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NEWSLETTER

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INSIDE THIS EDITION

Employment investigations – running a sound process

As an employer it is almost inevitable that you will encounter issues with employees that will require an employment investigation. The issues that could arise are as many and varied as the employees themselves, however, some examples are: complaints by an employee against another employee, complaints by clients or customers or accidental discoveries suggesting misconduct or dishonesty by an employee. Any action taken by an employer involving an employee can be scrutinised by way of the affected employee raising a personal grievance, and employment investigations are no exception. If the need for an employment investigation arises, an employer must ensure that the investigation can withstand scrutiny, and that any action resulting from the process was what a reasonable and fair employer could have done in all the circumstances.

When an issue comes to the attention of the employer, the employer should refer to the written employment agreement of the employees involved, and any policy and procedure documents that may set out the process to be followed in an employment investigation. It may be that these documents are silent about process, but if they do set out a process to be followed it is important that it is adhered to for the robustness of the investigation process.

Depending on the nature of the event or incident, an employer may wish to suspend the employee while the investigation is undertaken. If an employer wishes to suspend an employee, the written employment agreement must provide for this. If suspension is contemplated, the employer must obtain the employee's views regarding suspension before making the decision to suspend the employee.

Southland New Zealand

The next step is to gather the facts of the event or incident. The employer should carefully consider who needs to be spoken to in the course of the investigation. For example, the complainant and employee directly involved in the issue would be spoken to, as well as any others involved.

The employer should gather as much detailed information about the event or incident as possible through direct interviews and other information, for example emails, photographs or other documentary evidence. Any interviews or discussions with people involved should be carefully noted, as this information is at the very heart of the investigation process and may well form the basis of any future decisions regarding the employment of the employee under investigation.

Ideally, the person who will make the final decision regarding the outcome of the employment investigation should be actively involved in the investigation process. If the final decision maker is not actively involved, that person should satisfy themselves that they are adequately informed of the details of the investigation process to enable them to make a decision.

Once the employment investigation is completed, the employer will need to make a decision about whether the matter needs to be taken further, or whether the employer is satisfied that no further action is required. Whilst conducting a proper investigation may seem onerous and time consuming, the failure to conduct a fair and reasonable process can cost employers dearly.

Neighbour law part 1 - love thy neighbour

Disputes with neighbours can arise over many things; noise, fences, trees and animals etc. Ideally, you and your neighbour should be able to resolve any problem by discussing it and acting reasonably. However, if this is not possible, the law may be able to help resolve the matter.

Encroachment

When you purchased your property, your lawyer should have shown you a copy of the Certificate of Title for the property. The Certificate of Title records the plan of the property and its boundaries with neighbouring properties that were determined by land transfer survey. It can be disastrous for a land owner to discover that they do not actually own all of the land they thought they did because they relied on fences and natural boundary markers, rather than the boundaries shown on the Certificate of Title.

Encroachment is where you or a previous owner of your property has erected a structure and part of the structure is on a neighbouring property. This is technically a trespass and the encroaching land owner is legally responsible, whether or not they erected the structure. The definition of structure includes any building, driveway, path, retaining wall, fence, plantation or any other improvement.

The Property Law Act 2007 enables a party to seek relief where such an encroachment exists. Whether or not relief should be granted is an exercise of judicial discretion and must be considered “just and equitable” in the circumstances. Relief can be provided by: directing that the structure be removed, granting an easement (or alternatively a right of possession for a specific time) over the land under the structure, or transferring that land to the person who owns the encroaching structure. If the wrongly placed structure is a fence, no relief may be granted if the dispute can be resolved under the Fencing Act 1978.

Boundary fences

The Fencing Act 1978 sets out the rights and responsibilities relating to fences between neighbouring properties. It provides a statutory framework to resolve disputes that may arise. This includes (but is not limited to) determining what constitutes an adequate fence, the cost of building or repairing a fence, who is responsible for those costs, and who is to do the work. Land owners can enter into agreements or covenants concerning fencing matters that can be registered against the titles of the affected lands for a period of up to 12 years after registration.

Overgrown trees

The overhanging of branches of your neighbour’s trees onto your property is also considered encroachment. You are allowed to cut the branches back to the point where the tree crosses the boundary; however it is a good idea to contact your local council to ensure the tree is not a protected tree or talk to your neighbour about it.

If your neighbour is not prepared to do anything, you are able to apply to the district court for an order requiring your neighbour to remove or trim any tree if it is causing damage or injury, obstructing your view or otherwise reducing the enjoyment of your property or if it is diminishing the value of your house.

If any of these circumstances apply to you, we suggest you seek legal advice regarding your rights and responsibilities. Seeing a lawyer before a problem escalates can save you anxiety and money.

Protecting your trading name

The reputation of your business may be its most valuable asset. You have worked hard to develop your brand, so it makes sense that you also know how to protect it.

In New Zealand you can call your business anything you like. That name is known as a Trading Name. Trading Names are not registered, meaning it is quite possible that other businesses can use the same name, which may cost you customers. So, what can you do to prevent another business from using your Trading Name?

Companies Act 1993
Many people incorporate a company to own their business. A company name cannot be identical or nearly identical to another, however, this does not prevent someone from using a Trading Name similar to your own.

Registered Trade Mark
Your Trading Name can often be registered as a Trade Mark with the Intellectual Property Office of New Zealand (IPONZ). IPONZ runs a central register, providing you with clear evidence that you own that Trade Mark and an effective deterrent to others seeking to use that name.

To register as a Trade Mark, your Trading Name needs to be capable of being represented graphically and must distinguish your goods or services from anyone else's. This can mean if your name is too generic (i.e. 'Wellington Lawyers') your application will probably be declined. A registered Trade Mark provides you with all the remedies of the Trade Marks Act 2002. This can potentially allow you to recover damages, lost profits and litigation costs where someone is infringing on your Trade Mark.

Fair Trading Act
The Fair Trading Act 1986 ('FTA') provides you with some protection, relying on the provision that "No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." By way of example, Airport Rentals Limited, trading as 'Airport Rentals' were able to rely on the FTA and obtain an injunction to prevent a competitor from using the name 'Airport Car Rentals' within 50 km of Christchurch Airport, as it was likely to mislead customers. However, it is not always this simple. Courts are not willing to grant injunctions that restrict conduct without sound evidence. While it seems like a simple question - how do you demonstrate that a business Trading Name similar to your own is actually likely to deceive? In a similar case to 'Airport Rentals' discussed above, Diesel and Turbo Service Centre Limited were unsuccessful in their application for an injunction to stop a competitor down the road trading as 'Diesel and Turbo Auckland'.

Passing Off
Passing Off is a common law remedy that can be used where a competitor's goods or services are wrongly represented as being yours. For example, Coca-Cola recently brought an action of Passing Off (amongst other things) against the New Zealand distributor of Pepsi for using a similar shaped bottle, claiming that it was a misrepresentation that damaged the Coca-Cola brand and was likely to deceive customers. The claim failed, with the Court finding that Coca-Cola was such a well-known brand in New Zealand there was little chance of customer confusion.

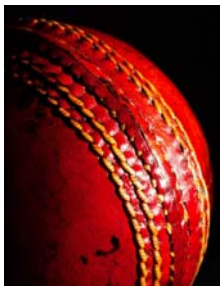
The best approach may be to rely on all of the above methods to protect your Trading Name. Registering a Company and a Trade Mark can act as an effective deterrent, but it may still be necessary in some circumstances to seek enforcement using the above remedies to protect your brand.

Sports law - criminalising match-fixing in New Zealand

The impending arrival of two large-scale international competitions to our shores in 2015 (the Cricket World Cup and FIFA Under 20 World Cup) has brought into question whether New Zealand's current legislation provides adequate tools to prosecute match-fixers. The recent revelations about former New Zealand cricketer Lou Vincent's involvement in match-fixing have only served to draw further attention to the issue.

Sport New Zealand produced the Regulatory Impact Statement – Match-Fixing Criminal Offences on 12 February 2014 ('SNZ's statement') to provide policy guidance on this issue. SNZ's statement outlined that any changes to our legislation would have to be blunt tools, given the limited timeframe available to put them in place before New Zealand's competition hosting begins. It also clarified that the statement was

prepared on the assumption that our existing laws do not adequately provide for prosecution of match-fixers.



While the laws we have in place may already cover some aspects of match-fixing, there are likely to be holes in the current framework that could impair prosecution and see match-fixers escape punishment.

SNZ's statement recommended a minor amendment to the Crimes Act 1961 to explicitly cover match-fixing. Accordingly, the Crimes (Match-Fixing) Amendment Bill ('the Bill') was introduced to Parliament on 5 May 2014.

The Bill proposes an amendment to Section 240 of the Crimes Act – "Obtaining by deception or causing loss by deception." The amendment clarifies that "deception" includes an act or omission done with the intent to influence a betting outcome of an activity. The influenced activity can be the overall result, or any event within the activity. The reference to any event within an activity is particularly important for cricket, given that a lot of match-fixing in cricket relates to controlling small elements of the game, for example, the timing of an event such as a no-ball.

There is also an important exception in the Bill, which is that the act or omission in question must be done otherwise than for tactical or strategic sporting reasons. On past occasions teams in sporting competitions have considered, for example, that avoiding a bonus point would be in their best interests. They have accordingly "under-performed", in the sense that they have played within themselves in order to get the best possible result for their team. This exception appears to acknowledge a team's right to make such a choice, provided it is for tactical or sporting reasons.

The Bill has not had its first reading but given the timing pressures in place, it is expected to receive priority. The Bill anticipates a commencement date of 15 December 2014, reflecting the intent to have the amendment in place in time for the sporting events of 2015.

It will be interesting to see what amendments, if any, are made as the Bill passes through the legislative process, given that meaningful review may be hampered by the objective of having match-fixing criminalised as soon as possible. A potential difficulty for our legislators is that there is no standard international approach to match-fixing. Without a proven international example to follow, New Zealand's response may be a case of drawing a line in the sand and reacting as this issue develops.

Snippets

What is a certificate of acceptance?

In some circumstances a certificate of acceptance may be issued by your local Council for unconsented works that have been completed on your property if the Council is satisfied that those works comply with the building code.

This certificate is issued only if the works comply with the building code at the time the application is made. So, if you were to apply today, the works would need to comply with the current building code to receive the certificate, not the building code as it was at the time they were completed.

A certificate of acceptance is only available for works done after 1 July 1992, and it is important to note the existence of the certificate of acceptance regime does not alter the requirement for you to obtain a building consent for building works you wish to have done in future.

Psychoactive Substances Act – amendment

Introduced in 2013, the Psychoactive Substances Act ('the Act') prohibited the import, manufacture and supply of psychoactive substances (such as those used in party pills, energy pills and herbal highs) without first obtaining a licence. It also introduced a requirement that those substances must first be approved by the Psychoactive Substances Regulatory Authority before they could be distributed. As a temporary measure interim product approvals and licences were granted to existing products, manufacturers and suppliers.

Following mounting public pressure the Act was amended under urgency on 7 May 2014 ending all interim product approvals and interim retailer and wholesaler licences with immediate effect. The Regulatory Authority then issued an urgent recall of all products that previously enjoyed interim approval.

Individuals can face up two years in prison and companies fined up to $500,000 for selling a product containing a psychoactive substance that has not been approved for sale. Individuals can also face up to three months in prison and businesses fined up to $40,000 for selling psychoactive substances without a licence.

If you have any questions about the newsletter items, please contact us, we are here to help.