Commercial eSpeaking

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Welcome to the Spring edition of *Commercial eSpeaking*; the last issue for 2021.

We hope you enjoy reading this e-newsletter, and find the content 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.

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Bonding agreements

Helping employers recoup training costs

Bonding agreements can be an incredibly useful tool for ensuring employers can recoup costs incurred for training staff that will provide employment benefits of higher skilled and well-engaged staff.

Used improperly, however, bonding agreements may be unenforceable and – in some circumstances – be a clear breach of the Wages Protection Act. We look at two of the most common issues with bonding agreements as well as what should be considered for enforceable agreements.

PAGE 2 ▶

Lease vs licence

Common contractual arrangements in commercial property

Choosing the premises from which to operate your business can be daunting; it is essential that you know you are entering into the right type of agreement to suit your intentions.

Leases and licences are common contractual arrangements. Although both are similar, there are crucial differences between them which can have significant implications for anyone who owns or occupies commercial premises.

PAGE 3 ▶

Business briefs

Unfair contract terms regime extended

The Fair Trading Amendment Act 2021, which was passed in August, bans unconscionable conduct in trade and prohibits businesses from having unfair contract terms in their small business contracts.

Many welcome new sick leave provisions

In July, minimum employee sick leave entitlements increased from five days to 10 days per year.

Changes to the retention money regime for construction contracts

The new Construction Contracts (Retention Money) Amendment Bill proposes to change the way contractors hold retention money under construction contracts.

PAGE 4 ▶

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RETURN TO FRONT PAGE

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Bonding agreements can be an incredibly useful tool for ensuring employers can recoup costs incurred for training staff.

Used improperly however, bonding agreements may be unenforceable and – in some circumstances – be a clear breach of the Wages Protection Act 1983 (WPA). We look at two of the most common issues with bonding agreements as well as what should be considered for enforceable agreements.

What is a bonding agreement?

A bonding agreement is a benefit given to an employee where you agree to pay for some or all of the cost of further training in exchange for your employee agreeing to stay under your employment for a period of time; this is usually around one to two years after the training is complete. The result is an upskilled employee who has better qualifications and future employment prospects, and your business has the benefit of a more valuable employee who usually will stay for the period of the bonding agreement.

These arrangements can be recorded in the original employment agreement or in a subsequent document both the employer and employee sign which records the bonding agreement as a formal variation to the employment agreement that is already in place.

Wages Protection Act 1983

Section 12A of the WPA states that an employer may not 'seek or receive any premium' for employing a person. In a 2016 case[1], it was found that bonding employees to recoup recruitment costs, such as skills testing, was considered a breach of s12A as it was the employer who primarily benefitted, not the employee. Any bonding agreement for training, testing or costs incurred by the employer only would likely be considered a breach of the WPA.

Workplace health and safety

All employers are responsible for ensuring that they provide a safe environment for their employees. For most businesses this means that, at a minimum, each workplace must have some staff trained in first aid. In more dangerous workplaces there must be additional measures, such as training employees in handling combustible materials or dangerous goods.

As an employer, if you have insufficient staff members trained in workplace safety and are required to provide training to up-skill existing staff in this area, it is unlikely that you could use a bonding agreement to recoup the cost of that training, as it is your responsibility to provide a safe workplace in the first instance. If any additional training goes above and beyond the requirement for safety, and significantly improves your employee's future employability, a bond may be valid.

Making clauses work

There are many circumstances in which bonding agreements are appropriate and enforceable.

When considering a bonding agreement, the following three basic principles are a good guideline.

1. **Mutual benefit**: the additional training being undertaken by your employee must be of a mutual benefit to you both. Another acceptable, but rare, situation is where the additional training is of sole benefit to your employee, such as up-skilling in a different field while continuing to work in the current role.
2. **Transparency of cost**: costs should be agreed as much as possible up-front, including how and when those costs will be repaid if your employee leaves during the bonded term. If the costs cannot be recorded clearly in the agreement, for example accommodation costs while on training, your employee should be given reasonable notice of the cost before it is incurred and the opportunity to opt out or for you both to choose a cheaper alternative.
3. **Reasonability**: the bonding term and repayment schedule should be reasonable in consideration of the costs incurred by the business. For the majority of bonding terms, a reasonable timeframe is somewhere between six months and two years, though there are certainly some circumstances where longer bonding terms are appropriate.

Like many elements of employment law, bonding agreements are very case specific. This means that in this article we cannot cover all the issues that arise with them. Any issues in the workplace such as harassment or constructive dismissal can shake the foundation of a bonding agreement. Even when an agreement is considered enforceable, there is no guarantee you will be able to recover the funds from an employee who leaves your business.

If you are considering a bonding agreement, whether you are an employer or an employee, please contact us to discuss your specific needs. +

1 *Labour Inspector v Tech 5 Recruitment Limited* [2016] NZEmpC 167 EMPC 114/2016.

RETURN TO FRONT PAGE

Lease vs licence

Common contractual arrangements in commercial property

Choosing the premises from which to operate your business can be daunting; it is essential that you know you are entering into the right type of agreement to suit your intentions.

Leases and licences are common contractual arrangements. Although both are similar, there are crucial differences between them which can have significant implications for anyone who owns or occupies commercial premises. Knowing their differences, and when to use each, will help prevent any confusion, conflict or loss that may arise if you are not fully informed.

Possession or occupation?

The essential distinction between a lease and a licence is the type of rights they grant in relation to the property. A lease grants you exclusive possession of the property, but a licence only grants the right to occupy and use the land.

'Exclusive possession' in a lease situation means you can exercise control over the property and exclude all others from it, even the owner of the property, except where they have a legal right to enter the premises, for example to complete repairs or inspections. Occupation, however, is a right to use the property for a certain purpose and does not give you the right to exclude other people from it.

A lease typically grants much wider rights than a licence because it gives you control of the property subject to some exceptions. The obligations imposed on you under a lease may be extensive, but provided you are not in breach of the lease, possession of the property will stay with you. Under a licence, however, the opposite is the case. Control and possession of the property stays with the owner except where you are granted certain limited permissions.

This is the main area where difficulties can arise in defining leases and licences because the name of the document may not reflect its true nature. It is not just a case of what language is used, but rather the content of the agreement, and the rights and obligations it creates.

Certainty of term

The length of the arrangement is another important point of difference. Leases are typically long-term arrangements and must be for a fixed period and have certainty around the start and end date. Even a periodic lease has clear terms about how and when it can be ended.

A licence, however, can be for an uncertain period and, depending on the terms of the licence, can be cancelled by either party by giving written notice. The advantage of a lease is that it gives both parties more security because the length of the arrangement is certain, but this in turn means it offers less flexibility than a licence.

Changes of ownership

A lease is a legal interest in land and will survive changes in ownership if the owner sells the property. For example, if a commercial building has a tenant under a lease and is sold, the buyer buys the building with the tenant in place. The tenant can also assign the lease to another party with the owner's consent through a deed of assignment without the new tenant having to enter a whole new lease.

A licence is different. It is a personal contract between the owner and licensee and generally cannot be transferred to another person. If the owner sells the property, the licence will come to an end.

Both have advantages

The crucial factor that distinguishes a lease from a licence is the scope of the rights, powers and obligations it grants or imposes. A lease generally gives you very wide powers to deal with the land and exclude others from it and anything that falls short of this is generally a licence.

Deciding whether to enter into a lease or licence will therefore depend on your intentions for the space. If you want long-term security and exclusive control over the property a lease will usually be preferable, but it comes with maintenance and other obligations and is generally a longer term commitment.

A licence may be more suitable for short-term use where more flexibility is required or where the parties are still uncertain about their commitment to the arrangement. A licence is useful, for example, where you have a pop-up shop or use a space that is shared by multiple users.

The important thing is to get good legal advice before you sign on the dotted line so that you can be sure of the rights and obligations you are taking on, and the agreement fits your particular situation. +

Business briefs

Unfair contract terms regime extended to small business contracts

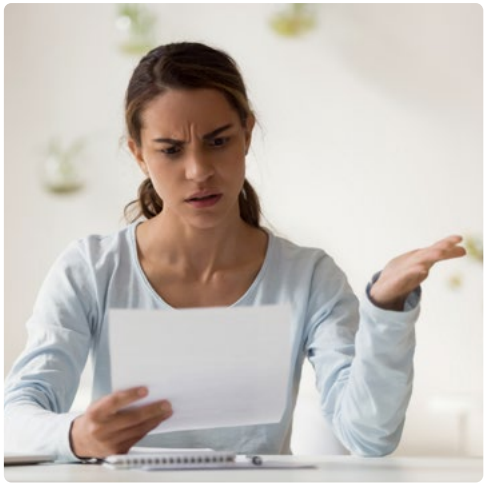
The Fair Trading Amendment Act 2021, which was passed into law in August, bans unconscionable conduct in trade and prohibits businesses from having unfair contract terms in their small business contracts.

The Act amends the Fair Trading Act 1986 in two key ways.

1. Unconscionable conduct: The legislation prohibits unconscionable conduct in trade. It does not define what 'unconscionable conduct' is, but it does provide a list of factors for the court to consider when assessing unconscionable conduct, including:

- The relative bargaining power between the person engaging in the conduct and the person affected by the conduct
- The extent to which the trader and an affected person acted in good faith, and
- Whether unfair pressure or undue influence was used.

2. Unfair contract terms: The Act extends the existing protections against unfair contract terms in standard form consumer contracts to include small business contracts.



The legislation defines this as a contract for the provision of goods or services between businesses where the value of the relationship between the businesses is less than $250,000 (including GST).

These two changes will come into force on 16 August 2022. This gives businesses just under one year to review their small business contracts to ensure they comply with the new requirements. The Commerce Commission is expected to release guidance on what unfair terms might look like for small business contracts.

Be aware, however, that some minor changes in the legislation are already in force.

If you would like some guidance on how this legislation affects your business, please don't hesitate to contact us.

Many welcome new sick leave provisions

One employee's sick leave may have doubled, but another employee's sick leave may still only be five days. How does this work?

On 24 July 2021, minimum employee sick leave entitlements increased from five days to 10 days per year[2]. Key points for employers are below.

When does the entitlement start? Not all employees will get the increase in sick days at the same time. Employees will get an extra five days' sick leave when they reach their next entitlement date. This is either after they reach six months' employment or on their existing anniversary.

For example, if your employee's anniversary date was 10 June, they become entitled to 10 days' sick leave on 10 June 2022, but until then, their entitlement remains at five days.

What remains the same?

- Employees who already get 10 or more sick days a year will not be affected by this change
- The maximum amount of unused sick leave that an employee can be entitled to accrue remains at 20 days, and
- The change applies to all employees whether they are full-time or part-time.

Remember, it's your obligation as an employer to ensure you're aware of your employees' entitlements.

2 Holidays (Increasing Sick Leave) Amendment Act.

Changes to the retention money regime for construction contracts

The new Construction Contracts (Retention Money) Amendment Bill proposes to change the way contractors hold retention money under construction contracts.

The current regime allows contractors to mingle retention money with working capital, which can result in subcontractors missing out on money owed to them if the contractor goes into liquidation. This happened in the liquidation of Mainzeal Property and Construction Limited in 2013.

The proposed legislation aims to put clear rules in place around how retention money is to be held to provide protection for subcontractors.

Key changes: The Bill proposes that contractors must:

- Place retention money on trust as soon as possible and keep it separate from other money or assets, and
- Hold retention money in a trust account in a registered bank in New Zealand or in the form of complying instruments (such as an insurance policy or a guarantee).

The Select Committee is expected to report on the Bill in November 2021. Contractors will need to be prepared for the changes when the Bill passes, as failure to comply could result in significant fines.