (e.g. the right to make deductions, suspend, conditions around sickness and obtaining a medical opinion, the disciplinary process etc) are in place and can be used if necessary.

Remember, even casual employees require a written employment agreement under the law. Provided the employer's work practices are consistent with casual employment, a Casual IEA will provide the employer with as much protection as a Permanent IEA. The key is ensuring that the document reflects what happens in reality.

HOW DO I MAINTAIN FLEXIBILITY?

If you do still need to maintain a highly flexible workforce in terms of the hours that you are able to offer but have 'permanent' staff instead of casuals, you should be designing an hours of work clause within your employment agreement which describes a *No Fixed Hours* arrangement. This will need to explicitly state that hours offered will be highly variable, and determined by the employer based on the needs of the business. There is no obligation for the employer to offer a minimum number of hours to an employee, though this can be useful in some cases. Where no minimum hours are put in place, the employee shall only be paid for the hours worked.

If you are unsure about the type of employment agreement any of your staff should be on, we are happy to discuss this with you and ensure the appropriate wording is in place to meet your requirements

MINIMUM WAGE (NEW ENTRANTS) AMENDMENT BILL

On Thursday, 6 September MP Sue Bradford moved that the Minimum Wage (New Entrants) Amendment Bill to be read for the third time in Parliament. The purpose of this bill was to end age-based discrimination in employment by removing minimum wage rates defined by the age of workers.

The bill has just been reviewed by the Transport and Industrial Relations Committee who recommended that the bill be passed with some amendments, allowing for a 'new entrants' minimum wage rate to be set for 16-17 year olds.

The Bill has now been passed by Parliament and requires the Minister of Labour, when reviewing minimum wages at the end of 2007, introduce a new entrant's minimum rate that:

- **Applies for the first 200 hours of employment**, which may be accumulated across several different employers, for 16-17 year-olds;
- Is set at a minimum of **80% of the adult minimum wage** (currently $11.25 per hour), and
- **Does not apply to young people employed as supervisors**. These people will have to be paid the adult wage from the outset.

The amendment comes into force on 1 April 2008, allowing the new entrants' minimum rate to be implemented at the same time as any other changes to minimum wage rates resulting from annual reviews, and allowing time for businesses to make any changes necessary in order to comply with the amendment.

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ON THE CASE: UNION ACCESS TO THE WORKPLACE

A recent case in the Christchurch Employment Court extended the right of union representatives to access workplaces. *Terry Young Limited (*Yunca*) v NZ Engineering, Printing and Manufacturing Union Incorporated CHCH CC 15/07 [25 July 2007]* (*Yunca case*) confirmed that Section 20 of the *Employment Relations Act 2000* (*ERA*) entitles authorised union representatives to engage with both individuals and groups.

The *ERA* entitles a union representative to enter a workplace for purposes related to the employment of a union's members and/or purposes related to a union's business. For example, a union representative might access a workplace to participate in collective bargaining, to monitor compliance with *ERA* provisions, to discuss union business with union members or to recruit. Workplace discussions with an employee must be of a reasonable length, be distinguished from union meetings, and the employee is still to be paid.

Section 21 of the *ERA* attaches conditions when exercising this right. A representative must believe on reasonable grounds that the union member they intend to meet with or a staff member who falls under the coverage of union membership "*is working or normally works*" in the workplace. Additionally, the representative must:

- Exercise the right reasonably regarding the time and method of the visit,
- Supply evidence of their identity and authority, and
- Ensure observance of all reasonable and existing safety, health or security procedures and requirements.

The *Yunca case* involved a non-de novo challenge to part of the Employment Authority's determination that Section 20 of the *ERA* entitled a representative to discuss matters with employees collectively **and** individually. Yunca alleged that a proper interpretation actually restricted workplace access by representatives to solely **one-on-one** interactions with employees. Yunca contended that 2004 amendments deliberately referred to discussions with "*an employee*". However, concerning the confusion over singular and plural references in sections of the *Employment Contracts Act 1991*, the Employment Court has observed previously that:

"*(Employers) must allow entry of representatives and it is not material, if the representative represents more than one employee, whether he or she holds discussions with those employees singly or in pairs or in groups or all together*" (*[1993] (2) ERNZ 513, 530*).

As it clarified a vital issue for employers and union representatives - when and how a union official can and should access a workplace, the Employment Court considered the *Yunca case* a test case. The effect of the *Yunca case* is to ensure every authorised union representative enjoys significant access to workplaces to speak with individuals **and** groups for purposes related to the employment of union members and/or related to a union's business. Provided the conditions of Section 21 of the *ERA* are met and no exemptions apply, employers will rarely be able to justify limiting such access.

ARE YOU HAVING TROUBLE GETTING GOOD, APPROPRIATELY SKILLED STAFF?

The latest Department of Labour regional labour market update reports that the labour force participation rate in Southland stood at **71.7%** during the year to June 2007, up slightly from 70.4% the year before. This compares with the national average of 68.5% for the year to June 2007. The **unemployment rate in Southland remains at 2.7%** compared to the national average of 3.7%.

Combined, these figures mean a very tight labour market for employers seeking great people to fill their vacancies. This is also confirmation for many employers that skill shortages for certain occupations are a reality and there is little relief in sight. Progressive Consulting can help you focus your recruitment efforts to attract the people you need - we can organize local, national, or international recruitment projects to target recruits for your 'hard to fill' roles. With such a tight market, it is also important to be open to alternative avenues of recruitment, such as considering traineeships or job-share situations.

Talk to one of our Consultants today about how we can help secure the elusive 'right person' for your vacancy.

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UPDATE: RECENT BARGAINING TRENDS

The introduction of the Employment Relations Act ('ERA') in 2000 and its subsequent amendment in December of 2004 sought to strengthen support for collective bargaining by employers, employees and unions.

Some of the more important provisions in the ERA 2000 and the 2004 amendment include the following:

- Employers must not discourage employees from participation in collective bargaining or from being covered by a collective agreement.
- Employers and unions who are deadlocked on a specific issue must continue bargaining on other issues
- Collective bargaining must lead to a collective agreement unless there are 'genuine reasons' not to; these reasons must be based on 'reasonable grounds'.

The 2004 ERA Amendment also sought to provide clarity around the 'free-rider' issue and provisions for bargaining fees, thus enabling non-union employees to be covered by a union negotiated collective agreement. The amendment prevents employers from automatically passing on collectively bargained terms and conditions to employees who are not part of the collective bargaining process or covered by the collective agreement. Such actions by an employer are regarded as a breach of good faith.

Recent research performed by Victoria University has shown that **over the past year there has been a reduction in collective bargaining coverage** from 321,900 in 2006 to 309,906 in 2007. This is in contrast to increases reported in the previous two years. The reason behind this decrease can be attributed to a reduction in public sector collective bargaining coverage, however it is worthy of noting that private sector coverage increased slightly over the same period. Another area in which the trend of recent years has not been sustained is that of Multi Employer Collective Agreements, with a slight shift in 2007 towards Single Employer Collective Agreements.

INTEREST AND ISSUES BARGAINING

Traditionally, the setting of wage rates has been the central focus of collective bargaining, yet recently there has been a trend for unions and employers to use an *Interest and Issues Based Bargaining* approach to negotiations.

This approach means that rather than entering negotiations with pre-determined positions and claims, the parties set out the issues each want to deal with and then work through them together to find mutually acceptable solutions. This approach was recently used to reach a Multi-Employer Collective Agreement ('MECA') between the New Zealand Nurses Organisation and District Health Boards, where a three year agreement included incremental pay increases of 3%, 4% and 4% respectively over each year of the term of the agreement as well as a number of improvements in other terms and conditions. The agreement received an overwhelming approval with 95% of members voting for the settlement.

WAGES

The agreed terms of the New Zealand Nurses Organisation MECA of an incremental wage increase of 3% and 4% is aligned with other Collective Agreement settlements at this time. The average collective agreement wage increase in 2006 was 3.2% (an increase of 0.4% from 2005) and **in 2007 the average wage increase moved upwards again, sitting around 3.4%**. More recently, negotiated collective agreements have continued to show an upward trend in the average wage, tending to settle at an average increase of 3.6%. Overall, the average wage growth over the past 16 years for Collective Agreements has been 2.4%.

When taking an overall view of collective agreements, there was a noticeable difference in wage increases over different sectors. Stronger growth was shown in the private (3.8%) and Local Government trading (4.4%) sectors in comparison to that of Government administration, defense and community services who showed an average of less than 2% increase in wages over the past year (to June 07).

If you have any questions regarding Collective Bargaining please feel free to contact Janet (Invercargill), Sheena (Queenstown), or Rachel (Dunedin) who will be happy to assist with your query.

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