CLEW'D IN

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

Issue 2018/3 – June 2018

CONTENTS:

NOTICES

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 to see if we can help.

CLEW CONTACTS

Centre Manager – Sue Ryall. Tel: 04 463 5143; clew-events@vuw.ac.nz.

Director – Dr Stephen Blumenfeld.

Tel: 04 463 5706,

stephen.blumenfeld@vuw.ac.nz.

RESEARCH UPDATE: EMPLOYEE PERFORMANCE MANAGEMENT IN THE PUBLIC SECTOR

Tai Anh Vu, Dr Geoff Plimmer and Professor Evan Berman - Schools of Management and Government, Victoria University of Wellington

Employee performance management (PM) has become increasingly popular in the last three decades. It supposedly improves individual attitudes, and then organizational performance. It does this through a continuous process of goal setting, feedback, communication, coaching and rewarding (Kinicki, Jacobson et al. 2013). Ideally, it differs from the traditional misery of annual performance appraisals by being more continuous, forward looking, developmental, job relevant and linked to rewards.

Many countries have introduced employee PM in their public services, at least rhetorically. Ideally it is a management tool to promote result-driven cultures, accountability, and transparency in order to improve public service delivery. This study of the Vietnamese public service outlines how performance management can work in public services. Some of the findings are probably very contextual and apply only to Vietnam. Others seem more global and likely apply here as well.

Despite the strong theoretical case for performance management (think goal-setting, expectancy, equity, reinforcement and social exchange theories), getting it to work is still a global challenge. Even in the most developed countries, the failure rate has been estimated at 56 percent (Haines III and St-Onge 2012). Irrespective of efforts devoted to improve this practice, "the formula for effective performance management remains elusive" (Pulakos and O'leary 2011 p1) and negative outcomes are still repeated (Azzone and Palermo 2011). In reality, employees and supervisors often dislike employee PM and see it as a control mechanism or an unnecessary administrative burden, and are sceptical about whether employee PM actually improves employee experiences and organizational performance. In the public sector implementation is even more challenging because of problems regarding conflicting goals, the need for

transparency, inadequate budgets for incentives, and so on. Performance management is also largely a product of western countries. In government it appeals mainly to those attracted to new public management theories. We know that contextual factors such as institution, capacity and culture can't be overlooked in the implementation of PM.

In order to provide a better understanding of if, and under what conditions employee PM in the public sector might work, this mixed method research investigated the implementation of five employee PM practices, including goal-based appraisal, feedback, reward for performance, addressing poor performers and employee participation. The data (interviews, survey and document analysis) was collected in 29 diverse public organizations within five central ministries and two provinces in Vietnam.

Selected research findings

1. Employee PM can influence job satisfaction, commitment and organizational performance.

The research found that broadly designed and well implemented employee PM systems are associated with improved job experiences and perceived organizational performance. However, for employee PM systems to have these effects, all five strategies should be implemented in combination and at quite high 'dosage levels'. For instance, goals have to be clear and job relevant, feedback frequent and useful, rewards meaningful, and participation has to be genuine rather than token. Previous studies have shown that employee performance improvement may fail when appraisal is separated from consequences (Liu and Dong 2012); when pay-for-performance is not based on objective performance standards (Randma-Liiv 2005), and when goal setting and rating lacks employee input and participation (Chiang and Birtch 2010). Hence, for an employee PM system to be effective, it should involve a bundle of practices rather than a "pick 'n mix" of half-hearted reforms. In some jobs such as those concerning policy development, performance management is very difficult or even impossible as goals are so hard to specify. In others, such as service delivery it can be quite effective.

2. Effective employee PM is driven by executive accountability, entrepreneurial leadership and HR autonomy

Only some organisations are able to implement employee performance management. The first requirement is that executives must be accountable, in order to have the mandate, and take the effort to implement the reforms. To put it another way, if public service executives are not held to account to, say, a higher agency or the public, they won't hold the people in their organisations to account either. In more detail, they won't set clear goals, give feedback, let staff participate in this process, reward good performance or address poor performance. Executives also need to be entrepreneurial, in other words to want to make reforms, be willing to try new things and sometimes take on entrenched interests. Competent HR people can make a difference too, but only if they have the backing of entrepreneurial and accountable executives.

Implications for practice

In the New Zealand context this means seeking and developing chief executives with entrepreneurial leadership and then *meaningfully* holding them to account for their stewardship, as well as wider performance. Reformed employee PM, as with other reforms, needs chief executives who have vision, capability, an innovative spirit and in particular the courage to take risks. It also means ensuring HR competence. Following are some implication for practitioners.

First, employee PM is best implemented as a bundle of five integrated practices: goal-based appraisal, feedback, reward for performance, dealing with poor performers, and participation. Of these, it is critical to ensure that:

- → employees are appraised by the criteria related to their jobs,
- → goals are set at the beginning of the performance period, there are consequences, and there is

→ feedback that includes input from employees and participation in the process.

Pay for performance has a very patchy record in government (Plimmer, Bryson et al. 2017). But in this Vietnamese study it was found to work – perhaps because the reasons people work for government are different in Vietnam compared to New Zealand. Unfair allocation of rewards annoy all types of workers, and the harmful effects of not dealing with persistently poor performers is well established (Taggar and Neubert 2004).

Second, performance based pay should be based on both individual performance and team performance. This finding in the Vietnamese public sector may not readily apply in New Zealand's public sector, but the international evidence is clear that group rewards can be very effective when the work is both interdependent and within the control of groups, connections between performance and reward are clear and valid, and management is competent (Shields, Brown et al. 2015). Group rewards not only encourage cooperation between members within the team but also promotes honest feedback.

Third, supervisors need to be held accountable for their rating. Given political motivation and cultural factors such as face-saving, harmony, and personal relationships, rating results might not reflect actual performance objectively and fairly. To curb this distortion, organizations can stipulate that providing objective and fair appraisal is one criterion used to appraise the performance of supervisors.

Fourth, Organizations will benefit if they can create a friendly and open atmosphere where employees feel comfortable to raise issues. Employee participation enables goal-based appraisal and performance-based reward to be more effective because it helps clarify goals and performance standards, align contributions, increase constructive feedback, and improves the accuracy of performance ratings. There are three critical conditions for effective employee participation:

1. Employees need to be convinced that the chief executive is committed and not self-interested.
2. They also need to be convinced that supervisors are open-minded and impartial.
3. Third, they need to understand that this process is not only critical for the organization's development but also directly relates to their own interests.

References

Azzone, G. and T. Palermo (2011). "Adopting performance appraisal and reward systems: A qualitative analysis of public sector organisational change." Journal of organizational change management **24**(1): 90-111.

Chiang, F. F. and T. A. Birtch (2010). "Appraising Performance across Borders: An Empirical Examination of the Purposes and Practices of Performance Appraisal in a Multi-Country Context." Journal of Management Studies **47**(7): 1365-1393.

Haines III, V. Y. and S. St-Onge (2012). "Performance management effectiveness: practices or context?" The International Journal of Human Resource Management **23**(6): 1158-1175.

Kinicki, A. J., et al. (2013). "Development and validation of the performance management behavior questionnaire." Personnel Psychology **66**(1): 1-45.

Liu, X. and K. Dong (2012). "Development of the Civil Servants Performance Appraisal System in China: Challenge and Improvement." Review of Public Personnel Administration: 0734371X12438244.

Plimmer, G., et al. (2017). "Opening the black box: The mediating roles of organisational systems and ambidexterity in the HRM-performance link in public sector organisations." Personnel Review **46**(7): 1434-1451.

Pulakos, E. D. and R. s. O'leary (2011). "Why is performance management broken?" Industrial and Organizational Psychology **4**(2): 146-164.

Randma-Liiv, T. (2005). "Performance management in transitional administration: introduction of pay-for-performance in the Estonian civil service." Journal of Comparative Policy Analysis: Research and Practice **7**(1): 95-115.

Shields, J., et al. (2015). Managing Employee Performance & Reward: Concepts, Practices, Strategies, Cambridge University Press.

Taggar, S. and M. Neubert (2004). "The impact of poor performers on team outcomes: An empirical examination of attribution theory." Personnel psychology **57**(4): 935-968.

'DYING FOR WORK' – WORKPLACE SAFETY AND CORPORATE LIABILITY

Dr Stephen Blumenfeld, Director, CLEW

Police announced late last year that they would not be bringing charges in the death of the 115 people killed in the collapse of the CTV Building during the February 2011 Christchurch earthquake. Key to that decision was that, under section 162 of the Crimes Act, no one can be held criminally responsible for the killing of another more than a year and day after its cause. Owing to the fact the building was designed and constructed in the mid-1980s and collapsed around twenty-five years later, in the words of the Deputy Solicitor-General, the law was likely to be a "complete bar" to prosecuting the two engineers who designed the building.

Although the current public and political exchange over increasing penalties for breaches of employers' duty of care resulting in death may appear on its face to be a knee-jerk reaction to recent tragic events including the collapse of the CTV Building, the Pike River Mine disaster three months earlier, and the rising number of fatalities in the forestry industry, this debate is in fact not new. For that matter, nearly 30 years have passed since the Crimes Consultative Committee suggested the government ditch the "year-and-a-day" law. In the meantime, several other countries, including the UK, Canada, and most Australian states, have dropped similar restrictions.

Nearly 30 years have passed since the Crimes Consultative Committee suggested the government ditch the "year-and-a-day" law. In the meantime, several other countries, including the UK, Canada, and most Australian states, have dropped similar restrictions.

In New Zealand, Justice Minister Andrew Little has now committed to repeal the "year-and-a-day" law as part of the Crimes Amendment Bill, which is currently in Selected Committee, having had its First Reading earlier this year. Nonetheless, despite this law change, it will still be the case that only individuals can be charged with manslaughter in New Zealand. Hence, while repeal of Section 162 of the Crimes Act is a necessary step in that direction, it does not in itself open the door to extending criminal liability to corporations in cases of negligence leading to a death.

That will take further legislation along the lines of the UK's *Corporate Manslaughter and Corporate Homicide Act 2007*. That law sets out that an organisation is guilty of manslaughter, "if the way in which its activities are managed or organised causes a person's death." Conviction carries an unlimited fine, and courts can order companies to take out adverts publicising the fact they have been convicted. Introducing an offence of 'corporate manslaughter' in New Zealand, as it has in the UK, would enable a prosecutor to charge a company or other 'legal

person' with manslaughter. It allows a company or group of people acting as a single entity to be punished for conduct resulting in at least one fatality.

It took a series of workplace tragedies and various government inquiries, both similar to what has taken place in New Zealand over the past decade, before the British Parliament felt compelled to act. Prior to enactment of the UK law, although companies could be prosecuted for a range of health and safety offences, it was nigh impossible for an organisation's executives to be held responsible for any death caused by a gross breach of their duty of care towards employees and others. Organisations *could* in principle face the same manslaughter charges as individuals, but the prosecution would have to demonstrate that a senior individual within it was personally guilty of gross negligence manslaughter. This, in fact, is the status quo in New Zealand.

Following the police's announcement late last year that they would not be seeking to prosecute anyone over the collapse of the CTV Building, Justice Minister Andrew Little proclaimed that the Government was looking at introducing a corporate manslaughter law. Bill English, leader of the opposition at the time, declared his willingness to work with the Government to find a solution to what he described as a 'large-scale tragedy' that should be subject to legal liability. In fact, under the previous Government, Justice Minister Amy Adams recommended that a corporate manslaughter offence be added to the Health and Safety Reform Bill, and Labour MP Damien O'Connor advanced a private member's bill which would have amended the Crimes Act 1961 to include corporate manslaughter.

So, it seems there would be little opposition to the Government enacting legislation to make corporate manslaughter an offence in New Zealand. Eight months into the current legislative session, however, the Government has yet to act.

So, it seems there would be little opposition to the Government enacting legislation to make corporate manslaughter an offence in New Zealand. Eight months into the current legislative session, however, the Government has yet to act. The *Health and Safety at Work Act 2015* did, in fact, substantially increase the penalties organisations face for failing to maintain appropriate standards. The law imposes a maximum fine of $3 million and a term of up to 5 years' imprisonment, if they fail to comply with their individual obligations. Notwithstanding this, a workplace death will only be sufficiently serious to result in a manslaughter conviction, with notably much higher maximum penalties, when an identifiable individual is found to have caused the death by way of an unlawful act or omission that amounted to a major departure from the standard of care expected.

When the Select Committee reported back to Parliament on the Health and Safety Reform Bill in 2015, it identified the increased penalties available under the new law as being sufficient to ensure that New Zealand employers would meet their duty of care and that a corporate manslaughter offence was, therefore, unnecessary. Hence, there is still no serious criminal sanction for work-related death at the hands of corporations.

Nevertheless, a charge of corporate manslaughter could recognise and punish serious organisational failings without necessarily having to identify an individual who was largely to blame for the death. Creation of the offence of corporate manslaughter holds organisations and executives at the highest level accountable for deaths resultant of management failings. Introduction of the offence will bridge the culpability gap between manslaughter and breaches of health and safety legislation.

This article was the basis of an article in Newsroom on May 21, 2018

Stephen was also interviewed on this issue on TV1 News on May 26, 2018.

LEGAL UPDATE: LABOUR INSPECTOR V SMITHS CITY GROUP LTD

Peter Kiely, Partner, Kiely Thompson Caisley

This case was a successful challenge to an Employment Relations Authority determination regarding whether pre-shift morning sales meetings were "*work*" under the Minimum Wage Act 1983 ("the Act").[1] This case has caused significant public comment as many retail employees are required to attend work before or after their scheduled work hours to set up, cash up or attend meetings.

Factual Background

For at least the last 15 years, every Smiths City store has held a daily meeting for waged sales staff before opening for business. These meetings ran for approximately 15 minutes and were usually conducted by store managers. Smiths City produced a standard meeting template which outlined specific points to be discussed in each meeting. These points included store sales figures measured against targets, sales promotions, sales comparisons with the previous day and company announcements. Smiths City considered these meetings to be an integral part of a store manager's job. However, the meetings tended to be relaxed to the point of being informal. It was clear that Smiths City expected sales staff to attend and there was a trend of store managers following up with sales staff who did not attend.

A Labour Inspector issued an Improvement Notice to Smiths City for failure to pay the sales staff for attending these meetings. Smiths City contested the Notice. The Employment Relations Authority found in favour of Smiths City and ordered that the Notice be rescinded.[2] The Inspector challenged that determination.

Employment Court Judgment

The Employment Court first considered whether the meetings constituted "*work*" under s 6 of the Act. The Court considered the Court of Appeal judgment in *Idea Services Ltd v Dickson*[3] and stated that a factual inquiry was required. However, the Court held that the work factors addressed in *Idea Services* – constraints on the employee, responsibilities on the employee, and benefit to the employer – should not be "*slavishly applied*".[4] Instead, the Court preferred to apply the approach suggested by the New Zealand Council of Trade Unions (as intervenor) which focused on whether the 'work' was an "*integral part of each employee's principal activities*".[5]

The Court applied this approach first, finding that sales staff only attended the meetings because they were Smiths City employees, that the subject matter was sales, that the meetings were solely for Smiths City's purposes and about Smiths City's business, and that the informality of the meetings was immaterial. Hence, the meetings were an integral part of the employer's activities and were therefore work. In the alternative, the Court also considered the three factors from *Idea Services* and reached the same conclusion.

The Court then considered whether commission and incentive payments should be taken into account when assessing Smiths City's compliance with s 6 of the Act. The Court stated at [73] that:

> *"[w]hile we accept that commissions and incentives qualify as wages that does not provide an answer to the Inspector's notice or satisfy s 6. In* [Idea Services] *the full Court, and the Court of Appeal, held that the key expression in s 6 is the phrase "rate of wages" meaning each unit of time. The only units of time in that*

[1] [2018] NZEmpC 43.
[2] [2016] NZERA Christchurch 200.
[3] *Idea Services Ltd v Dickson* [2011] NZCA 14.
[4] EC Judgment at [57].
[5] EC Judgment at [50].

legislation are by the hour, day, and week. Which of those units of time is to be used depends on whether the employee is paid by the hour, by piece-work, by the day or otherwise."

The Court concluded that the Notice was only concerned with permanent or casual employees paid by the hour and that their statutory entitlements must be calculated using the same unit of time. Commissions and incentive payments "*were additional income earned over and above the contractual hourly rate not in substitution for it*".[6] Smiths City's method was also found to be flawed because it excluded from the pay period the time for the morning meetings, during which employees had no opportunity to earn commission or incentive payments – a future opportunity to earn these payments was insufficient for compliance with the Act.

The Court therefore upheld the Inspector's challenge and, as a result, the employees were entitled to back pay for attending the meetings and payment going forward.

WORKSHOP: 'DEALING WITH DAMAGING BEHAVIOURS IN THE WORKPLACE – MEDIATION AND RESTORATIVE PRACTICES'

In February this year, we held a seminar in our 'Short seminar series' on 'Bullying and violence in the workplace - intervention and prevention'. We had an overwhelming response and were given a clear indication that more training and information was needed around this issue. We are therefore pleased to announce a workshop that focuses on interventions - mediation and restorative processes - to assist people to better understand what they can do in situations of harassment, bullying, and other damaging behaviours in the workplace.

We are partnering with the Employment Mediation Service of the Ministry for Business, Innovation and Employment (MBIE) and the Chair for Restorative Justice at Victoria University of Wellington in the presentation of these seminars. The presenters are Judy Dell, Principal Mediator at the Employment Mediation Service; Jon Everest, a Senior Consultant with the Chair of Restorative Justice at Victoria University of Wellington.

The workshop will be available in Christchurch (July 26), Auckland (August 2) and Wellington (August 9) in the afternoons (1.30-4.45pm) of our annual Employment Agreement Update seminars. The cost is $260+gst and includes lunch prior to the seminar start.

Further information and registration is available from our website.

Employment Agreements Update 2017/2018

The 2018 edition of *Employment Agreements: Bargaining Trends and Employment Law Update* will be published in late July, in time for the launch of our 2018 seminar series.

The book is seen as the essential reference for employment relations experts and the only source of information on current provisions in employment agreements. In our 2018 survey year we expect to add more than 1000 agreements to our database to give a sample of around 2000 collective agreements current between 1 June 2017 to 31 May 2018.

Download a subscription form from our publications page. There are a few copies of the 2016/2017 book still available if you need information prior to July and these can be ordered on the subscription form.

[6] EC Judgment at [77].

TRENDS IN EMPLOYMENT AGREEMENT AND EMPLOYMENT LAW SEMINARS AVAILABLE AS WEBINAR

In 2018 we are including an on-line webinar with our annual seminar series. The **'Trends in Employment Agreements and Employment Law Update'** seminar series is considered the 'must attend' for those dealing with wages and conditions in employment agreements, in New Zealand and CLEW is proud to have maintained the quality of the information presented over so many years.

Our team has travelled to the main centres for many years to deliver the seminars but in recent years have had requests from people from outside the main centres for a seminar that could be accessed remotely. While it does not provide the same opportunities for discussion and networking this webinar will hopefully fill this gap.

The webinar is available on **Friday 10 August and will be limited to 50 people.** The major change from the 'in-person' seminars is that Employment Law Update session presented by Peter Kiely will go from 9am-10.30am and Stephen Blumenfeld will present the findings from our 2018 data in the Trends in Employment Agreements section from 11am-12.30pm.

The dates and venues for the 2018 seminars are:

South Island

Christchurch - Thursday 26 July, 9am-12.30pm, Chateau on the Park
Dunedin- Friday 27 July, 9am-12.30pm, Dunedin Art Gallery

Upper North Island

Auckland - Thursday 2 August, 9am-12.30pm, Crowne Plaza Hotel
Hamilton - Friday 3 August, 9am-12.30pm, Novotel Tainui Hamilton.

Central North Island

Wellington - Thursday 9 August, 9am-12.30pm, Rydges Hotel

More i**nformation and registration** for the seminars.

2018 CONFERENCE ON LABOUR, EMPLOYMENT AND WORK

We are pleased to announce that the 2018 Conference on Labour, Employment and Work (LEW 2018), organised by the Centre for Labour, Employment and Work (CLEW), will be held at Victoria University of Wellington's Pipitea Campus on 29 and 30 November, 2018. The Call for papers has been made and closes on August 24, 2018.

The theme of the 2018 conference, '*Work and Wellbeing'*, allows for a broad range of themes including workplace health, safety and wellbeing; employee engagement and representation; the regulatory environment for work and employment; migration and work; women in the workplace; work and caring; developing people and capability; pay equity; and job quality/good work.

A new addition to the LEW conference is a post-graduate symposium, to be held on 28 November, the day preceding the full conference. This will provide an opportunity for students in the area of labour, employment and work to network, share research in workshops and gain insights from experienced scholars into a range of issues faced by post-graduate students.

Further information and registration links are available on the LEWconf website >>

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

CLEW Contacts:

Centre Manager – Sue Ryall. Tel: 04 463 5143

Director – Dr Stephen Blumenfeld. Tel: 04 463 5706