

NEWSLETTER

May/June 2004

"WORKPLACE BULLYING" – THE NEW MILLENNIUM EMPLOYEE PERSONAL GRIEVANCE??

Given the lack of comprehensive research into "Workplace bullying", it is difficult to assess the existence and/or prevalence of this phenomenon in New Zealand workplaces.

Statutory recognition and protection from workplace bullying is limited to amendments to the Health and Safety and Employment Act 1992 (HSEA 1992).

These amendments came into force on 5 May 2003 placing robust general duties on both employers and employees. Importantly, the HSEA Act now places specific duties on employers in relation to "hazard management".

The amendments specifically relating to workplace bullying extend the definition of "harm" and "hazard" to include "stress" and "fatigue". According to experts, these are primary symptoms of an employee who is the target of a workplace bully.

What is workplace bullying?

There are numerous definitions of workplace bullying yet all contain several salient features. In summary, workplace bullying is:

- Repetitive, health-endangering behaviour that amounts to mistreatment having a detrimental effect on an employee's dignity, safety and well being;
- About the bully's need for control; and
- Involves focused and systematic selection of targets;

Typical workplace bullying can involve physical behaviours, hostile verbal and non-verbal communication, interfering actions, withholding of resources, threats, abuses of power, isolating and degrading behaviours.

A common unconsidered response to the concept of workplace bullying and the proposition that such behaviour is abusive, is that competent management of employees requires "tough", "straight talking", "strong people". Further, complainants of workplace bullying need to harden up – they are "trouble makers", "weak" or "undesirable" employees.

The risk and in particular the costs associated with workplace bullying must be carefully considered before such attitudes prejudice employers against taking all practical steps to protect employees against workplace hazards such as stress.

CONTENTS

"Workplace Bullying" – The new millennium employee personal grievance?? 1

What is workplace bullying?.....1
End Result.....2
What do Employers Risk?.....2

Home-Made Wills – A Cheap Option? 2

Home Made Wills.....2
Potential Problems.....2

Why is Due Diligence important when buying a business? 2

Why do we have due diligence?.....3
What will you find?.....3
Risk Avoidance.....3
Our Thoughts.....3

Terms of Trade – Are Yours Up to Scratch? 3

Compliance with the PPSR.....3
Interest on unpaid amounts.....3
Personal guarantees.....3
Recovering costs.....3
Location of court proceedings.....3
Its worth the effort of getting them right.....3

What Hat shall I wear? 3

How about the shareholders hat?....3
Power behind the throne.....3
Shareholder power.....3
Sometimes all or nothing.....3
Role at meetings.....3

All information in this newsletter is to the best of the authors' knowledge true and accurate. No liability is assumed by the authors, or publishers, for any losses suffered by any person relying directly or indirectly upon this newsletter. It is recommended that clients should consult a senior representative of the firm before acting upon this information.

End Result

According to experts, the risks and costs for employers associated with workplace bullying are decreased productivity, increased absenteeism, high staff turnover, costs related to temporary staff, recruitment and training.

Additional costs include exit packages or settlement agreements for complainants of workplace bullying, costs of litigation and associated legal fees.

Symptoms affecting performance for employers to be wary of include lower concentration, low morale, exhaustion, apathy, burnout, anxiety, and depression.

What do Employers Risk?

Employers face potential liability for personal grievance claims under the Employment Relations Act 2000 and/or claims for breach of their statutory duty to provide a safe and secure workplace. A person convicted of an offence against the HSEA Act is now potentially liable for custodial sentences (maximum 2 years) and/or fines (maximum \$500,000.00).

Workplace bullying with its increasing recognition and awareness appears set on a path that will raise questions both for employers and employees. It's implications have the potential to be far reaching and costly for all parties involved.

HOME-MADE WILLS – A CHEAP OPTION?

In a recent High Court case in Hamilton the difficulties and pitfalls of drafting and executing your own Will were highlighted when the Court heard of a person that created and signed two Wills on the same day.

Home Made Wills

Mr Madsen had obtained a 'home made will kit' and used it to record his testamentary intentions. The problem arose after he died, in March 2001, when it was discovered that he had executed two documents both of which purported to be his last Will and Testament.

The two documents were dated "8th December 2000" and "8th 2000" respectively. Both documents were signed by the same witnesses, and the evidence presented to the Court established that the Wills were signed on the same day, but no one could remember which one had been signed first. There was no question that Mr Madsen had testamentary capacity to sign both documents.

The difficulty arose when the trustees tried to obtain probate for the Wills. It required a formal application to the High Court and required all people affected by the Wills, and who might have some claim to the estate, being served with the proceedings and being required to instruct solicitors to represent them.

Fortunately, it was accepted by all concerned that both documents should be granted probate as the Wills were essentially of the same effect, with one Will being slightly more detailed version of the other. In those circumstances, where there was essentially no dispute over the Wills, the Court was able to make orders that suited all parties.

If there had have been a dispute, or if the contents of the Wills were significantly different to each other the case would not have been so straight forward.

In any event the matter was not resolved until it went to Court in November 2003, some 18 months after Mr Madsen's death.

The Court awarded costs of \$3,337.50 to each of the two groups of beneficiaries, both of whom were represented by solicitors. Those costs, as well as those of the solicitors for the estate, and the disbursements incurred in the proceedings, were all paid from the estate. The costs awarded were undoubtedly used up in legal fees.

Potential Problems

A home made will kit may be cheaper to prepare than a will prepared by your lawyer, but this case clearly demonstrates that mistakes may cost a lot more than the savings made. In addition there are dangers in preparing your own Will. If it is incorrectly signed or witnessed, it will not be valid, and in preparing your own Will you run the risk that it will not adequately deal with the distribution of your assets, and the beneficiaries will need to resort to costly legal proceedings.

The law relating to Wills and their administration is very specific, and strictly adhered to, and the Court is very conservative when dealing with estate matters as its only guidance is the written wishes of the person who has now died.

If those wishes are ambiguous, or there is a problem with the execution of the will, the beneficiaries will suffer due to costs and delays as a result.

WHY IS DUE DILIGENCE IMPORTANT WHEN BUYING A BUSINESS?

"Due diligence" is a phrase used to describe a process of business investigations. A purchaser will often insert a due diligence clause as a condition to be satisfied in an agreement to purchase a business or shares in a company which operates that business.

Why do we have due diligence?

The main objective of due diligence is to extract information about the important areas of the business to be purchased. Through the process due diligence provides the purchaser with greater certainty as to the likely future performance and earnings of the target business.

Engaging the appropriate experts (i.e. lawyers, accountants, financiers and others) an investigation is undertaken into the contracts, financial statements, supply arrangements and other information related to that business.

What will you find?

Due diligence can identify a purchaser's exposure to third parties in the event of non-compliance by the vendor under various regulations and legislation affecting the business. It can identify those areas of the business which are vulnerable in terms of contractual arrangements with either suppliers or customers.

Due diligence may result in:

- the purchase price being affirmed or re-negotiated;
- additional conditions or covenants being added to the agreement;
- better allocation of the purchase price, for example, minimising the value of the personal goodwill in the business and increasing the value of plant, equipment and stock in trade in order to maximise future taxation benefits.

In some cases, due diligence may result in the cancellation of the contract.

Risk Avoidance

No matter how thorough the due diligence process, risks still exist in purchasing a business, and enforceable warranties and indemnities from the vendor need to be included in the agreement for sale and purchase to protect the purchaser. However, these warranties and indemnities have to be enforced for the purchaser to receive the benefit of them.

A vendor seldom rolls over and pays up on a failed warranty. A purchaser may also find the vendor has disappeared, or spent the proceeds of the sale by the time the purchaser realises the warranties are needed.

The purchaser also has to bear the time and cost burden of that enforcement. Hence the need to obtain as much information as possible through the due diligence process before proceeding with the purchase.

Our Thoughts

If you intend to purchase a business in the future, you should ensure that, as a minimum, your lawyer and accountant are involved in the due diligence process. Ideally, both these professional advisers should be involved as early as possible so that a clear and coordinated approach to the due diligence can be adopted.

TERMS OF TRADE – ARE YOURS UP TO SCRATCH?

If you are in business and have occasion to extend credit to your customers, are your terms of trade adequate to ensure the effective and efficient collection of unpaid accounts?

Your terms of trade need to be effective and work for you. Too often terms of trade are ambiguous and do not adequately provide for personal

guarantees, collection costs and security over items sold. If you are wondering whether or not your terms of trade are adequate, here are a few questions for you to consider.

Compliance with the PPSR

The enactment of the Personal Property Securities Act 1999 ("Act") changed the provisions for taking security over personal property as a form of securing payment. Do your terms of trade reflect those changes to comply with the Act? Are you aware that retention of title clauses are no longer effective?

Interest on unpaid amounts

Can you charge interest on unpaid accounts? This must be provided for in your terms of trade. Otherwise you are limited to the statutory rate imposed by the Court, which can only be charged after you have obtained a judgment against your customer.

Personal guarantees

Do you have provision for a personal guarantee? Personal guarantees must be in writing, be clear and unambiguous and executed in a way that ensures that the person signing realises that they are to be held personally liable to pay you if the customer or borrower does not. If the guarantee is not clear or not properly executed it may not be enforceable, and you may lose the last opportunity you have to get paid, especially if your customer is a company that has gone into liquidation or has otherwise ceased trading.

Recovering costs

Can you recover your actual costs (including lawyer's fees) of pursuing someone that does not pay? Again you can, but only if you provide for it in your terms of trade. Otherwise you are limited to the amounts set by statute for "costs" in Court proceedings.

Those "costs" are low and do not reflect the actual costs incurred in instructing a lawyer to assist in pursuing a reluctant payer.

Location of court proceedings

Do you supply to customers who are based out of town or in other centres? If you do, do you realise that you must issue any Court proceedings against them in the Court nearest to them – unless of course your terms of trade specify that you can issue in any Court that suits you.

Its worth the effort of getting them right

Of course, terms of trade cannot guarantee that you will in fact get paid. However, the better they are the more likely you are to be able to effectively obtain payment of not only the amount owing to you, but the costs of doing so, as well as interest on the amount outstanding. You may also improve your chances of getting paid if the guarantee provision in your terms of trade is effective and enforceable, as a customer may think twice about not paying.

Your lawyer is the best person to advise you on what should be in your terms of trade and how to best ensure that the terms you trade on are yours, and not your customers – but that's another story!

WHAT HAT SHALL I WEAR?

How about the shareholders hat?

The large majority of businesses in this country are small in size and trade as closely held companies. Often, directors and shareholders of these companies also work in their businesses. The lines between acting as director, shareholder, or manager get very blurred. Owners of a business definitely

wear more than one hat. To ensure that directors/shareholders act appropriately, there are a number of legislative obligations that directors and shareholders must fulfil. Lets focus in on the shareholder ones.

Power behind the throne

The directors of a company make the day to day decisions. Section 104 of the Companies Act 1993 (Act) restricts shareholder power, and the exercising of it, to the annual meetings and special meetings of shareholders (or a resolution in place of an actual meeting, which is often the preferred option). It must be remembered that a director may be linked to another entity which is a shareholder in the company, such as where a director is trustee and/or beneficiary of a family trust, holding shares in the company. In that situation, the role of independent trustees in those trusts becomes important in ensuring that the interests of the shareholders are met and that the shareholders do not simply rubber stamp the directors wishes.

Shareholder power

The Act prescribes that certain powers must be exercised only by the shareholders of a company. These powers include adopting, altering or revoking a constitution (s32), altering shareholder rights (s119), approving a major financial transaction (s129), appointing and removing directors (s153), approving an amalgamation (s221) and putting the company into liquidation (s241). While the appointing and removing of directors is usually done by an ordinary shareholders resolution (simple majority vote) the other powers require a shareholders resolution to be passed by a majority of 75% (or higher if required by the company's constitution) of those

shareholders entitled to vote, and voting on the decision.

Sometimes all or nothing

There are instances where unanimous resolutions from shareholders may circumvent the requirements of the Act. Under s107 of the Act shareholders acting unanimously may authorise a dividend, approve a discount scheme, allow a company to acquire or redeem its own shares, provide financial assistance to purchase its own shares and sign off on benefits, guarantees, remuneration packages and the like for the company's directors. These unanimous resolutions however, do not override the requirement for the solvency test to be met by the company, and for the related directors solvency certificate under s108.

Role at meetings

Annual meetings are the most usual ones for shareholders to turn their minds to. Business carried out in such a meeting may be limited to receiving and adopting financial reports, election of directors, appointment of auditors, any other business requiring a special resolution and general business.

Special meetings can be called at any time to discuss a specific resolution provided the calling procedure has been adhered to.

In signing a resolution in lieu of a meeting each shareholder must ensure that all the requirements are included in the resolution and all matters to be resolved are clearly stated – if there is any doubt seek clarification, have it rectified or have the actual meeting.

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