

Commercial eSpeaking

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Welcome to the Spring edition of *Commercial eSpeaking*. We hope that you find the articles in this e-newsletter are both interesting and useful to your business.

Inside:

Redundancy

Totara Hills case lifts the bar

Are you wanting to cut staff costs and considering letting someone go? The recent Totara Hills case has raised the bar for an employer's need to prove redundancy for financial reasons is a justified business decision. We offer you some advice based on recent employment law decisions... [CONTINUE READING](#)

Is User Generated Content Really Advertising?

Using social media to promote your business

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Business Briefs

Exclusivity: think before you ink... [CONTINUE READING](#)

New trademark clearinghouse for domain names... [CONTINUE READING](#)

Inadequate medical certificates: are you sick of the pandemic?... [CONTINUE READING](#)

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The next issue of Commercial eSpeaking will be published early next year.

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Redundancy

Totara Hills case lifts the bar

Are you wanting to cut staff costs and considering letting someone go? The recent Totara Hills case has raised the bar for an employer's need to prove redundancy for financial reasons is a justified business decision. We offer you some advice based on recent employment law decisions.

In the past, the Employment Relations Authority and Employment Court have been reluctant to take more than a superficial look behind an employer's stated business decision in relation to redundancy.

Until this year, the accepted rationale as applied in the Simpson Farms case¹ was that a genuine business decision about redundancy should be upheld in the absence of ulterior motives and also that business decisions are for the employer to make, not the court. Essentially the court would not overturn a business decision unless it was just a ruse to sack an employee without going through the proper process.

Justifiable and reasonable business decision – the Totara Hills' test

Earlier this year in the Totara Hills case², the Employment Court determined that the court can, and should, look deeper into the reasoning behind business decisions, as an employer's decision must always be one that is justifiable and reasonable in the circumstances at the time the decision is made. The court has now demonstrated a willingness to test the assertions of employers to see whether their decision really can be justified by reference to the accounts of the business.

Be careful what goals you set

In Totara Hills, the employer (Mr Rittson-Thomas) met with staff and set a goal to reduce the wage cost by 10% for the business to survive. When Mr Rittson-Thomas later chose to make a senior position redundant and to create a junior position, with a net saving of only 6% of the wage cost; this decision was found to be unjustified. The court considered that Mr Rittson-Thomas couldn't show that the business had explored other avenues to cut costs, nor could Mr Rittson-Thomas show any objective reason why 10% was chosen as the goal, given that the business had survived a lengthy downturn prior to the redundancy.

To make matters worse, Mr Rittson-Thomas didn't offer the newly created junior position to the employee (Mr Davidson) who was made redundant. Even though this might result in a demotion and reduction in pay, as an employer you must offer to redeploy an employee to any alternative position vacant in your business in which that employee could perform.

Putting the Brakes on – can you prove what you claim?

The claimed cost savings must be real and your figures must be accurate. In a more recent case in May this year³ the Brake case has affirmed the Totara Hills' test and clarified that it's not reasonable for an employer to rely on erroneous figures or business data, even if they were not aware of the error at the time. In the Brake case, Grace Team Accounting tried to justify a redundancy on the basis of a large drop in turnover. When the Employment Court investigated further, however, it found that the figures were miscalculated by more than \$120,000. Relying on the incorrect figures was determined to be unreasonable and the dismissal was unjustified.

What does this mean for you?

If you're re-evaluating your staffing levels and considering possible redundancies, take the time to collate (or have your accountant gather) financial data to back up your plans. It's vital to check and double check the evidence that you intend to rely on when taking the step of making a position redundant. Ask yourself – is it robust enough to stand up in court? If in any doubt, talk to us. You may want to seek assistance in managing the process or in assessing the evidence that you want to rely on. Get advice before you take action. ■

1 *Simpson Farms Ltd. v Aberhart* [2006] ERNZ 825

2 *Totara Hills Farm v Davidson* [2013] NZEmpC 39

3 *Brake v Grace Team Accounting Limited* [2013] NZEmpC 81

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This article looks at differing approaches taken by the Advertising Standards Authority (ASA) in New Zealand and its Australian cousin, the Advertising Standards Bureau (ASB), as to whether user generated comments (UGC) will be considered advertising and subject to their respective codes.

The Australian position

In two widely discussed decisions⁴, the ASB has concluded that comments posted to a brand's Facebook page were advertising and that the brand owners were responsible for ensuring compliance with the ASB codes. In one of those cases⁵, the ASB decided that everything that could be controlled (ie: edited) by the site owner was advertising and therefore within its jurisdiction.

The Australian Advertiser Code of Ethics defines 'advertising' as:

Any material which is published or broadcast using any medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, and over which the advertiser or marketer has a reasonable degree of control, and that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct.

The Interactive Advertising Bureau (IAB) in Australia (the trade association representing online advertisers) has, however, commented that it does not consider user comments directed towards an organisation or social media platform to be constituted advertising. These competing positions indicate that there is still some uncertainty surrounding this issue across the ditch.

The New Zealand position

In New Zealand, we have our own codes administered by the ASA and whose rules of interpretation state:

... "advertisement" is to be taken in its broadest sense to embrace any form of advertising and includes advertising which promotes the interest of any person, product or service, imparts information, educates, or advocates an idea, belief, political viewpoint or opportunity... advertising in all traditional media and new media such as online advertising, including websites ... [and] [e]mails and SMS messaging that are selling or promoting a product, service, idea or opportunity ...

The ASA has also issued a short guidance note indicating a presumption that UGC will not be treated as advertising. The ASA notes, however, that in certain circumstances UGC may be advertising and provides some 'preliminary areas of enquiry' for use in that assessment:

- » Did the advertiser originally solicit the submission of the UGC from individuals and then adopt and incorporate it within their own advertising?
- » Did an individual provide the advertiser, on an unsolicited basis, with material that the advertiser subsequently adopted and incorporated within their own advertising?
- » Did the advertiser solicit UGC (eg: via an invitation to enter a competition) that resulted in content being posted on the site?

Managing UGC

Where your business invites UGC on social media sites for promotional purposes remember that those comments can become part of your advertising and, potentially, your responsibility. Combine this with potential liability for defamatory or copyright infringing material posted by your users and it's clear that if you are using social media sites, you need a robust and adequately resourced moderation and takedown function. If you are not pre-vetting UGC before it's posted to the site, you need to ensure that you monitor what goes up so that you can act quickly if it's getting out of hand. ■

⁴ Case Number 0272/12, Diageo Australia Limited, 11/07/12 ("Smirnoff") & Fosters Australia, Asia & Pacific, 11/07/12 ("Victoria Bitter")

⁵ Case Number 0272/12, Diageo Australia Limited, 11/07/12

Business Briefs

Exclusivity: think before you ink

The recent high-profile stoush involving fashion designer Kym Ellery and the Australian retail giants Myer and David Jones has shone the spotlight on exclusivity arrangements. Whatever it is you do, if you're looking at entering into an arrangement under which you'll do that on an exclusive basis for the other side, it's critical for you to ensure that:

- » You get what's fair in return. By granting exclusivity you are giving up your ability to provide your products or services to others, and therefore other potential sources of revenue. Are you being adequately compensated for that?
- » The scope of the restriction is appropriate, both in terms of its duration and geographic reach. Are there any products, services or regions that ought to be carved out, ie: not be subject to the restriction?
- » You've got strong-enough 'outs', by making the exclusivity conditional on, for example, minimum quantities being bought or used by the person you're entering into the contract with. This way, if the arrangement isn't working out, you'll have the right to terminate the contract or at least convert it to being on a non-exclusive basis so that you can go elsewhere.

Granting exclusivity can have significant commercial consequences, and parties that have the benefit of exclusivity arrangements will act quickly to protect them. ■

New trademark clearinghouse for domain names

The Internet Corporation for Assigned Names and Numbers (ICANN) has recently opened its Trademark Clearinghouse (TMCH) to help trademark owners protect their brands in anticipation of the impending launch of hundreds of new gTLDs (generic top-level domains). The TMCH aims to protect brands by providing:

- » The Sunrise Service which will enable trademark owners to register corresponding domain names in any new gTLD before general registrations for that gTLD open, and
- » The Trademark Claims Service which will notify domain name registrants and trademark owners of possible infringements by:
 - Issuing potential domain name registrants with warning notices when they attempt to register a domain name that matches a trademark in the TMCH, and
 - Letting trademark owners know if a party who has received a warning notice in relation to that owner's trademark has proceeded to register the domain name in question anyway.

Given that the number of gTLDs will dramatically increase in the near future, the TMCH's centralised service will be invaluable to trademark holders who previously have had to protect their intellectual property rights by dealing individually with each gTLD. The TMCH's website is located at www.trademark-clearinghouse.com ■

Inadequate medical certificates: are you sick of the pandemic?

As an employer you may have been presented with medical certificates containing nothing more than 'This patient was seen by me on *date* and in my opinion is/has been unfit for work from *date* until further notice'.

These medical certificates provide you with little or no information regarding the diagnosis or prognosis of the illness (particularly in situations where the workplace is alleged to have contributed to the absence). Together with your inability to make further enquiries because of patient privacy, this makes managing your employee's absence difficult and frustrating.

The Medical Council of New Zealand is reviewing medical certificate standards. Amongst the proposals are that more information (such as a diagnosis) is provided, there's more guidance on what duties your employee is fit for, as well as some advice on disclosure.

If implemented, the proposed will provide you with more information surrounding your employee's absence.

You'll have more information to not only see through 'sickies' but to also manage your employee's return to work. ■