Commercial eSpeaking

DG LAW LIMITED
54 Lunn Avenue, Mt Wellington
PO Box 14 081, Panmure, Auckland 1741
DX EP 80503
T 09 574 5316 | **F** 09 570 9529
A/hours 021 527 311, 021 737 220 or 021 544 390
mail@dglaw.co.nz | www.dglaw.co.nz

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Welcome to the first edition of *Commercial eSpeaking* for 2024.

In this issue we cover trial periods (now available for all businesses) and probation periods, the implications for landowners and company directors resulting from the Whakaari/White Island prosecutions, and we have three brief articles of 2024 business news.

We hope you enjoy reading this e-newsletter, and that the content is both interesting and useful.

If you would like to discuss 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.

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Trial periods vs probation periods

Both are useful for employers

Many New Zealand business owners know they can offer a trial period (usually 90 days) when hiring a new employee.

An alternative to a trial period is a probation period. This is designed to set expectations clearly between you and your employee including the terms of the hire and when a final decision about the suitability of their employment is decided.

We discuss the differences between trial and probation periods so you can better understand your options.

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Whakaari/White Island eruption

Health and safety lessons

The eruption of Whakaari/White Island on 9 December 2019 was a tragedy. Of the 47 people on the island when it erupted, 22 people were killed. The other 25 people were severely injured, many with life-changing injuries.

The last of the prosecutions brought by WorkSafe due to the eruption concluded on 31 October 2023 with sentencing to take place in late February.

We look at the lessons landowners and company directors can learn from these prosecutions.

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Privacy proposals for biometrics

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New reporting obligations for large businesses

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Trial periods vs probation periods

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Many New Zealand business owners know they can offer a trial period (usually 90 days) when hiring a new employee. A trial period is designed to ensure a new employee is a good fit for their employer.

An alternative to a trial period is a probation period. This is designed to set expectations clearly between you and your employee including the terms of the hire and when a final decision about the suitability of their employment is decided.

We explain the differences between trial and probation periods to enable you to better understand your options.

Trial period

A trial period, if successfully included in an employment agreement, will allow you to terminate the agreement in the first 90 days of employment without your employee being able to raise a personal grievance for the dismissal. Trial periods can, however, only be used in limited circumstances.

Until 23 December last year, using a trial period was only available to employers who had fewer than 19 staff. Now, under the new coalition government, this limitation was removed and trial periods can be used by all employers, regardless of size, for new employees.

Key requirements of a valid trial period are:

- Only for new employees, not current or prior employees
- 90 days maximum length
- Must be documented in the written employment agreement, signed before your employee starts work and must contain a valid notice period, and
- Must only be included in the agreement and exercised in good faith.

When exercising a right to terminate under a 90-day trial clause, you are not obliged to provide any reasons for the termination. It is important to note that your employee can still raise a personal grievance against the business if there are other causes for grievance during their employment, such as (but not limited to) discrimination or bullying.

Probation period

Unlike a trial period, probation periods have a much wider application in employment law.

Probation periods are an ideal way for employers and employees to 'try out' a new or expanded role while setting clear expectations that this may only be a temporary employment change, and what to expect if it does not work out.

Some of the common reasons you may want to use a probation period include making sure a staff member is appropriately skilled for their role, or to allow an existing employee to accept a promotion or lateral move in the business and to show they can do the job.

Key characteristics of a valid probation period are:

- Can be used for existing OR new employees
- The probationary period can be for any length of time, as long as it is clearly defined in writing, is reasonable considering the role's complexity, and has an appropriate agreed notice period
- The written agreement includes what may occur at the end of the probation period (termination, reversion to their former role and responsibilities, etc), and
- That you as the employer must provide adequate support and training.

Throughout the probationary period you must be able to show that you have taken reasonable steps to support your employee in achieving success in their role. This includes frequent performance-based conversations, providing adequate training and support on new skills and tasks, discussing any areas for improvement and setting clear expectations of what 'success' looks like for their role.

Unlike a trial period, if you decide at the conclusion of the period to terminate the employment agreement, you must explain how you have fairly assessed your employee's performance, why their performance was not sufficient for the role and your intention to end the employment relationship.

Your employee must then have sufficient time to respond. Any response must be considered before making a final decision to terminate the employment agreement. Unlike a trial period, your employee *can* still bring a claim for unjust dismissal if they feel you have not followed due procedure and come to a fair conclusion.

It is also critical to note that probation periods cannot follow after a trial period for the same or very similar role. If your employee moves multiple times within your business, on each subsequent role change you may be able to apply a new probation period.

Regardless of whether you are considering a trial period or probation period, it is important you talk with us before incorporating it into your employment agreements. To be effective and defensible against a personal grievance, both trial periods and probation periods must be documented correctly throughout the period's lifecycle, from the employment agreement pre-commencement all the way through to the end of the period. Please don't hesitate to contact us if you are considering a trial or probation period for any of your employees. +

Whakaari/White Island eruption

Health and safety lessons

The eruption of Whakaari/White Island on 9 December 2019 was a tragedy. Of the 47 people on the island when it erupted, 22 people were killed. The other 25 people were severely injured, many with life-changing injuries. The last of the prosecutions brought by WorkSafe due to the eruption concluded on 31 October 2023. We look at the lessons landowners and company directors can learn from these prosecutions.

After the eruption, WorkSafe brought charges against 13 parties under the Health and Safety at Work Act 2015. These included charges against tourism operators, two government agencies responsible for advising on volcanic risks and the landowners. The charges against the landowners are the most legally significant.

Whakaari Management Limited

Whakaari/White Island has been in the Buttle family since 1936. The family currently owns it through the Whakaari Trust; the trust leased the land to Whakaari Management Ltd (WML). The directors of WML are three members of the Buttle family. WML used to contract with tourism operators to allow them to conduct tours on the island. WML had no presence on the island and its staff did not work there.

Charges brought against WML and its directors

WorkSafe charged WML under sections 36 and 37 of the Act. Section 36 requires employers to ensure that, as far as is reasonably practicable, the health and safety of their employees. Section 37 requires an employer to take all reasonably practicable steps to ensure the safety of anyone who enters a workplace controlled by the employer, whether they work for the employer or not.

WorkSafe also charged WML's directors under section 44. Where an employer is a company, section 44 requires directors to take reasonable steps to ensure that their company complies with its obligations under the Act.

The court's decisions[1]

The charge against WML under section 36 was dismissed. The court held that section 36 only applied to the employer's business activities, and WML did not carry out its business on the island. Section 36 will generally only apply to an employer's premises or anywhere else its staff are working.

WML was convicted[2] under section 37 because Whakaari was a workplace that it controlled, and it had failed to obtain expert advice on the risk posed to visitors by a volcanic eruption. The court found that WML could exercise control over the activities of tour operators on the island and that it had been involved in managing their activities in the past as it had actively engaged with the tour operators regarding their operations. WML could also control the workplace by terminating, or threatening to terminate, its agreements with tourism operators that allowed them to access the island.

Implications for landowners

If you are a landowner and allow other parties access to your property for commercial purposes, you may have health and safety obligations as WML did on Whakaari. Section 37 will not usually apply if you operate solely as a landlord because a landlord will not usually have sufficient control to meet the section 37 requirements. Section 37 also contains a specific exemption to prevent the section from applying to farmers who allow people onto their farms for purely recreational purposes such as walking or hunting.

The charges against the directors of WML under section 44 were dismissed, despite WML being convicted under section 37. The court held that it could not conclude that any directors had breached their personal duty under section 44 based on the company's failure to meet its obligations as it had no information about how the directors had made their decisions. For example, one director could have argued that WML should have sought expert advice on the risk of volcanic eruption but was outvoted by the remaining two directors.

What directors need to do

Following the Whakaari/White Island decision, WorkSafe will likely seek full disclosure of all board documents before bringing similar future prosecutions.

To avoid any potential criminal liability, any company director who is uncomfortable with their fellow directors' stance on a health and safety matter should ensure that their dissenting view is recorded.

As a company director, if you are concerned about any decisions that your board proposes to make, or has made, about a health and safety matter, it would be useful to talk with us to clarify your position. +

1 *WorkSafe New Zealand v. Whakaari Management Ltd* [2023] NZDC 23224.

2 Sentencing will take place in late February.

Business briefs

Cartel conduct: New Zealand's first ever criminal cartel prosecution

The Commerce Commission recently filed criminal charges against two construction companies and their directors for alleged bid-rigging of publicly funded construction contracts. This is New Zealand's first ever criminal prosecution for alleged cartel conduct under the Commerce Act 1986.

Bid-rigging, or collusive tendering, occurs where some or all the bidders collude to pre-determine who will win the bid or tender. This is a form of cartel conduct that is prohibited by the Act.

The case is currently before the court so information is limited but, if found guilty, the companies and their directors could face serious penalties. Each company could be fined up to $10 million, three times their commercial gain from the cartel conduct or 10% of their turnover per year per breach. Each director could be imprisoned for up to seven years and/or fined up to $500,000.

The Commission's willingness to bring criminal proceedings for cartel conduct is a warning for all businesses to understand their obligations under the Act and have adequate processes to avoid engaging in cartel conduct.

New privacy rules for biometrics

The Office of the Privacy Commissioner (OPC) has announced it will release a draft policy code early this year regulating the collection and use of biometric information. The code will have direct implications for any businesses dealing with biometric information.

Biometric information is any information about a person's biological or behavioural characteristics, such as fingerprints, face, voice or eyes. It is increasingly common for businesses to collect and use biometric information to verify people's identities online, enhance retail security, control access to devices or physical spaces, or to monitor attendance at a site or a work place.

While the use of biometrics has significant benefits for businesses, it also increases the risks of profiling, discrimination, bias, and lack of transparency and control to individuals.

The OPC has proposed three categories of rules that businesses must comply with when collecting and using biometric information. These are:

1. Proportionality assessment: Businesses must undertake a proportionality assessment to ensure that the reasons for collecting biometric information outweigh the risk of privacy intrusion
2. Transparency and notification: Businesses must be open and transparent with individuals and the public about the collection and use of their biometric information, and
3. Purpose limitations: The collection and use of biometric information will be restricted for certain purposes.

The public will have an opportunity to provide feedback on the code before it is implemented.

New reporting obligations for large businesses

The Business Payment Practices Act 2023 will come into effect on 25 May 2024. It will require large businesses to publicly report information on their payment practices to the Business Payment Practices Register.

The legislation applies to businesses with more than $33 million in annual revenue and $10 million in third party expenditure. The information that must be reported on includes:

- The average time to pay supplier invoices
- The percentage of invoices paid in full within the required timeframe, and
- A description of the business's standard payment terms (if any).

If a business fails to comply with its reporting obligations, it could be fined up to $9,000. If a business intentionally provides false or misleading information, it could be fined up to $500,000.

The Act is designed to address payment delays that can have significant impacts on the cash flow for New Zealand's small and medium-sized businesses.

If you would like more information or advice on any of the above topics, please feel free to contact us. +

The next edition of Commercial eSpeaking will be published after the government presents its Budget – usually towards the end of **May**.