Commercial eSpeaking

Allen, Needham & Co. Ltd.
Barristers, Solicitors and Notary Public
ESTABLISHED 1907

52 Canada Street, PO Box 12, Morrinsville 3300
T 07 889 5062 | F 07 889 5369
law@anco.co.nz | www.allen-needham.co.nz

ISSUE **60** | Summer **2022**

Welcome to the first edition of *Commercial eSpeaking* for 2022. We hope the year has started well for you and your business despite the advent of Omicron in our communities.

Enjoy reading the articles we have gathered in this edition; we hope they are both interesting and useful.

If you would like to talk more about any of the topics covered, or indeed on any legal matter, please don't hesitate to contact us. Our details are on the top right of this page.

NZ LAW
Stronger Together.

Contractors

A veritable minefield of employment law

From a legal perspective, hiring contractors has always been tricky. The onus of correctly identifying who is an employee versus a contractor and ensuring legal compliance remains an employer's responsibility. The financial consequences of misidentification can be significant on a business owner.

With the rise of the 'gig economy', employers are increasingly relying on contractors to fulfil essential roles, so correctly identifying these people's employment status is more important than ever.

PAGE 2

Grounding your jet-setters

The Covid dilemma of annual leave and holidaying offshore

Since Covid appeared in 2020, employers have navigated complex matters relating to vaccinations, alert systems and workforce management. In this third year of the pandemic, many employers now face difficult decisions around annual leave and international travel ambitions of their valuable staff.

Employer responses will depend on the individual circumstances, but we look at some of the general principles that will govern these scenarios.

PAGE 3

Business briefs

Charges against Bunnings dismissed

Certain rules for interpreting whether broad marketing statements comply with the Fair Trading Act 1986 (FTA) were clarified in a 2021 case brought by the Commerce Commission against Bunnings.

Directors found trading recklessly may face multiple fines

Director breached not only the Companies Act 1993, but also the Fair Trading Act 1986 – significant fines resulted.

Important upcoming legislation drafted

Two bills introduced in 2021 will, if passed, make small but significant changes to business – directors' responsibilities and extending the time frame for raising a personal grievance for sexual harassment.

PAGE 4

Contractors

RETURN TO FRONT PAGE

A veritable minefield of employment law

From a legal perspective, hiring contractors has always been tricky. The onus of correctly identifying who is an employee versus a contractor, and ensuring legal compliance, remains an employer's responsibility. The financial consequences of misidentification can be significant for a business owner.

With the rise of the 'gig economy', employers are increasingly relying on contractors to fulfil essential roles, so correctly identifying these people's employment status is more important than ever. The Employment Relations Authority has been very clear that it does not matter that a 'contractor agreement' is in place, if the individual behaves like an employee, their employer is responsible for ensuring compliance with the Employment Relations Act 2000 and will be penalised if they fail to do so.

We explore the key features to differentiate between contractors and employees, and what changes may lie ahead for those who fall into the grey area in between.

Defining a contractor

A contractor is a self-employed person who is engaged to provide services privately under contract law and issues invoices for those services. As such, the Employment Relations Act 2000 and all associated entitlements do not apply to the relationship. Key identifying features of a contractor are:

- They have their own business and are responsible for all their own taxes and associated expenses such as ACC levies
- They are considered to have an equal bargaining position to the business they are contracting with (in contrast to the power imbalance between an employer/employee)
- The relationship may not be exclusive
- They will ordinarily have an element of control or discretion over their daily tasks and work, and
- Under normal circumstances they are freely able to accept or decline work.

Who is an employee?

Anyone who is not clearly a contractor should be considered an employee until determined otherwise. Red flags should be raised to treat an individual as an employee if there is little discretion on daily tasks, an exclusivity of relationship or they do not complete all their own financial accounting and reporting.

If they are an employee, you will need to assess if they are casual, part-time or full-time and are provided with the appropriate employment agreement and entitlements.

Consequences of getting it wrong

Misidentifying your employee as a contractor can give rise to a personal grievance (PG). The outcome of that PG could result in your employee being entitled to backdated entitlements such as annual leave and sick leave all the way through to the beginning of the relationship. There may also be other financial penalties imposed by the Employment Relations Authority.

Introducing the 'dependent contractor'

A grey area arises when a person clearly runs their own business but works exclusively for one company or depends heavily on one contract for an income, and has very little discretion in daily tasks.

An example of this is a courier driver who owns their own vehicle, runs their own accounts, is free to contract with third parties and take on additional duties. For the majority of the time, however, they work for one company, are dependent on one income source and have very little control over the day-to-day activities as this is dictated by that company.

The government has consulted on a proposal to introduce legislation designed to protect this type of vulnerable worker. A new category under employment law is proposed called the 'dependent contractor' that is designed to protect and enhance the entitlements of this type of contractor such as a courier or rideshare driver. These contractors' protections would be extended into parts of employment law which means a dependent contractor may be entitled to certain benefits such as sick leave.

These proposals have not been finalised and further consultation is expected this year. If this proposal is enacted, employers will need to be proactive in promptly reviewing and reclassifying (if necessary) their workforce to ensure all dependent contractors are given their new protections and entitlements.

CONTINUE TO PAGE 5

RETURN TO FRONT PAGE

Grounding your jet-setters

The Covid dilemma of annual leave and holidaying offshore

Since Covid appeared in New Zealand in early 2020, employers have navigated a variety of complex matters relating to vaccinations, vaccine passes, alert systems and workforce management. In this third year of the pandemic, many employers now face difficult decisions around annual leave and international travel ambitions of their valuable staff.

Can employers legitimately deny leave if their staff disclose an intention to travel internationally? What happens when employees are stranded overseas?

As with many employment law areas, responses will depend on the individual circumstances, but we look at some of the general principles that will govern these scenarios.

Disclosure is optional

While most employees freely disclose their leave plans, they are not legally required to tell you what they will be doing in their personal time – including how they take annual leave. As an employer, you may only request additional information relevant to the good faith assessment of the leave request, ensuring that it is not 'unnecessarily unfair to your employee in the circumstances or unreasonably intrusive on your employee's personal affairs'[1]. Quizzing employees about their plans could be considered a breach of the Privacy Act 2020 and employer good faith.

Approving/denying leave

You must consider 'in good faith' every leave request submitted by your employees. This means you may only reject the leave request on objectively reasonable grounds.

Reasonable grounds to reject leave may apply if your employee:

- Is required to be present in your workplace during their proposed leave due to prior commitments or key business dates
- Is required to be present immediately after, or shortly after, their proposed leave and that quarantine or self-isolation may jeopardise that availability, or
- On their return to New Zealand they may present a significant health and safety risk to themselves or your workplace.

It is anticipated that the majority of leave that is reasonably denied will be due to essential staff shortages and a requirement to be physically present either during the leave period requested or shortly after. It is important to remember, however, that your employees must be allowed to take annual leave within 12 months of their entitlement arising, so perpetual rejection of leave is not permitted.

An argument that a returned employee could present a health and safety risk is unlikely to be considered 'reasonable' given that the government is already enforcing stringent public protection measures such as quarantine, self-isolation and 'trans-Tasman bubble' pauses. This could change, however, if the government relaxes protection measures and increased responsibility falls on employers to provide a safe workplace.

Someone stranded!

What happens when you have granted annual leave and your employee is stranded overseas or in MIQ? When can you terminate their employment and move on?

Again, the principle of acting in good faith will be the prevailing principle and each situation will be unique.

Some of the most relevant factors to consider are:

- How long is your employee stranded? If it's only an additional two to four weeks for MIQ, it's likely you will have to make do until their return. The appropriate time frame before termination will vary, but in almost all circumstances it would be months before termination was considered a reasonable response.
- Can your employee work remotely in some capacity? If so, you should support them to work in this way. Dismissing an employee who can work remotely (even if it's less desirable than in person) would likely be valid grounds for a personal grievance claim.
- Can your business take alternative measures such as hiring casual or fixed-term contractors? If so, it is likely the role will need to remain open for a much longer time frame before terminating your employee.

CONTINUE TO PAGE 5

1 Privacy Act 2020 Principle.

Business briefs

Charges against Bunnings dismissed

Certain rules for interpreting whether broad marketing statements comply with the Fair Trading Act 1986 (FTA) were clarified in a 2021 case brought by the Commerce Commission against Bunnings[2].

The Auckland District Court dismissed charges that Bunnings had misled consumers regarding its prices when it made statements such as 'lowest prices are just the beginning', 'lowest price guaranteed', 'lowest prices on all your DIY jobs' and 'unbeatable prices'. The Commerce Commission claimed such statements breached the FTA by misleading consumers into thinking Bunnings had the lowest price on all of its items, when in practice it did not.

In finding Bunnings successful, the court considered the following key factors:

- Bunnings routinely conducted surveys of competitors' prices and had processes for adjusting prices if a competitor's pricing was found to be cheaper
- A reasonable consumer would be aware that a store the size of Bunnings could not know on a daily basis exactly what competitors were charging for every product and that a small number of products may be more expensive
- The guarantee to beat a lower priced product by 15% implied that some items may be cheaper elsewhere, but it provided a means to ensure consumers could get a lower price at Bunnings, and
- There was no evidence that consumers had complained of being misled by Bunnings and only one of its competitors had made a complaint.

This case provides guidance to businesses when making broad marketing statements. You should, however, be aware of your obligations under the FTA; if you are unsure about any aspect of the legislation, we can help.

Directors found trading recklessly may face multiple fines

In October last year, the High Court found a director who traded recklessly not only breached his directors' duties under the Companies Act 1993, but also breached the Fair Trading Act 1986 (FTA)[3].

Panama Road Development Limited (PRDL), a property development company, was encountering delays on a project and its funding was due to expire. Mr Gapes, a director of PRDL, was working to secure further funding. Dempsey Wood Civil Limited (Dempsey) had provided services to PRDL and Mr Gapes assured Dempsey that PRDL had funds to pay for ongoing work. However, PRDL was unable to secure further funding and was put into liquidation.

There were insufficient funds in the liquidation to pay Dempsey for its work, so Dempsey sued Mr Gapes personally. Dempsey alleged that Mr Gapes had not only breached his directors' duties, but that he also breached the FTA by misleading Dempsey into thinking PRDL had sufficient funds to pay it.

The High Court ordered Mr Gapes to pay $100,000 to PRDL for the breach of his directors' duties, and an additional $280,000 to Dempsey for breaching the FTA.

This judgment is good news for unsecured creditors who may have an additional avenue for recovering funds in an insolvency situation. It is also a cautionary tale for directors to be careful about any representations they make regarding the financial position of a company should it encounter financial difficulty.

2 *Commerce Commission v Bunnings Limited* [2021] NZDC 8918.

3 *Dempsey Wood Civil Ltd v Gapes* [2021] NZHC 2362.

Important upcoming legislation drafted

Two bills introduced in Parliament in 2021 will, if passed, make small but significant changes to the law as it relates to business.

Company law: The Companies Act 1993 requires directors to act in the 'best interests' of the company, which was traditionally understood to mean maximising return to shareholders.

If passed, the Companies (Directors Duties) Amendment Bill will clarify that a director may also consider environmental, social and governance factors when determining the best interests of the company, including:

- Recognising the principles of the Treaty of Waitangi
- Reducing adverse environmental impacts
- Upholding high standards of ethical behaviour
- Following fair and equitable employment practices, and
- Recognising the interests of the wider community.

Sexual harassment: The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Bill, if enacted, will extend the time frame for raising a personal grievance for sexual harassment from 90 days to 12 months in an effort to recognise that being exposed to sexual harassment can be traumatic and may take time to process before coming forward.

While it's expected both bills will become law, they are currently awaiting their first readings and may be changed before being enacted. We will keep you posted. +

RETURN TO FRONT PAGE

Contractors

CONTINUED FROM PAGE 2

Classify your employees

Ensuring your employees are correctly classified as contractors or employees is essential. Roles such as marketing, social media management, IT support, website management and virtual assistants are all examples of valid contractors who, under the right engagement circumstances, could be considered employees or, if the new proposal becomes law, a dependent contractor.

If you have concerns about correctly classifying an existing contractor or you are a contractor but believe you are probably an employee, please feel free to discuss this with us. +

Grounding your jet-setters

CONTINUED FROM PAGE 3

During the time your employee is stranded overseas, you must continue to communicate proactively with them and consult with them on how to best rectify the situation. If you have a Covid policy (which is now recommended for all businesses), this should be followed.

If, after considering all relevant information, it is unlikely that your staff member can return in an acceptable time frame, you may be able to terminate their employment in accordance with their employment agreement.

Employers must ensure their staff have appropriate opportunities to rest and enjoy their accrued entitlements and, generally, this leads to a healthier and more engaged workforce. However, business disruptions can and do happen. Ensuring your Covid policy is up-to-date and undertaking good consultation with employees can lay the foundation to manage whatever circumstances arise.

If you have any difficult annual leave conversations ahead and would like additional support, please contact us. +

The next edition of *Commercial eSpeaking* will be published in **early Winter 2022**.