

HOT TOPICS 2015

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TAX & CUSTOMS UPDATE

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WHAT WE WILL COVER

- Legislative changes**
- Tax amnesty**
- Tax cases**
- What's hot at FRCA**
- Customs**

LAW CHANGES 1

Income Tax Act:

Export Income Deduction up - to 50% for 2015

Hotel Investment Tax Incentives

(includes “buying and selling of residential units” and “new apartments”)

FBT not deductible

LAW CHANGES 2

Fringe Benefit Tax Decree:

Accommodation or housing to hotel “executives”

Valuation for “motor vehicle fringe benefit”

LAW CHANGES 3

Capital Gains Tax Decree:

*Sale of shares in a private company for listing on the SPSE
(reorganising for purposes of listing)*

*Disposal of “principal place of residence” or “shares in a company”
by way of “love and affection”*

LAW CHANGES 4

Stamp Duties Act:

Leases for “commercial purposes” now depend on “annual gross turnover” - ?? [\$0-1,000]

[“tourism” leases remain at \$1,500]

“non-residents” - 10% (transfers) 5% (mortgages)



**Hmmm, a tax
amnesty,
you say?**

TAX AMNESTY 1

Yes, FRCA has the right to – s.48, TAD

What is covered by the amnesty?

- *penalties on tax assessed as at 31 December 2014*
- *penalties on income from “offshore assets”*

TAX AMNESTY 2

Offshore Assets Disclosure - things to think about:

- *disclosure of all offshore income*
- *Exchange Control Act implications – RBF now on board*
 - *“will not be taking legal action”*

Take advice before you disclose.

TAX CASES 1

Tax Tribunal – 7 rulings (cf 22 in 2013) (3 procedural)

Tax Court – 5 rulings (3 appeals from Tribunal – all affirmed)

TAX CASES 2

Company R v FRCA

Non-resident dividend withholding tax (FRCA changed position in 2009)

Held:

- *A tax demand is a tax assessment*
- *A tax clearance is not a tax assessment*

“WACKY” TAX CASES - 1

A Freight Services Company v FRCA

- *Taxpayer re-sells freight capacity on ships to import/export customers*
- *Taxpayer zero-rates this freight capacity as “supply of transport services relating to international carriage”*

Held:

- *Cost of freight capacity to freight forwarder can be zero-rated; but “mark up” can not be zero-rated*

[VAT 101 – VAT is a tax on supply of goods and services, not a tax on “mark-up”]

“WACKY” TAX CASES - 2

A New Zealand IP Holder v FRCA

- *NZ resident taxpayer had registered IP in several countries (including Fiji), licensed to Fiji manufacturer*
- *Taxpayer sold IP to a Fiji company*
- *Issue – is this a “Fiji asset” for CGT purposes?*
- *FRCA – yes, because it just sort of feels like it*
- *Taxpayer – IP does not have necessary connection, not a “Fiji asset”*

“WACKY” TAX CASES - 2 (Cont.)

A New Zealand IP Holder v FRCA

Held:

- *IP was a “Fiji asset” (since it was licensed to a Fiji branch, the NZ owner had an “interest” in it as a “capital asset of a fixed place of business” in Fiji)*

Consequences:

- *If IP is licensed to a Fiji business/used in Fiji (?) – offshore IP owner can be taxed in Fiji when it is sold*



at FRCA

CUSTOMS



WHAT IS CUSTOMS DUTY?

- **Tariff or tax imposed on goods when goods are transported across international borders**
- **One purpose is to control flow of goods especially restricted or prohibited goods**
- **The other obviously to collect revenue**

CUSTOMS DUTY

The charging section is s. 3 of the Customs Tariff Act imposing on:

(a) on imported goods -

- *fiscal duty;*
- *import excise duty; and*
- *value added tax; and*

(b) on exported goods produced or manufactured in Fiji -

- *export duty,*

at the rates specified in Schedule 2.

ISSUES ARISING FROM CUSTOMS DUTY

Common issues are:

- classification of goods
- availability of a concession
- valuation of goods (buying agent commission)
- recovery of duty

RECOVERY OF CUSTOMS DUTY

- Demand
- Customs lien over goods
- Garnishee order
- Amended assessment

CUSTOMS CHALLENGE PROCEDURE

**Challenge on the amended assessment must be filed with
Customs Court of Review**

- **15 working days from the Short Payment Advice or**
- **3 months from date of payment “under protest”**

Baravi Boatcruisers v Comptroller of Customs

(One lapse can cost your duty concession)

- Yacht imported under a duty concession
- Yacht used once for non-concession purposes
- Yacht in the process of being sold- FRCA claims breach of duty concession terms and detains the yacht for full payment of duty

Held:

- Terms of the concession breached
- FRCA entitled to detain unless duty paid



Finest Liquor v Comptroller of Customs - 1

How far back can Customs go on short payment advices?

- In August 2012 Customs claimed short payment of duty during the period Jan – Dec 2011 and issued short payment assessment (SPA)
- Importer relied on one-year time limit for 5/9 entries (s.95).



Finest Liquor v Comptroller of Customs - 2

- Court of Review said: SPA's can go back 5 years because records must be retained this long
- Now locked this in with a Budget amendment



CONCLUSIONS

- **Tax amnesty – are you now safe for Exchange Control?**
- **Tax clearance is not an assessment**
- **Zero-rating**
- **Customs getting more aggressive**
- **Importers now exposed to longer periods for SPA claims**
- **One non-concessionary use of your goods can lead to loss of Customs concessions**

... from FRCA



LAND SALES UPDATE

Emily King
Associate

Overview

- Headlines
- Current position
- New restrictions
- Exceptions
- Penalties
- Workarounds
- What's hot at the
Department of Lands



Headlines

- unexpected amendments to Land Sales Act – aimed at Asian residential land buyers?
- minimal consultation – not thought through
- some unexpected consequences and gaps – it's not just urban land that is affected
- need to understand law changes if you are
 - non-resident (new definition)
 - selling to or buying from non-resident

Land Sales Act 101

- regulates (previously taxed) non-resident land dealings
- non-residents can't deal with each other without consent
- non-residents can buy up to one acre (total) from residents without consent
- must get consent before you contract (there are workarounds)
- much-litigated law when land market is rising
- applies to freehold/State land (not *iTaukei*/native land)

What's new – 1

Who is now a “resident”?

- Fiji citizen
- company controlled by Fiji citizens
- Fiji citizen trustee of trust and who earns > 15% income of trust (?)
- RBF-licensed financial institution
- foreign government or international organisation

“**Non-resident**” – anyone else

What's new - 1

- State or freehold land *for residential purposes* within any town/city boundary shall not be sold, transferred or leased to a non-resident
- non-residents owning any vacant land *for residential purposes* (**urban or otherwise**) must complete **\$250,000 building** within two years
- existing non-resident owners of vacant land must complete \$250k build by **31 December 2016**
- penalty of 10% of purchase price for every 6 months you are late completing

So get building...

[or talk to us!]



What's new - 2

Non-residents:

- can buy freehold/ State residential land within town/city boundaries for **unit/strata titles**
 - can still buy, take, transfer or lease residential freehold or State land within city/town boundaries for:
 - acquisition of strata or unit title
 - industrial or commercial purposes
 - residential purposes in integrated tourism development (eg Denarau?) or
 - operation of a hotel
- [but they still have to build on it within 2 years]**

What's new - 4

Exceptions

- tenancy for < 5 years to a non-resident
- sale, transfer or lease to non-resident *immediate family member*
- gifts/bequests to a non-resident and
- sale agreements signed pre-21 November 2014 if completed before 31 March 2015

But

- everyone has to build within two years
- you still have to apply for consent under old rules

What do the new restrictions mean ?

No-one is sure...

- *for residential purposes* – means land zoned residential? or any land resided on (eg farmland)?
- no exception for multi-lot owners/developers (non-resident developers must build \$250k house on every vacant lot they own)
- no discretions or waivers available



If you breach the new laws

- Fine of up to F\$100,000 (or up to 5 years in prison)
- Could also apply to the seller (!) because sale of vacant land is on condition that buyer builds in 2 years. If buyer does not build, who has committed the offence –??!!
- So a risk-averse seller should sell **on condition that** non-resident buyer will comply with s.7A and seek indemnity if buyer doesn't (?)
- Penalty of 10% of value every 6m

But wait...there's more

Stamp duty for non-residents

Punitive new stamp duty rates affect non-residents dealing in land *for residential purposes* (including TLTB land):

- Land transfers: 10% of sale price (residents 3%)
- Mortgages: 5% of borrowed sum (residents 1.75%)

Combined with 10% CGT – complicates land transactions for non-residents, significant disincentive to buy land in Fiji.

The gaps

Are there “workarounds?”

- If land is owned by resident company, sale of **shares** to non-residents don't appear to breach the law [non-resident can't buy land – can still buy shares]
- Transfer or lease to immediate family to buy another two years to build? (cheaper than paying 10% every 6 months)
- Easy to set up “resident trust” with Fiji citizen trustee earning 15% income to own non-resident land
- Build \$20,000 house now, then transfer it to non-resident – so land not “vacant”, no \$250k build needed

Opportunities for creativeness!

What's next?

Further changes?

- hard to believe that there won't be some law changes to give relief to *bona fide* non-resident landowners/developers
- building in Fiji is hard enough – planning consents alone take months, completing in two years...?
- many unique situations the law doesn't anticipate
- So, hope for the best, plan for the worst...?

What's hot at Lands...

- New SOP announced (but not made public yet; “still being fine tuned”)
- Aim: improve processing of Land Sales Act and State Lands Act transfers to 10 working days (we are told) (currently 8-10 weeks)
- Amnesty on interest for all unpaid rental.
- Amnesty from 1 January – 30 June 2015 but unclear as to parameters of waiver

WATCH THIS SPACE?

Conclusions

- New rules make land dealings for non-residents more complex and confusing (including to us)
- Some “workarounds” available but this adds more complexity
- iTaukei land simpler to deal with
- Punitive stamp duty on non-residents buying and borrowing for residential land (including TLTB leases) confuse foreign investors
- Regulation of non-resident dealings in State/freehold land are slow and bureaucratic now – these changes make things worse
- Let’s hope the new SOPs can cope!

**SOCIAL MEDIA AND
THE LAW**

Nicholas Barnes
Partner

WHAT WE WILL COVER

- Social media and defamation
- Social media and employment
- Contracting through social media
- Copyright and social media

THE NUMBERS

- as of January 2015 - **2.078 billion** active social media accounts
- **222 million** new accounts in 12 months (608,000 new accounts every day)
- Australia, NZ, Pacific – nearly 16 million Facebook members.
Nearly 200,000 are from Fiji

WHY DO WE CARE?

- **Everyone – employees, suppliers, customers, competitors, friends, enemies – in a virtual universe**
- **Content spreads virally – reputations are made and broken quickly**
- **Everything is done informally and at speed – click and it's too late (#hasjustinlandedyet)**

**DEFAMATION
AND
SOCIAL MEDIA**

A DEFAMATORY STATEMENT

- lowers a person in the estimation of right thinking members of society generally
- causes him/her to be shunned or avoided or
- exposes him/her to hatred, contempt or ridicule, or
- disparages him in his/her office, profession, calling, trade or business.

Not just media – **any person can defame another person, including on social media, anywhere**

A tweet can defame - *Cairns v Modi* [2012] (UK)

Indian cricket official Lalit Modi tweeted :

[NZ player] *Chris Cairns removed from the IPL auction list due to his past record of match fixing. .. done by the Governing Council today.*”

Modi then told online cricket magazine Cricinfo:

We have removed [Cairns] from the list for alleged allegations [sic] as we have zero tolerance of this kind of stuff.”

**Cairns sued in the UK (where the tweet was widely read.
Damages: £90,000.**

Speaking up for your dad

Mickle v Farley [2013] (Twitter and Facebook) (NSW)

- Farley (school principal's son) posted defamatory statements accusing Mickle (teacher) of being the cause of his father's resignation. He ignored other readers' warnings about defamation.
- Court awarded Mickle damages AU\$85,000 plus **aggravated damages** AU\$20,000.

What can you say on Tripadvisor?

- Ashley Inn (USA) sued “12Kelly, for posting their hotel was “nasty”, employees “high or drunk”, receptionist “was having phone sex” and owner smoked weed” (case dismissed under media shield laws)
- Two cases in US and Canada of hotels suing guests who posted about bedbugs. No rulings yet.

Tripadvisor 2 – some further thoughts

- **As a hotel/restaurant/attraction**

You sign a waiver of your right to sue Tripadvisor if you get a bad review on its website.

- **As a guest or critic**

Treat your Tripadvisor posts with care. Tripadvisor terms may not protect you from being sued by a suit from the hotel owner!

RECENT DEFAMATION AWARDS - FIJI

Gosai v Patel [2012] - \$70,000

- defamatory statement made during Nadi Town Council meeting (broadcast on TV)

Trade Air Engineering v Mechanical Services Ltd [2012] – \$100,000

- competitor paid damages for defamatory statements published in business magazine.

More high-flying...

Tandem Skydive v Tupek [2014] - \$85,000

- Tupek - former employee of Tandem
- after his employment ended, Tupek circulated a letter to government departments alleging Tandem engaged in “numerous, illegal, criminal and highly dangerous activities”
- Tupek posted similar comments on a website
- Tandem claimed business losses of \$230,000 from lost bookings (Judge thought this was exaggerated) and difficulty in hiring staff

Conclusions:

- No social media defamation cases in Fiji yet – but damages could go as high as *Mechanical Services* [plus your lawyers' fees]
- Anyone can be sued for defamation, not just the media
- Normal defences (justification, fair comment, privilege) apply to social media defamation – but these can be hard defences to run
- Defamation on social media can circulate faster – greater damages

SOCIAL MEDIA AND THE WORKPLACE

Some issues

- Can your employee criticise you on her own Facebook page?
- Can you dismiss an employee who criticises your customers on his Facebook page?
- How do you deal with an employee who posts about/bullies other employees on Facebook?
- How important is it to regulate social media behaviour under your employment contract?

Little v Credit Corp Group Limited [2013] Australia

- Employer dismissed employee for criticising customer and making sexually suggestive comments about a new employee.
- Employee claimed the right to his own Facebook opinions; he did not identify himself with his employer on Facebook (Facebook profile: “dinosaur wrangler at Jurassic Park”)
- Dismissal upheld: Breach of employer’s Code of Conduct and breach of “common sense” standards of behaviour.

Little v Credit Corp Group (cont).

Commission said even if employer had no written policies it would not matter:

One hardly needs written policies or codes of conduct to understand and appreciate that, firstly, the kind of sexual comments made about the new employee were grossly offensive and disgusting and were more than likely to cause hurt and humiliation.

[but note – it's always better to have a policy, to avoid doubt]

Adams v Wellington Free Ambulance Service Inc (NZ, 2010)

- Adams wrote derogatory statements on Facebook about co-worker. Co-worker complained. Employer dismissed Adams for workplace bullying.
- Dismissal upheld. Tribunal found Adams's Facebook interactions
 - were “of legitimate concern to her employer” and
 - “entitle employer (even obliged employer, if a worker's health and safety is affected) to investigate problems between co-workers
 - “were unprofessional in the extreme”.

Not everything is dismissable

Taylor v Somerfield (2007, Scotland)

- Employee posted a video on YouTube showing two colleagues hitting each other with plastic bags. He was dismissed for bringing employer into disrepute.
- Tribunal did not accept sufficient grounds for dismissal:
 - video clip got only 8 hits (!)
 - no evidence of loss to employer.
- Employee compensated for unfair dismissal

LEARNING FROM THIS

- **Have a clear policy in place** regulating employees' actions on social media that impact the business
- **Take care** when disciplining or dismissing a worker based on social media content. Consider:
 - the content itself (i.e. derogatory comment on work, or private picture of worker passed out drunk?)
 - number and type of people who saw it (public Twitter account or rant on FB to 6 friends?)
 - fair assessment of consequences to your business, workplace relations, clients (if not serious, not disciplinable/dismissable)

**CAN YOU CREATE A
CONTRACT THROUGH
SOCIAL MEDIA?**

- The short answer is yes
- Contracts can be oral or written. They only require
 - Two parties
 - Agreement on certain terms
 - Intention to be legally bound
 - Consideration (ie exchange of value)

Facebook or Twitter can deliver all of these (in some cases)

BEWARE ONLINE MESSAGING

CX Digital Media, Inc. v. Smoking Everywhere, Inc. (2011, US)

- CX sued SE for damages based on an agreement made entirely through instant messages.
- SE argued online conversation lacked “specificity and directness” needed to form a valid contract.
- Court held that IM conversation was a valid contract.

BE CAREFUL WHAT YOU SAY

(in the US, anyway)

Augstein v. Leslie (US, 2011)

- Leslie lost Macbook while in Germany, published a video on Youtube (and posted on Twitter and Facebook) offering a USD1 million reward
- Augstein found Macbook and claimed reward. Leslie refused.
- US court found valid contract – USD1.2m in damages

[Not sure an English court would agree]

SOCIAL MEDIA AND COPYRIGHT

COPYRIGHT – THE BASICS

- **Copyright** is a **property right** which exists in **original works** in writing, picture, audio visual recordings, computer programmes, etc
- Copyright owner has **exclusive rights** to the work
- So if another person uses the work without permission (licence) there is an infringement (potentially).

INFRINGEMENT ON SOCIAL MEDIA

- Social media is about “sharing” content
- Sharing is OK if it is clear whose content it is (eg “share” on Facebook or “re-tweet” on Twitter)
- Cutting and pasting/downloading content without permission is infringing – **even if you attribute**, you are infringing
- Just because it’s online, doesn’t mean there’s a licence to share it
- Using a picture or newspaper article requires a licence from copyright owner

[For ordinary infringements – no or low damages – so no-one sues – but never rely on this]

Seafolly Pty Ltd v Madden – [2012] FCA 1346

- Madden – swimsuit designer
- She copied pictures of Seafolly swimsuits onto her FB page beside pictures of her own swimsuits captioned: “*The most sincere form of flattery?*” and claimed Seafolly copied her designs
- Seafolly sued Madden, including for copyright of the pictures she had copied
- But copyright belonged to photographer (!)
- No loss could be proven to photographer – no damages.

HOWEVER, WHEN THERE'S A BIG LOSS...

Daniel Morel v Agence France Presse (AFP) and Getty Images

- Morel uploaded award-winning photos of Haiti earthquake onto Twitpic
- Another photographer claimed ownership and sold them to AFP (worldwide news agency) AFP distributed the pictures
- Morel sued AFP for infringement. Damages **USD1.2 million**



So what can I do if I want to paste a picture or news article online?

- If it's yours – go ahead; you own the copyright in the work
- If it belongs to someone else – get permission!
- If reproducing for commercial use – get an indemnity from the copyright owner (don't make AFP's mistake)
- If > 50 years old copyright may have expired – so go ahead – it's in 'public domain'
- If you're not sure – best not to use the content at all.

So how does Facebook do it?

Answer: THEY HAVE GOOD LAWYERS

Read the fine print of your FB terms:

You grant [Facebook] a non-exclusive, transferable, sub-licensable, royalty free, worldwide licence to use any IP content that you post on or in connection with Facebook (IP Licence). . .

FINAL THOUGHTS

- For employers and employees, social media creates big legal issues (employment, defamation, harassment)
- You can be exposing your business to legal action without knowing it (copyright)
- You can be making a contract you didn't think you were making
- And finally – **THINK BEFORE YOU CLICK**

COMPANIES BILL 2015
aka “Groundhog Day”

Richard Naidu
Partner

Where this talk is going

- Key changes in the Companies Bill
- What happens to my existing company?
- Foreign companies
- Forming a new company
- Managed investment schemes
- Some thoughts

What's different from 2011?

- Not a lot
- Companies Registry – still in a state of disarray – can't handle the old law, how will it handle a new one?
- It's a Bill – you can make submissions!
- Simplicity is critical – understanding, precedents
- Did we need a “home-grown” law?

Companies Bill headlines

- 752 sections in 46 Parts.
- It will repeal and replace:
 - Companies Act cap 247
 - Capital Markets Decree 2009
 - Unit Trust Act cap228
 - Registration of Business Names Act Cap 249

Key changes - 1

MUNRO LEYS

Companies Act [Based on NZ 1955 law]	Companies Bill [based on “corporations law”]
Regulates private, limited by guarantee, foreign, NL companies	Regulates “small” “medium” and “large” private companies, public limited companies, unit trusts, managed investment schemes
One regulator (Registrar of Companies)	Two(three) regulators – Registrar and Reserve Bank of Fiji (capital markets) and Ministry of Justice (liquidators and auditors)
Private: minimum 2 members, 2 directors (one resident)	Minimum one member, one(resident) director
Other than private: minimum 7 members, 3 directors (2 resident)	No change from Companies Act
Share buybacks/reduction of capital need Court approval	Share buybacks, reduction of capital can take place (as long as solvency preserved)

Key changes - 2

MUNRO LEYS

Companies Act	Companies Bill
Relatively few prescribed directors' duties (common law)	Stricter prescription of directors' duties (eg promote success, exercise independent judgment, use reasonable care and skill, not to accept third party benefits, etc)
	New "takeovers code"
	All capital markets laws included (no Capital Markets Decree 2009)
More relaxed rules about auditors, receivers, liquidators	Auditors and liquidators must meet certain conditions, be registered with Ministry of Justice
Memorandum/Articles of Association	No Memorandum of Association (no need to prescribe what coy may do) just Articles of Association to regulate internal management

Key changes - 3

MUNRO LEYS

Companies Act	Companies Bill
Share Premium Reserve and Capital Redemption Reserves	Such reserves abolished (unnecessary)
	Regulation for managed investment schemes (ie money paid for rights, used for common purpose, no day-to-day control over enterprise)
Statutory demand for indebtedness of \$100 for creditor's winding up	Increased to \$10k and proceedings required to conclude within 6 months
Common seal	No common seal required
	Regulation of director meeting on use of technology, quorums, circular resolutions

Directors' duties

- duty to act within powers
- duty to promote the success of the company
- duty to exercise independent judgment
- duty to exercise reasonable care, skill and judgment
- duty to avoid conflicts of interest
- duty not to accept benefits from third parties
- duty to declare interests

What happens to my company? – 1 (including foreign/branch cos)

- Day 1 – not very much – deemed registered
- Private company: 3 years to change name to [____] (Pte) Limited
- Memo of Association deemed part of Articles of Association
- Capital – Share Premium Reserve deemed part of paid-up capital
- Accounts – where y/end is < 1 year from commencement date, financial reporting under (existing) Companies Act acceptable
- Existing auditor may remain (but must be registered within 12 months)

What happens to my company? - 2

- Financial reporting:
 - public companies
 - Small Private Company (consolidated revenue) < F\$5m (based on FAS) – no reporting (unless directed)
 - Medium Private Company – F\$5-20m – *pro forma* financial statements
 - Large Private Companies (consolidated revenue > F\$20 million) – full reporting

Foreign (ie branch) companies

- Apply for registration within 28 days of establishing a place of business and must have a FIRC to carry on business (!)
- must have a local agent [who is *answerable for the doing of all acts, matters and things* required of the Foreign Company]
- must file annual financial statements

Forming a new company

- Standard form Articles set out (may be varied)
- Simpler in some respects (*eg* no authorised/paid-up capital, no Memorandum, etc)
- Generally not difficult to form a company (but dealing with the bureaucracy another story – FIRCs, TINs...)

Managed investment schemes 1

- A scheme where:
 - People contribute money to acquire rights
 - Contributions are to be pooled or used in a common enterprise to produce financial benefits for members
 - Members do not have day-to-day control over operation of the scheme
- A time share scheme

Managed investment schemes 2

- Unit trusts will become MISs
- Not clear whether Bill will govern pre-Bill MISs
- Not clear what this will (or is intended to) cover:
 - holiday credit schemes (eg Wyndham – offshore based)
 - pooled accommodation revenue (eg Radisson, Sheraton Villas)
 - villa management scheme (eg Hilton)?

Some considerations

- Enforcement – how serious are the implications?
- (just be honest and fair!)
- Who will administer all of this?
- Who will learn all of this?
- When do we start?
- Precedents

What can you do about a bill ?

- Standing Committee on Justice Law and Human Rights must scrutinise the Bill and report to the House of Representatives
- Important to make your views known to the Committee (you never know...)

EMPLOYMENT LAW

LATEST DEVELOPMENTS

Jon Apted
Partner

What will we cover?

- **Significant 2014 cases:**
 - Redundancy
 - Probation
- **Recurring General Issues: minimising risk and best practice**

REDUNDANCY

Recent case:

*National Union of Hospitality Catering & Tourism Industries
Employees v Tradewinds Hotel and Convention Centre [2014]
FJHC 66, ERCA 02 of 2012 (17 February 2014)*

Redundancy 1:

Case study

- Hotel closed for upgrading – expected to take 12 months
- Management identified 10 workers for redundancy - including 9 Union members
- Consulted with Union at a meeting
- Agreement reached on 9
- Union official attended at hotel to give out notices to the 9 members

Redundancy 2:

Case study

Surprise!

- Workers protested
- Union reports dispute under ERP
 - claims can't reinforce redundancy if the situation is only "temporary"
 - says its never signed any agreement

Redundancy 3:

Case study

Lengthy hearing took place in ERT

- Employer's managers had to fly in from overseas because had been transferred
- Each staff member had to give evidence

Redundancy 4: ERP

ERP – Part 12: sections 106-108

Section 107 – procedure

Section 108 – compensation



Redundancy 5: ERP

Definition:

“redundancy” means –

- “no longer being needed at work”
- “for reasons external to a worker’s performance or conduct”
- “pursuant to the reasons and processes in Part 12”

Redundancy 6: ERP

When does section 107 apply?

Applies when the employer “contemplates termination of employment by redundancy of workers for reasons of an economic, technological, structural or similar nature”:

“**economic**” – for profit.

“**technological**” – “concerning the use of technology or information technology”.

“**structural**” – way that an entity is “organised, managed or administered.

Redundancy 7: ERP

What does section 107 require?

- information to be provided
- consultation to take place

Redundancy 8: ERP

When information must be provided? To whom? When?

- Must provide **workers**, their **representatives** and the Permanent Secretary not less than 30 days before carrying out the terminations with “relevant information” including –
 - reasons for contemplated terminations
 - numbers and categories of workers likely to be affected
 - period over which terminations are intended to be carried out

Redundancy 9: ERP

Who must be consulted? When? What about?

- must give the workers **or** their reps
- an opportunity for consultation
- as early as possible
- on measures to be taken to avert or minimise terminations and
- on measures to mitigate adverse effects
 - e.g. attempts to find alternative employment or retraining
- Note – only “consultation” – not agreement.

Redundancy 10: ERP

Remember

- **Information** to be provided to worker **and** representative and Permanent Secretary
- **Consultation** with worker **or** representative



Redundancy 11: Common law

Additional requirements

“Common Law” [implied requirement from cases]

- redundancy must be “genuine” or *bona fide*
- “consultation” must be “genuine”/open-minded

Redundancy 12: Tribunal decision

- In *Tradewinds* case – ERT finds employer complied with section 107
- there were genuine redundancies even if hotel re-opened relevant facilities
 - finds agreement not necessary, but in this case Union agreed

Redundancy 13: Appeal decision

And then...

Union appealed to Employment Relations Court

- because it can!

Redundancy 14: Appeal decision

Hooray!

ERC upheld ERT

- emphasised redundancies can be enforced for temporary situations so long as genuine decision
- pointed out economic difficulties usually must be viewed as temporary. If they were regarded as permanent, then it would be better to shut the business
- confirmed no agreement required

Redundancy 15: Take Home

- Follow process and document fully when carrying out redundancies
- Provide information in writing (as well as orally)
 - letter should go to each worker, Union and Permanent Secretary
- Work out consultation strategy to cover unionised and non-unionised
- Document consultation and any agreement

Redundancy 16: Redundancy

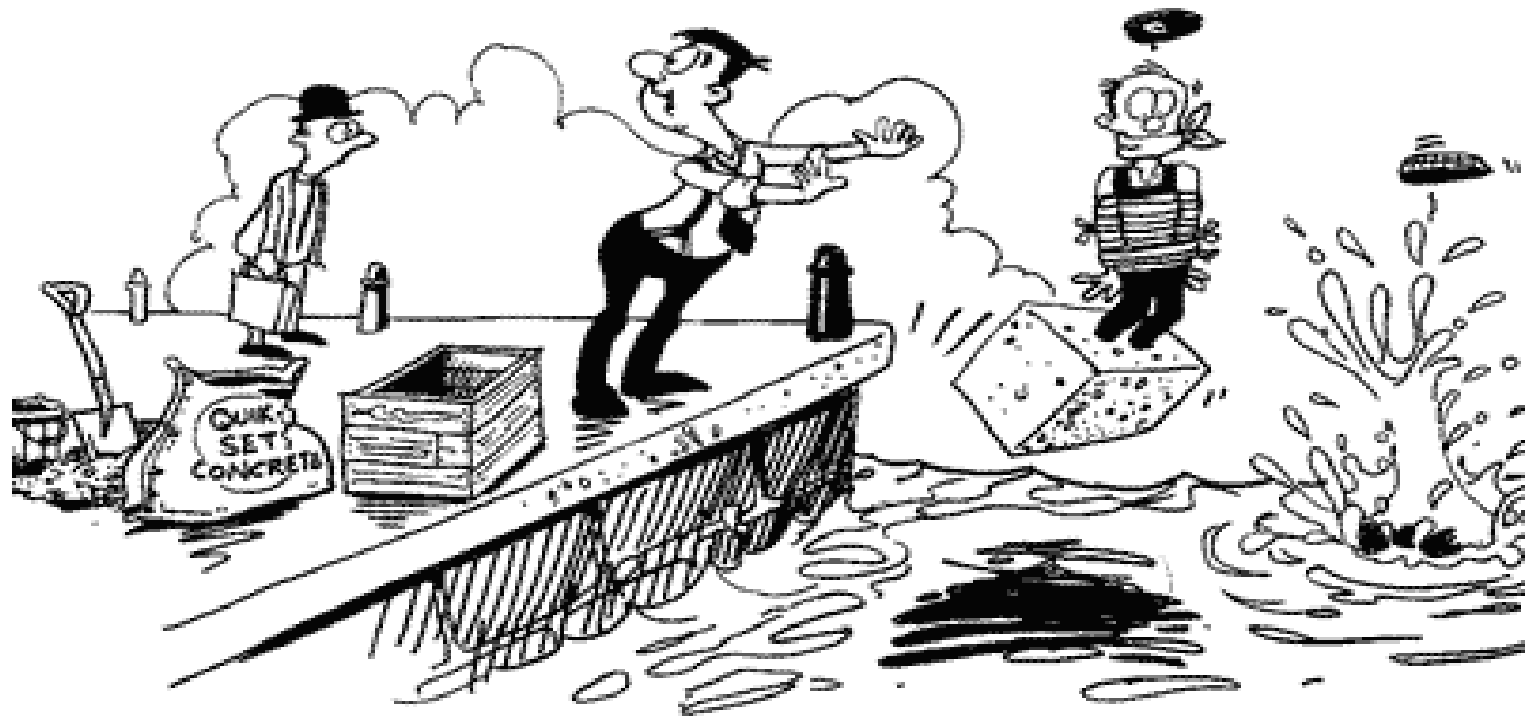
- Consultation
- Ways to avoid
 - redeployment?
 - reduced hours?
- Ways to mitigate
 - retraining
 - job search assistance?
 - counselling
- Anticipate requests before consultation

Redundancy 17: Redundancy payments

- **At least** one week's pay for every completed year of service
- Remember it's a minimum.

MUNRO LEYS

"... I THINK I CAN HONESTLY SAY
THAT I'VE NEVER HAD ANY PROBLEMS
OVER REDUNDANCY PAYMENTS..."



PROBATION

Recent Case:

*Cross v Speedy Hero
Development Ltd*
[2014] FJCA 23



"Where do I see myself in five years? Well, if I make it through this day ... "

Probation 1

Case study

- Provided for 3 month probation period (20 October)
- Worker did not come to Fiji and start until 14 August
- Worker dismissed for non-performance on 3 November
- Employer said dismissed within 3 month probation period calculated from 14 August
- Said it had never given confirmation letter

Probation 2

Case study

Court of Appeal – (overturning High Court)

- No
 - contract must be interpreted according to words used
 - no provision for extension of probation period
- No need for confirmation letter
- Probation period had ended by time of dismissal

Probation 3

Case study

This decision consistent with
Suva City Council v Koroi [2013]
FJCA 97

Court of Appeal in that case also
said Employer must define goals
and give feed back during
probation



"Congratulations. I hear you passed
your first month's probation."

Probation 4

Take Home

- Draft probation clauses in contracts carefully
- Reserve a right to extend probation in employer's own discretion
- Include a clause saying that probation is deemed to continue until confirmation is given
- Have a proper procedure for managing probation
- Follow and document the process – especially if you think you are unsure about the suitability of a worker
- Rule of thumb – at least 3 “sessions” before final decision
- Clearly define when final review might take place – at or after the end of probation

GENERAL ISSUES

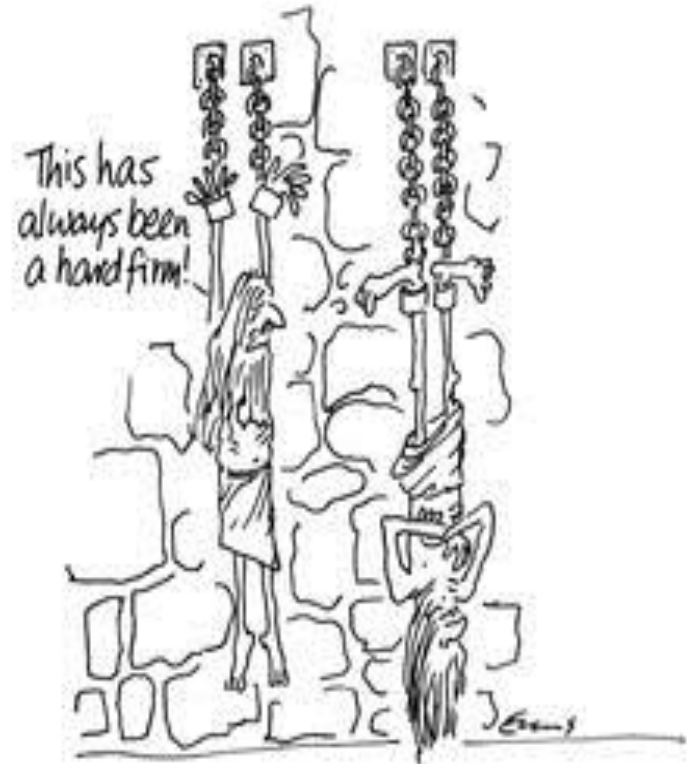
- Discipline
- Constructive Dismissal
- Abandonment of Employment
- Wage regulation issues
- FNPF/PAYE on bonuses, incentive payments, commissions, tips etc.
- Independent contractors

General Issues 1

Discipline

Discipline and dismissal – cause of most ERT litigation

- ERP system now makes it easy for workers to lodge grievances
- Essential to follow proper processes and have evidence that you did



**MAKE SURE TO FOLLOW THE
WORK GRIEVANCE PROCEDURE.**

General Issues 2

Discipline

- Current ERC approach is that summary dismissals do not require an employer to follow process
- However, ERT still requires fair process to be followed
- ERT is probably right this time
- Best practice follow fair process



General Issues 3

Discipline

What is a fair process?

- Fair process in Fiji – follows criminal process
- Two separate issues
 - guilt of misconduct
 - penalty (after mitigation)
- Must be separately considered
- Possible to do both at one hearing but risky

General Issues 4

Discipline



Principles

- presumption of innocence
- “investigation and hearing may be combined but if possible – keep separate
- every allegation and adverse piece of evidence on which employer relies, must have been put to worker for his or her response
- original evidence if possible should be put to the worker

General Issues 5

Discipline

- ample opportunity must be given to worker to obtain evidence to show innocence
- employer must keep open mind
- employer must follow up on reasonable points raised by worker

General Issues 6

Discipline

- Employer must be satisfied on balance of probabilities that worker was guilty of misconduct alleged
- Shifting standard – the more serious an allegation, the higher the proof required as more serious misconduct is considered more unlikely
- Take time to consider

General Issues 7

Discipline

- If guilt is found – allow for “mitigation”
- Worker’s opportunity to seek mercy
- You should already know worker’s record

General Issues 8

Discipline

- Test for dismissal – in all the circumstances, can Employer place trust and confidence in worker to perform contract as required in the future?
- Long clean record – and relatively minor offence – may be reason for lesser penalty

General Issues 9

Discipline

- Be careful zero tolerance policies do not mean worker must be dismissed
- They mean breach must be taken seriously
- Must still consider all the circumstances

e.g. the obscene email case

General Issues 10

Discipline

Other common issues

- Be careful with lesser offences – objective: no longer to punish but to encourage performance
- Condonation
- Consistency

General Issues 11

Discipline

Additional requirement: implied term of fair dealing.

Employer must treat worker fairly and with appropriate respect and dignity in carrying out the dismissal

- harsh and humiliating treatment forbidden
- applies throughout disciplinary process

General Issues 12

Discipline

Examples of fair dealing:

- Deliver communications personally
- Avoid unnecessary embarrassment or distress with notices, etc. (eg. case of threat to daughter)



General Issues 13

Discipline

Criminal Offences

- Deal with discipline before reporting the matter to the Police
- Avoid using technical criminal law terms “theft”, “stole” etc. if you can

General Issues 14

Discipline

- Golden rules
- Take the time!
 - Record! Record! Record!
 - When in doubt, call your lawyers!

General Issues 15

Constructive Dismissal

- When worker resigns upon request of employer or in response to breach of fundamental term of employment



General Issues 16

Constructive Dismissal

- Be careful about asking for resignations
- Breaches of fundamental terms may include –
 - ongoing harassment/bullying
 - failure to address workplace issue
 - pay issues
 - hours or transfer issues if not covered by contract

General Issues 16

Abandonment

- Usually covered in a contract or manual
- Courts still require some process to be followed
- Do not just act on expiry of period
- Make reasonable attempt to contact and “hear” worker before decision

General Issues 17

Wages Regulation

- Be aware of Wages Regulations Orders that affect your business
- These affect every “worker” who earns \$250 or less per week (without taking into account allowances, bonuses, overtime , additional payments
- You can’t get out of it by calling remuneration “salary”

General Issues 18

Wages Regulation

- Wages Regulation Orders regulate rosters, days off and overtime pay calculations
- Breaches can be very expensive

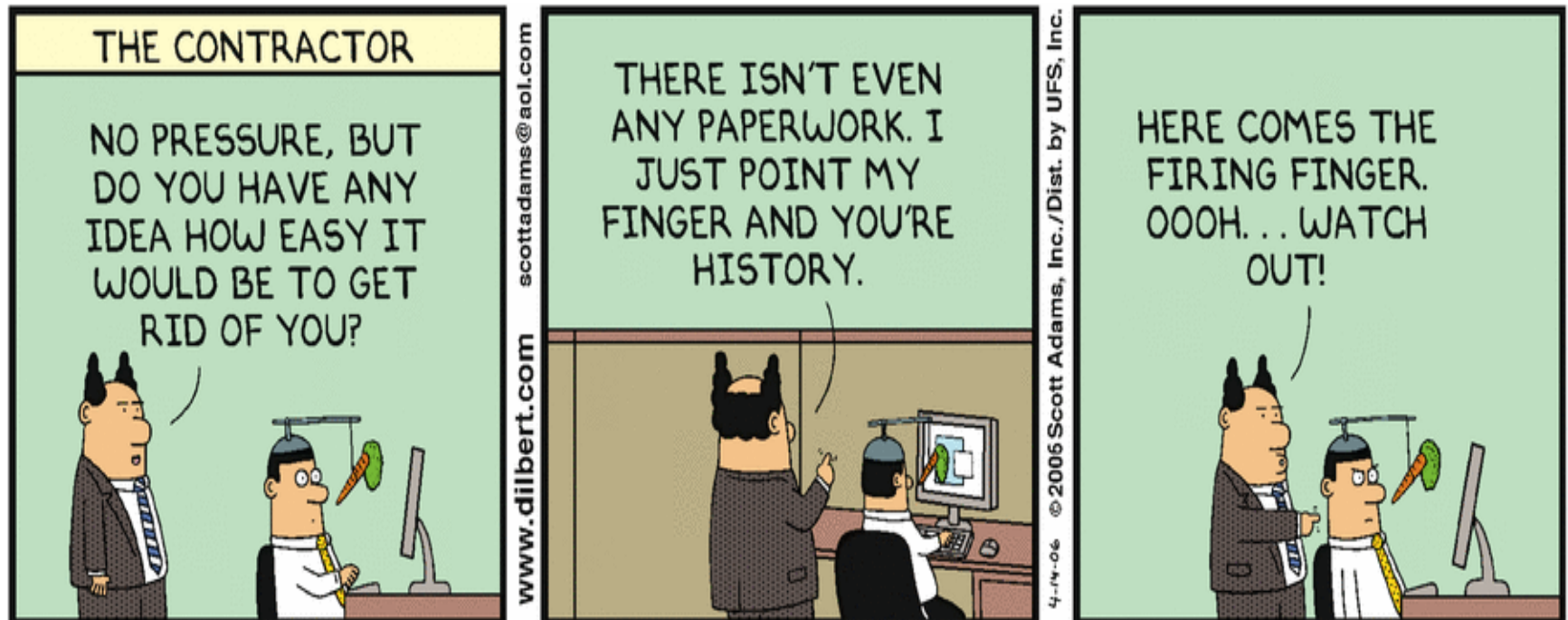
General Issues 18

FNPF/PAYE

- Reminder: FNPF and PAYE are payable on all worker's income – not just basic salary
- New penalties can make it very expensive

General Issues 19

Independent Contractors



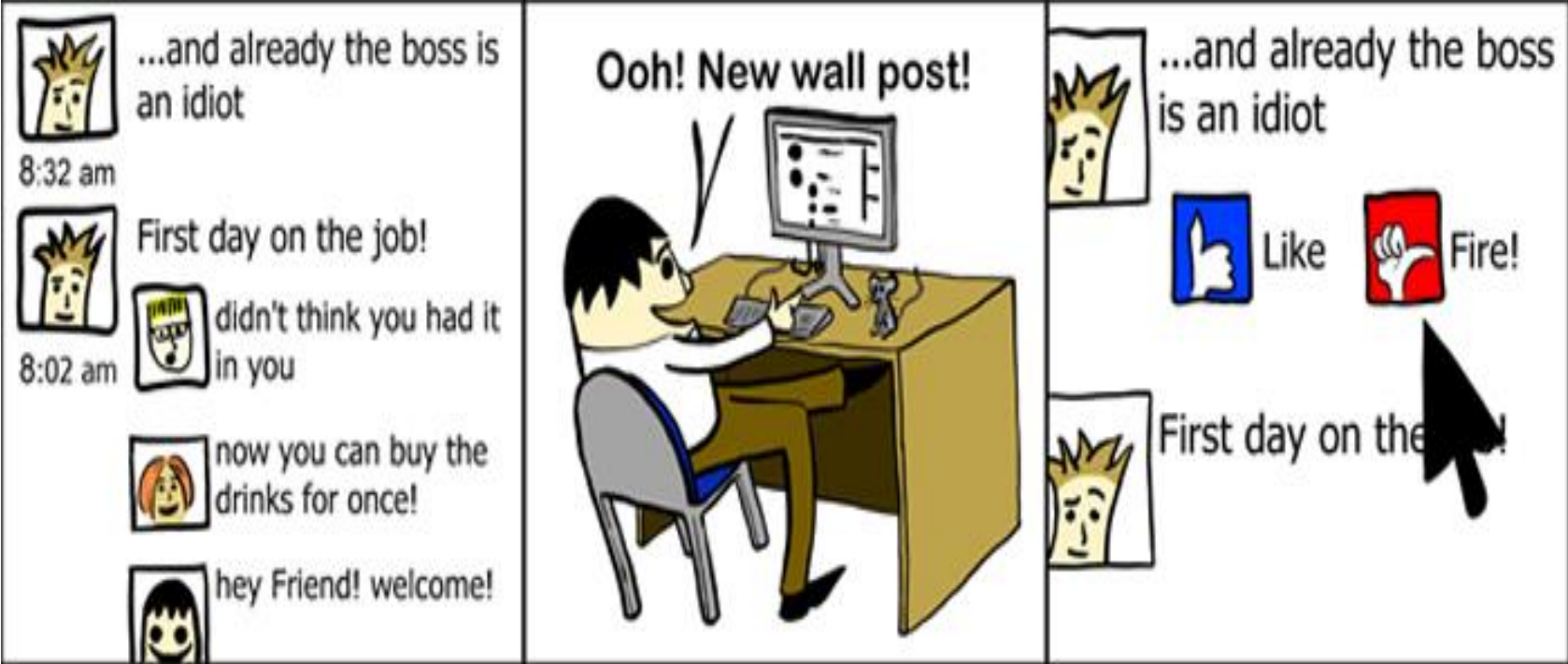
General Issues 20

Independent Contractors

- A person is not a “contractor” just because you say so
- Unless she/he appears to be in his or her own business, can delegate work and is largely uncontrolled by you in the performance of the task, she/he will be a worker or employee
- Possible expensive consequences in unpaid FNPF, leave, overtime

General Issues 21

Social Media



General Issues 22

Social Media

- Workers making comments on personal pages regarding customers and business associates
- Public or private
- Do you have a policy regarding outside behaviour and/or social media use?



Note: The material set out in this presentation is of a general nature. It is not a substitute for specific legal advice in a given situation and should not be relied on as such. Munro Leys cannot accept responsibility for any such reliance.