BEATTIE RICKMAN LEGAL

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NEWSLETTER

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Our Hamilton office has moved to 554 Victoria Street.
All other contact details remain the same.

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Work life and private life – implications of social media

In the last decade the use of social media has exponentially expanded. Social media such as Facebook enable users to interact with large numbers of people, with immediate and permanent impact. Users of social media might assume that their use of sites such as Facebook in their own time has no relevance to their work life; however, the impacts of the use of social media can overflow from a user's personal life to their work life, with serious effects on both employee and employer.

The effects of the use of Facebook in an employee's own time were recently illustrated in an Employment Relations Authority (ERA) decision Blylevens v Kidicorp Limited [2014] NZERA Auckland 373. Kidicorp employed Ms Blylevens as a centre manager. A number of staff and parents made complaints about Ms Blylevens, which Kidicorp investigated.

During the investigation Ms Blylevens sought assistance from an advocate, Ms Rolston. While representing Ms Blylevens, Ms Rolston posted derogatory comments on her own business Facebook page. Ms Rolston made various comments in two separate posts about Kidicorp, including allegations of Kidicorp "removing unwanted staff", "bullying", describing HR as the "vindictive Kidicorp HR Krew" and stating that Kidicorp created a "toxic" environment. Ms Blylevens 'liked' Ms Rolston's posts, and added her own comment to one of them, noting that it was "an interesting article" and "that as a parent looking for childcare it's good to be informed".

Ms Blylevens was identified on Facebook as an employee of Kidicorp, and her Facebook friends

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included other Kidicorp staff and parents. Ms Blylevens' 'like' of the posts ensured that Ms Rolston's derogatory comments were disseminated to a wide audience. Kidicorp had a social media policy that prohibited employees from posting information that could bring Kidicorp into disrepute or that could cause reputational damage. After Kidicorp became aware of Ms Blylevens' actions in 'liking' and commenting on the derogatory posts, an investigation was launched. Ms Blylevens was dismissed for serious misconduct.

Ms Blylevens challenged her dismissal. The ERA found that her dismissal was justified. Ms Blylevens' explanation that her 'likes' did not endorse or support Ms Rolston's derogatory posts was not accepted. The ERA likened Ms Blylevens' actions in 'liking' and commenting on the posts to her standing outside the childcare centre and handing out copies of Ms Rolston's derogatory comments about Kidicorp while telling people "here is an interesting article – it is good to be informed". The ERA had no difficulty in finding that Ms Blylevens' actions breached her employee obligations of fidelity, loyalty and good faith.

This case clearly illustrates the need for employees to be mindful that their use of social media in their private capacity and in their own time may have unexpected implications for their employment. This case also provides employers with some assurance that if an employee is using social media in a way that may damage an employer's reputation, an employer can consider disciplinary action.

Trust law: trustees' duties – are you at risk?

You might have been asked by a friend or family member to be an independent trustee of a Trust. You may also have been appointed as an executor of someone's estate, which will often also make you a trustee of the estate assets.

Trustees have strict duties to the beneficiaries of the Trust. Most duties are contained in the Trustee Act 1956. In certain situations trustees can be held personally accountable for their actions or for failing to act, so it is important trustees understand their rights and obligations.

All trustees must know the terms of the Trust (or the terms of the Will as the case may be), and must ensure the Trust (or Will) is managed in an efficient and economic manner. Trustees should take all precautions that an ordinary prudent business person would take in managing similar affairs of his or her own – a trustee must act with care and diligence. An independent trustee is not a 'rubber stamp', meaning they must not blindly agree with and follow the instructions of the remaining trustees or settlors; trustees must carefully consider their decisions.

Trustees have a duty to make prudent investments. This duty applies to the methods trustees use to make the investment, rather than looking at the actual results of that investment. A failed investment is not necessarily a breach of trust as long as the trustees acted prudently when choosing that investment.

Trustees must be impartial. They must consider the needs of each beneficiary and have a duty to manage the Trust assets in the best interests of those beneficiaries in accordance with the terms of the Trust deed or Will. Trustees must avoid being in a position of conflict between their duties to the Trust and its beneficiaries.

Trustees are accountable to beneficiaries. They must keep proper accounting records and may be required to give beneficiaries information and explanations as to the investment of and dealings with the Trust property.

A breach of trust by a trustee can mean he or she is personally liable to the beneficiaries for any loss caused, particularly if it was an intentional breach of trust, dishonesty or negligence that caused loss. If a trustee can demonstrate that he or she acted honestly and in good faith and that the breach of the terms of the Trust was unintentional on their part, that trustee would not ordinarily be liable to the beneficiaries for the consequences of their breach.

When a Trust enters into a contract with a third party the trustees will typically be personally liable to ensure that the contract is completed. They may have a right to be indemnified from the assets of the Trust (meaning the liability they incur will be paid for from the Trust assets); however they will lose that right of indemnity if they act in excess of their Trust powers or in breach of their Trust duties. In addition to this, any right to be indemnified is only useful if the Trust actually has realisable assets. Recent case law has seen an independent trustee personally liable for Trust IRD debt, as the remaining trustees had fled the country. While the independent trustee had the right to be indemnified, there were no Trust assets left to cover the debt. The independent trustee paid the IRD debt using their own funds.

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Becoming a permanent resident in New Zealand

The process to apply and become a permanent resident in New Zealand can be complex, difficult and expensive for some. Depending on your skill base and financial status this process can be fast-tracked if your skills and investment are sought after.

New Zealand permanent residents are non-citizens who hold a permanent resident visa. A visa is an endorsement given by the New Zealand Government that the non-New Zealand citizen is allowed to enter, leave or stay in New Zealand for a specified time and on specific conditions.

There are three types of visas granted in New Zealand under the Immigration Act 2009. Transit Visas, Temporary Entry Class Visas (consisting of temporary, limited and interim) and Residence Class Visas (resident and permanent resident).

New Zealand permanent residents are not New Zealand citizens and therefore are not afforded all the natural rights New Zealand citizens enjoy, which include standing for public office, being entitled to New Zealand consular protection and never being deported from New Zealand.

The first step towards gaining permanent residency is to be accepted to apply for a resident visa by Immigration New Zealand. The categories that you may apply under consist of:

- **Skilled Migrant Category** - based on specialist skills, qualifications or experience. The person must also be aged under 55 years and meet English language, health and character requirements,
- **Work to Residence Category** - for people that have worked for two years on a work visa, meet health and character requirements and are from an English speaking background,
- **Entrepreneur Work Category** - for people that want to move New Zealand to buy or start their own business,
- **Investment Category** - for people that want to invest a large amount of money in New Zealand,
- **Family Category** - for partners, children or parents of New Zealand citizens or resident visa holders,
- **Samoan Quota Category** - for Samoan Citizens, or
- **Pacific Access Quota** - for citizens of Tonga, Tuvalu or Kiribati.

Once the non-citizen has held the resident visa for a period of two years, and held their resident visa in the last three months consecutively prior to applying, they may apply for a permanent resident visa. The non-citizen must meet criteria confirming that they are of good character, meet any conditions that the resident visa was subject to and have met one of the five commitments to New Zealand criteria (which are; spending enough time in the country, becoming a tax resident, owning a business, investing in New Zealand or establishing a base).

A permanent resident visa holder is entitled to be granted entry permission into New Zealand at any time whereas a resident visa holder is only entitled to apply for entry permission, and the usual rights granted to them in New Zealand (which include: stay in New Zealand indefinitely, work or study in New Zealand, receive free health care etc.) only become effective if entry is granted into New Zealand.

The costs for applying for a resident class visa vary depending on the non-citizen's country of origin and whether the application is lodged in or outside of New Zealand and the category in which the resident class visa is sought. If you have any queries or wish to seek assistance in order to gain residency, we suggest you contact a lawyer with appropriate expertise in immigration law.

The Supreme Court – 10 years on

The Supreme Court, New Zealand's final court of appeal, recently marked its 10 year anniversary. Before 1 January 2004, the Judicial Committee of the Privy Council in London was New Zealand's final court of appeal.

Decisions made in New Zealand Courts before 31 December 2003 still have the right of appeal to the Privy Council. It is for this reason that appeals such as the Teina Pora case are still being heard in London 10 years on.

The Court was established to recognise New Zealand's independence, history and traditions, to enable important legal matters to be resolved in New Zealand's unique context and improve access to justice. The Court will only hear appeals that it considers are in the interests of justice.

The Court was created amid much controversy. There were, amongst other things, concerns that the Court bench would be politically "stacked" and that it would interfere with Parliament's role as the country's supreme law maker (a common criticism of some

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foreign jurisdictions). These concerns appear not to have eventuated.

In fact, the Court has undoubtedly increased access to justice. In the 1990s, less than 10 appeals per year were being heard by the Privy Council. In contrast the Court now hears on average more than 20 appeals per year. In particular, the Court hears a far greater number of criminal appeals than were heard by the Privy Council.

While arguments about whether or not the right of appeal to the Privy Council should have been abolished may no longer be useful, at a recent forum held to mark the Court's anniversary, a number of legal academics met with the current Judges of the Court to critique its performance.

A common thread in the discussion was the suggestion that the Court's decisions be presented with more clarity. Each of the five Justices who hear an appeal may deliver their own judgment. Although the majority wins the day, each individual judgment may have different reasoning, which can make judgments difficult to interpret. It was proposed that the Court issue judgments in majority order and consider single judgments for clarity's sake. On the flipside, it was acknowledged that while these differences of opinion can make interpreting a decision difficult, they can also be useful in future litigation.

The Court's approach to Treaty issues and criminal cases was applauded. In other areas, the Court was urged not to equivocate but to develop the law by elaborating clear legal principles and making clear cut decisions.

Criticism of the Court is the bread and butter of legal academics. Uncertainty about the law is what drives litigants to Court, thus criticism of the Court's performance is inevitable. The Court's relative infancy must also be considered. However, these criticisms should be viewed in the context of the numerous decisions that have been welcomed by the legal profession.

The task for the Court will be to continue to build on and improve its approach in providing clear legal principles and finality in the law.

Snippets

New Zealand's extradition laws – Law Commission review

The Law Commission released its Issues Paper, "Extradition and Mutual Assistance in Criminal Matters" on 2 December 2014, with submissions on the Paper's preliminary proposals open until 2 March 2015.

The Paper examined the Extradition Act 1999 and the Mutual Assistance in Criminal Matters Act 1992 (MACMA), concluding that both need reform to meet the challenges posed by a modern globalised world.

The Paper recommends extradition laws be simplified to a two category approach, with one set of procedures and requirements for New Zealand's closest extradition partners, and another set for all other countries.

MACMA allows foreign countries to request New Zealand's assistance in criminal investigation and prosecution. Paper recommendations include:

- making MACMA more principle orientated and less technical so as to widen the function of this legislation in terms of assisting foreign countries to conduct searches and surveillance under our domestic framework, and
- simplifying the current framework so as to give effect to New Zealand's international commitments.

Traffic law - can you bike home from the pub?

You cannot be charged with a drink driving offence under New Zealand law while riding a bicycle, unless it has a motor. Excess Breath/Blood Alcohol (EBA) charges only apply if you drive or attempt to drive a motor vehicle, meaning a vehicle drawn or propelled by mechanical power (see sections 2, 11 & 12 of the Land Transport Act 1998 [the LTA]). A bicycle without a motor is not considered a motor vehicle (see Lawrence v Howlett [1952]) nor is a bicycle with an electric motor of less than 300 watts (see NZ Gazette 25 July 2013).

However, this is not without risk. While EBA charges can only apply while driving motor vehicles, some other charges, such as careless driving, are not restricted to your activities with vehicles that have motors. Someone cycling home under the influence could be charged with careless driving if it can be shown they have used their bicycle carelessly or without reasonable consideration for other persons (see sections 2 & 8 of the LTA).

If you have any questions about the newsletter items, please contact us, we are here to help.

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