MACKINNON & ASSOCIATES

Employment@Work

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Wishing you a very Merry Christmas

For the team at Mackinnon & Associates, 2007 has been an exciting and extremely satisfying year. We've continued providing leading edge employment law and human resources advice. We've helped clients resolve all sorts of issues and have enjoyed doing so.

One of things that has pleased us most has been the feedback that we've received from you, our clients. This indicates that we're succeeding in our aim of providing you with the high quality proactive advice that we pride ourselves on. We've also received independent recognition by being named as one of the top employment law teams in New Zealand by the AsiaPacific Legal 500. In the same survey, Don was also named as being one of the seven top employment lawyers in New Zealand.

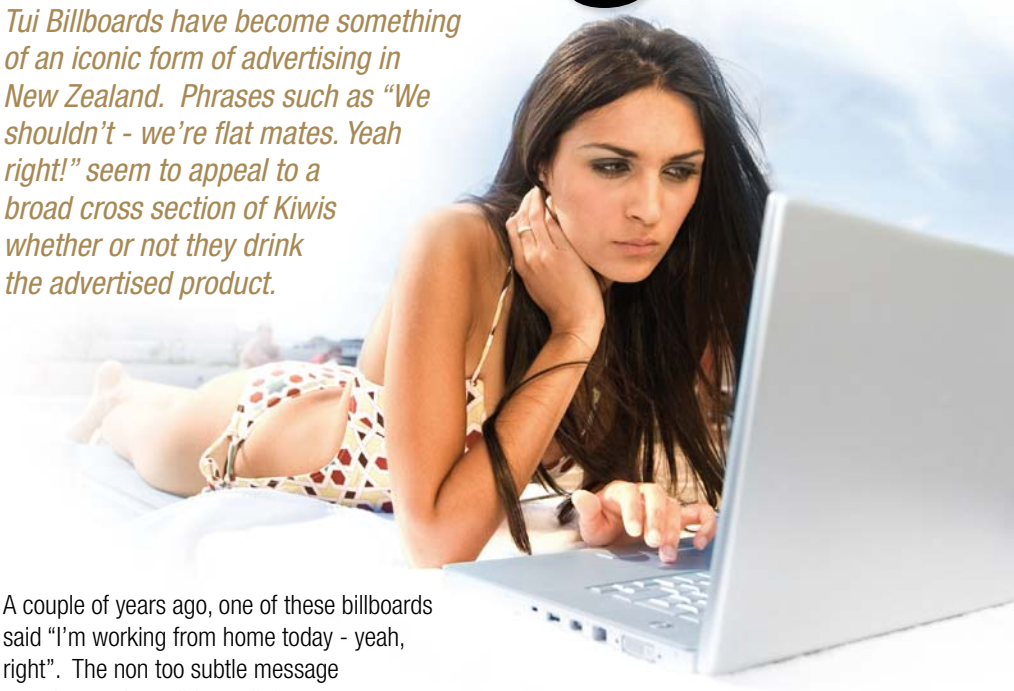
In our 'spare time' it has also been a big year. Richard has wrestled with the joys of fatherhood, while Don has chaired Netball New Zealand and has helped run the World Champs.

We'd like to extend our sincere thanks to you all for your support throughout 2007. We hope that you all have a wonderful Christmas with your family and friends. We look forward to working with you in 2008.

IN THIS ISSUE...

I've Been Working From Home - Yeah Right!

Tui Billboards have become something of an iconic form of advertising in New Zealand. Phrases such as "We shouldn't - we're flat mates. Yeah right!" seem to appeal to a broad cross section of Kiwis whether or not they drink the advertised product.



A couple of years ago, one of these billboards said "I'm working from home today - yeah, right". The non too subtle message was that workers did very little when working from home. However, the concept of doing paid work from home will soon become a much more serious issue in many New Zealand workplaces. That is because Flexible Working Hours Bill has recently been passed as law. It has some important implications for employers.

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Background

Essentially, the Bill aims to allow employees to request "flexible working arrangements" so that they can care for dependents. Originally, the Bill proposed that employees could request that employers provide "flexible working arrangements" only if they cared full time for a child under five or for a child under 18 who had a disability. The concept of "flexible working arrangements" was also limited to requesting changes to hours and/or days of work.

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I've Been Working From Home" - Yeah Right! continued

How has the Bill been extended?

The Select Committee significantly extended the scope of the Bill. The final Bill provides that employees can apply for flexible work if they have responsibility for the care of a child aged under five, a child of any age who has a disability or a "dependent" relative. This could include a dependent parent or grand-parent.

Who Can Apply?

Only employees who have been employed by their employer for the previous six months are eligible. Various minimum hours must also have been worked.

What can they apply for?

Eligible employees can request their employer provide them with 'flexible working arrangements'. This could include a change to their working hours, to their days of work or to their location of work (including a request to work from home). While there will have to be some link between the flexible arrangement sought and the ability to provide the care required, the Bill gives eligible employees the ability to request to work from home, to work "glide time" and potentially to work on weekends as part of their normal working week. Employees can seek these arrangements on a temporary or a permanent basis.

Eligible employees can make a request for a flexible working arrangement every 12 months.

Must Employers Agree?

Employers can refuse a request for flexible hours from an eligible employee only on one of the specified grounds set out in the Bill. These grounds include an inability to reorganize the work or recruit additional staff, the burden of the additional cost associated with the employee's request, the detrimental impact on the ability to meet customer demand or that it may undermine the terms of any relevant collective agreement.

Importantly, an employer can only rely on one of these grounds if it cannot "reasonably" accommodate the employee's request. In our view, this will mean that in practice, the ability to refuse a request will often be harder for larger employers, than for smaller companies with fewer staff. Larger employers should more easily be able to reasonably accommodate absences, than smaller businesses.

If the employee disputes a refusal, they can involve a Labour Inspector to try to resolve the issue. Failing that, the matter can then be referred to Mediation Services or the Employment Relations Authority for determination.

What about Union Members?

One unusual aspect of the Bill is that when the work of the employee making a request falls within the coverage clause of a collective agreement, the employer must consult with the union about the approving the request. Surprisingly, the question of whether the "requestor" is a union member is irrelevant. The only question is whether the work the employee does falls within the type of work covered by the collective. This means that in some work places, there could be a high level of union involvement in these requests, even if union membership levels are low.

Also, as noted above, the Bill does allow for requests to be refused on the grounds that providing flexible working arrangements may undermine the terms of the collective agreement. Consequently, unions may have some influence on requests made for flexible working arrangements, even when those requests do not involve union members.

The future of the Bill

The National Party opposed the Bill. National were "not convinced" that the addition of what it described as "yet another prescriptive piece of employment law" would increase the number of employees getting flexible working arrangements.

In spite of that, the Bill has been passed and takes effect 1 July 2008. Employers may wish to start planning for resulting impacts now.

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I've Got a Secret (And It's Worth Millions!)

One of the most famous things about KFC is that it has a secret recipe. The secret recipe has existed for over 50 years without the key ingredients becoming public.

Realistically, that secret recipe must be worth many millions of dollars. So what can KFC, or, for that matter, any employer can do to protect their confidential information from being removed by a 'trusted' employee?

The first point is that prevention is definitely better than cure. While employees do have implied duties not to breach confidentiality, there is little doubt that these obligations should be set out expressly in an employment agreement. This emphasizes the obligation to the employee, reduces risk and makes enforcement much easier.

Employers should avoid broad, vague clauses. Instead, if the business has trade secrets (or secret recipes!) the confidentiality of those particular matters should be emphasized.

However even though good confidentiality clauses are quite common these days, there seems to be a growing trend of employees who have joined competitors and who have taken their previous employer's confidential information or intellectual property. Certainly, the Law Reports feature many cases involving such issues. So what should an employer do if an employee is leaving and they believe that this poses risk?

As a matter of best practice, if an employee resigns to join a competitor then the employer should take a deep breath and, as calmly as possible, work though this checklist:

- Consider whether you can place your employee on 'garden leave'. That would mean that the employee would continue to be employed but would remain away from the workplace on pay for their notice period. The rationale behind this is that during the garden leave, the employee cannot start work for the competitor, yet will also be 'out of the loop' in terms of what the company is doing. It also means that their ability to access (and potentially remove) any information is limited;
- If there is no contractual ability to place the employee on garden leave, then you will still be able to do so if the employee agrees (and given that they're being told to stay home on full pay, many would!);
- Review whether the employee has restraints of trade (such as 'non compete provisions') contained in the relevant employment agreement. Essentially, a non compete restraint will attempt to prevent an ex-employee from commencing work for a set period of time with a direct competitor. Whether or not they can be enforced will depend upon whether they are reasonable in all the circumstances, which will ultimately be a question of fact.
- Once you've decided on how to approach garden leave and any restraint, you should sit down with the employee and discuss these matters, together with the various legal obligations that will continue to apply after the employment has concluded. Those obligations will include, at least, duties of confidentiality and fidelity;
- You should then follow up that conversation with a letter, confirming what was discussed and emphasizing the importance of all of these obligations;
- If there are valid grounds to do so (and the email policy supports this), then you may also wish to review the employee's email system. That often provides a far clearer picture of what, if anything, has actually occurred. In order to do so as fully as possible, the involvement of a computer forensics expert may also be required.

While these steps certainly reduce the employer's risk, there will be still be instances when an employee will ignore all of these steps and will breach their confidentiality obligations. In those circumstances, urgent proceedings may need to be filed.

Assuming that proceedings are to be filed, there is an interesting question regarding what jurisdiction the proceedings should be filed in. There are various advantages associated with using the specialist Employment Courts (it is generally quicker to get a hearing, the emphasis on mediation, lower costs etc). However, those courts do not have an ability to award damages or injunctions against third parties (i.e. the new employer). The courts of general jurisdiction, on the other hand, commonly impose injunctions and damages against offending third parties (as well as the ex-employee) in these circumstances. In recent months, there have been examples of frustrated employers having cases heard in the Employment Court and also in the High Court.

The Courts generally take a dim view of employees who deliberately breach their confidentiality obligations. That said, there is little doubt that having to issue proceedings to prevent the (mis)use of confidential information is an expensive, reactive step. Careful drafting of employment agreements and policies, together with vigilance, should give the employer some comfort that their secrets are protected.

Send Him Off, Ref!

Probably the most talked about event in sport last year was Zinedine Zidane's headbutt of an opposing player in the football World Cup final.

Football fans hold Zidane up as an exceptionally gifted footballer. Unfortunately, however, that is not all that he will now be remembered for. The public will remember him for that one off 'brain explosion', which saw him 'red carded' and sent from the field.

So what happens when such 'brain explosions' occur in the workplace? Can the employer 'red card' the offending employee? Can such an act be of such seriousness that it could justify the employee being "sent from the field" in the form of an immediate dismissal from the workplace?

The issue of 'brain explosions' was recently considered by the Employment Court in the case of Dr X v Auckland District Health Board ("ADHB"). In brief, Dr X, who was a long serving senior employee of ADHB, emailed a photo of his genitals to a colleague. He also forwarded an email to others containing a lewd calendar. ADHB learnt of Dr X's actions and commenced a disciplinary investigation. In the course of that investigation, Dr X accepted that he had sent the images. However, he expressed his complete remorse over his actions and provided assurances to ADHB that his conduct would not occur again. Although it was not discussed with Dr X, based in part on his body language, ADHB believed that his assurances were insincere. Ultimately, he was dismissed.

The Judge was particularly critical of the procedure that the ADHB had followed in dismissing Dr X. The Court's decision emphasizes that an employee must have the opportunity to comment on all matters that the employer is relying on in reaching its decision. Included in this will be conclusions that are being drawn from body language and demeanor.

If an employer is not going to accept assurances from an employee that the misconduct will not occur again, then it seems that the employer must have a reason for this. Those matters should then be put to the employee for explanation.

Ultimately though, the Court concluded that the punishment of dismissal did not 'fit the crime'. Rather, this had been a one-off brain explosion that a fair and reasonable employer would not have dismissed a long serving senior employee for.

But what if the 'brain explosion' involves a head butt or another form of assault - will that justify dismissal? Many employers will automatically think 'yes'. The justification for this is that workplaces should be free from violence. But while this principle is true, a recent case again stresses that each situation will need to be carefully considered on its own facts. There is no 'one size fits all' answer.

The case involved a fight in the workplace. After a heated argument, a contractor, Mr Nathan, attempted to punch an employee, Mr Housham. Mr Housham pushed Mr Nathan using (he claimed) his open hand. He also attempted to hold Mr Nathan's head down to prevent him striking him again. Neither tactic was successful as Mr Nathan was able to land several punches on Mr Housham's face and body, leaving him bleeding heavily and requiring medical treatment.

When asked for his explanation, Mr Housham claimed that he had acted solely in self defence. Like many workplaces however, the employer had a Code of Conduct specifying that serious misconduct included fighting "even if provoked". Based on this, the employer was satisfied that Mr Housham had breached this policy by 'pushing/striking' Mr Nathan. Mr Housham was dismissed (and although not detailed in the Court's decision, one assumes that Mr Nathan had his contract terminated too!!).

Mr Housham challenged this. The Court had little difficulty in finding the dismissal was unjustified. It said that any employee has a right to take reasonable steps 'in all the circumstances' to avoid actual or imminent assault. The Judge held that applying a blanket 'zero tolerance' approach to violence in the workplace is inappropriate. Once again, each case needed to be considered on its own facts.

Can such an act be of such seriousness that it could justify the employee being "sent from the field"?

So, would an employer be justified in 'red carding' Zinedine Zidane from a workplace for his infamous headbutt? The answer can only be "maybe". All situations involving brain explosions and/or violence in the workplace will need to be carefully considered to make sure a 'red card' is truly warranted.

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