WebbFarry Lawyers

Summer NEWSLETTER 2021

Staff Updates

We are pleased to announce the following recent promotions.

TOM CLOUT
ASSOCIATE

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Tom is a valued member of the Webb Farry team and enjoys advising clients across a range of property and commercial law areas including residential and commercial conveyancing, subdivisions, building contracts, trust structuring and estate planning. We congratulate Tom on his promotion to Associate and are pleased to recognise his continuing achievements.

AMANDA DEAN
REGISTERED LEGAL EXECUTIVE

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Amanda joined Webb Farry in 2019 as a Legal Secretary and has recently obtained her Diploma of Legal Executive Studies. We are pleased to have promoted Amanda to a Registered Legal Executive position where she is assisting and advising clients with residential conveyancing and estate planning while also expanding her knowledge and skills across wider property, private client and commercial law areas.

New Staff

We welcome the following new staff to the Webb Farry team.

JORDAN WILSON
LAW CLERK

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Jordan joined our Commercial / Property team earlier this year and we congratulate him on his recent admission to the Bar. Jordan enjoys assisting clients with residential property purchases and particularly helping first-home buyers through the entire process from navigating the Dunedin housing market to making an offer, applying for KiwiSaver and First Home Grants and getting the keys to their new front door.

MADISON MCKENZIE
LAW CLERK

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Madison (Maddy) has joined our litigation team as a Law Clerk having recently completed her studies at Otago University. She is currently undertaking her Professional Legal Studies course and aims to be admitted to the Bar in 2022. Maddy will be working closely with and under the supervision of partner Kimberly Jarvis in our litigation and dispute resolution team, focusing on family, relationship property, civil and employment matters.

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COVID-19 VACCINE / REGULATIONS - EMPLOYER AND EMPLOYEE RIGHTS

Employers and employees both have responsibilities under the Health and Safety at Work Act 2015. Employers are required to take steps to eliminate or otherwise minimise risks, and employees are expected to follow the policies and procedures of their workplace.

The World Health Organisation deemed Covid-19 a worldwide pandemic in March of 2020. All countries are expected to take as many precautions as possible to eliminate or minimise its spread. One way that New Zealand is doing this is to offer the Pfizer vaccine (and soon the AstraZeneca vaccine) free to all.

While an employer cannot require any individual to be vaccinated, they can require that certain roles must only by undertaken by vaccinated workers where there is a high risk of contracting and transmitting Covid-19 to others, or if their work is covered by the Covid-19 Public Health Response (Vaccination Order 2021 ("Vaccination Order").

To decide if a role/position is high risk and therefore needs vaccination for Health and Safety reasons, an employer must first assess their Covid-19 exposure risk.

Typical situations to consider are:

- How many people does the employee come into contact with whilst conducting their duties?
- How easy will it be to identify the people who the employee comes into contact with?
- How close is the employee in proximity to other people whilst conducting their duties, and how long does the work require the employee to be in that proximity to other people?
- Does the work involve regular interaction with people at high risk of severe illness from Covid-19?
- What is the risk of Covid-19 infection and transmission in the work environment compared to the risk outside of work?
- Will the work environment continue to involve regular interaction with unknown people if the region is at a higher alert level?

Employers must consult their employees while undertaking the risk assessment process. During this process it may be determined that they can change work arrangements or duties, which could mean a role/position is no longer high risk. Employers and employees should work together to reach a mutually agreed outcome.

If, as a result of the Health and Safety Exposure Risk Assessment process, it is deemed that a role/position can only be undertaken by vaccinated staff, employers should set a reasonable timeframe for employees to decide if they will be vaccinated. If during this time an employee cannot work, special paid leave should be considered; especially in the short term while employers and employees discuss what happens next.

An employee does not need to disclose or prove their vaccination status to an employer; and an employee cannot be redeployed or disadvantaged for refusing to disclose their vaccination status, unless it is determined under the Health and Safety Exposure Risk Assessment that their role cannot be completed by unvaccinated employees.

If a role is determined under the Health and Safety Exposure Risk Assessment to be high risk that requires an employee to be vaccinated, an employer can ask an employee if they are vaccinated. If the employee does not disclose or provide evidence of their vaccination status, the employer has the right to assume they have not been vaccinated. However, employers will need to ensure they have previously informed their staff of this assumption and what will happen if an employee is not vaccinated or does not disclose their vaccination status.

Collecting, storing and sharing information about employees' vaccination status must be done in accordance with the Privacy Act 2020.

Recent developments in the law relating to Covid-19 vaccination and employment include the extension of the Vaccination Order to capture workers in a number of settings, including healthcare, prisons, and education, setting out deadlines for vaccination of those workers; a centralised and prescriptive scheme for vaccination exemptions; and the vaccination certificate regime which requires workers and members of the public in facilities who opt into the regime to be vaccinated in order to enter the premises.

This area of law is developing rapidly, so it is important to stay up to date on the changes as they are announced.

TRUSTS: WHEN IS A LOAN REALLY A DISTRIBUTION?

Loans to beneficiaries are often made without proper consideration as to whether the powers being exercised will affect the preservation of trust assets or how these will affect any benefits to beneficiaries.

Recording a payment to a beneficiary as a loan does not conclusively make it so, and such a misrepresentation could put the trustees in breach of their duties as a trustee.

Under the Trusts Act 2019, trustees have a mandatory duty to act honestly and in good faith (s25). They also have the following default duties that apply unless the Trust Deed in question modifies or excludes:

1. a general duty of care (s29);
2. a duty to avoid a conflict between the interests of the trustee and the interests of the beneficiaries (s34); and
3. a duty not to make a profit from the trusteeship of a trust (s36).

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The above duties mentioned are not the complete list of mandatory and default duties under the Act but are the ones that could be considered relevant to this situation.

If a trustee does not exercise their powers properly or they breach the above mentioned duties, a trustee is not entitled to be indemnified out of the trust's assets. A trustee could also find themselves liable to beneficiaries.

Factors to consider include:

- Is the loan of a significant sum in terms of the trust's overall assets?
- Is the beneficiary in a financial position to pay this loan back?
- Will there be a provision for security?
- Will interest be charged?
- Is there a clear and expected repayment date?
- Could this loan be considered contrary to the interests of other beneficiaries?

If a loan is made where the prospects of it being repaid is low, there is no security, no interest being charged and no clear repayment date, the loan could easily be characterised as a distribution instead.

At the very least trustees should consider the insertion of a Marshall Clause into the terms of the loan to offer some form of asset protection.

The trustees should also ensure that detailed Trust Minutes/Resolutions be completed contemporaneously with any such loan document outlining the considerations the trustees have taken before entering into the loan.

A comprehensive paper trail will significantly improve the trustees' position in the face of potential future allegations of dishonesty and/or breach of trustee duties.

TRIAL VS. PROBATIONARY PERIODS - WHAT IS THE DIFFERENCE?

Trial and probationary periods look very similar and are used for similar reasons but they are fundamentally different. It is important to get these right because misuse of the provisions can result in a personal grievance. The main differences are set out in this article.

Trial periods

Section 67(A) of the Act provides that an employment agreement containing a trial period may be entered into by a small-tomedium sized employer, with a person who has not previously been employed by the employer. A small-to-medium sized employer is defined as an employer who employs fewer than 20 employees.

A trial period clause needs to be agreed on before the employee starts work, be in writing in the employment agreement and can only be used for new employees. It is further important to note that trial periods can only be used for up to 90 days, and if there is a collective agreement that covers the work to be done by the employee, that the collective agreement would prevail. Trial periods can't be extended beyond 90 days.

A trial period clause places restrictions on the employee's rights and this clause, if applied correctly, can prevent an employee bringing a personal grievance for unjustified dismissal at the end of a trial period. Notice of termination under a trial period must also be in accordance with the terms of the employment agreement.

If the above requirements are not met, the trial period will not be effective, meaning the dismissed employee will have grounds for a valid personal grievance.

Probationary periods

Section 67 of the Employment Relations Act 2000 ("the Act") provides that a probationary period must be specified in writing in the employment agreement and that the application of the law of unjustified dismissal applies in the situation where an employee is dismissed under the probationary period.

In other words, the effect of a probationary period clause is limited and an employee under probation generally has the same legal rights and protections as a permanent employee, albeit often with a shortened notice period.

Probationary periods are commonly used in circumstances where a trial period is unable to be used (i.e. where an employee has previously been employed or there are 20 or more employees in the workplace).

The probationary clause does, however, provide employers with some degree of flexibility when hiring a new employee and can also be useful to assess someone's performance, for example if you would like to offer an existing employee a new role but you are not sure whether they have the skills to succeed in that role.

The employer is obligated to put an employee on notice if they have concerns about the employee's performance. The employee should be given the opportunity to respond and to improve their performance over a period of time. The employer is further obligated to supervise and review the performance of the employee accordingly.

The employer also needs to follow a fair process and act in good faith before making a decision to dismiss an employee under a probationary period. Probationary periods do not prevent an employee from raising a personal grievance for unjustified dismissal, which is one of the key differences compared to a trial period clause.

There's no maximum length for probationary periods. This will depend on what is reasonable in your particular situation. A probationary period can be extended (by agreement).

A probationary period could also be added on to a trial period so that when the trial period has expired there will be a further probationary period. But it would have to be fair and reasonable to do so.

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Snippets

TENANTS IN COMMON - WHEN ONLY ONE WANTS TO SELL

Property sharing agreements are becoming more prevalent as individuals seek certainty of outcomes, where unforeseen circumstances intervene after property purchases. The form of property ownership known as 'tenancy in common' is becoming more popular due to this. This form of ownership enables an individual to have control over their share of the property they are a part owner of, to the extent that they can decide who they wish to take over their share in the event they die or for any other reason they choose.

If the owners of a property are tenants in common that wish to go their separate ways, the party wishing to remain as the property owner, on the face of it does not have to agree to sell, thereby thwarting the wish of the other owner(s) to sell. This is where a Property Sharing Agreement ("PSA") is useful. Signed and agreed before the purchase of the property, the PSA provides paths and processes to allow an exit strategy to exist for any of the owners, in the event they wish to exit the property as owner.

The PSA includes details such as what each of the parties contributed, agree what each of them contributed to the purchase price, how much lending was obtained and if the undivided shares are unequal. It also includes who may give notice of wanting to sell, how a price value may be determined, what timeframes are deemed reasonable and what constitutes a net share of the profit to be paid out in the proportions agreed upon.

Our team can talk you through a PSA and have one drawn up to ensure your future planning is safeguarded in the event that property owners decide to go their separate ways.

FAMILY PROTECTION ACT - CLAIMS AND DATES

The Family Protection Act 1955 ("FPA") becomes relevant under either a Will or intestacy (i.e. where a deceased dies without a will in place) in circumstances where a claimant does not consider that they have been appropriately provided for under the deceased's estate. Proper maintenance and support is the test, which is a wide and general phrase.

So, who can make a claim under the FPA?

A spouse or civil union partner of the deceased is at the top of the list. Children (this also includes stepchildren), grandchildren and parents in certain circumstances are also on the list. We are able to advise you on whether you would qualify if you suspect you may have a claim.

Where a claimant wishes to ask the court to enforce the moral duty of the deceased, notice must be given to the executors of the relevant Will via the estate's lawyer within a twelve-month period from the date the Probate is granted by the court in respect of that Will. The required period may be longer should the applicant either be a minor or not have full mental capacity.

The Court has the power to extend the timeline at their discretion based on the circumstances. It is prudent, however, to give written notice of your claim within six months from the grant of Probate. Executors will have been told by the estate's lawyer that if they move to distribute the estate to the beneficiaries inside the six month period, then an executor may be personally liable should a subsequent claim surface.

Our team is able to advise on the full process as a FPA claim unfolds.

WHO'S WHO

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