

# WILLIAMS & CO.

Incorporating A J Newman & Newfields Law

## BARRISTERS & SOLICITORS

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# NEWSLETTER

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### Employment Issues – The Bill And John Case Study

John is employed as a mechanic and has been working for the same employer for around six years. One day John arrives at work 10 minutes late and finds his employer, Bill, looking very unhappy. Bill says to John that he is sick and tired of John being late and then shouts at John, "That's it – go home".

John works the standard 37.5 hour week from Monday to Friday and is paid \$14.50 per hour. He receives a tool allowance for hours worked and minimum statutory leave entitlements as set out in the Holidays Act 2003. The employment agreement between John and his employer is not recorded in writing. As far as John can recall Bill has never commented on the time that John arrives at work.



#### What Should John Do?

John believes he has been dismissed.

All employment relationships are governed by the Employment Relations Act 2000 ("the Act"). The Act sets out that the parties to employment relationships have obligations to deal with each other in good faith. It also sets out that all employment agreements must be in writing and provides the minimum details that an employment agreement must contain – such as hours of work, place of work and rate of pay.

The Act provides a number of grounds upon which an employee can raise a personal grievance claim against an employer including unjustified dismissal. It also stipulates time limitations within which an employee must raise his/her personal grievance claim. Outside of the statutory time limitations and unless the employer agrees to extending them, the employee may make application to the Employment Relations Authority ("the Authority") for leave to raise the claim out of time. In John's case, he has 90 days from the date on which he believes he has been dismissed.

To be successful in his personal grievance claim, John must first establish that he has in fact been dismissed. Once this has been established, the onus then shifts to Bill who must show that there was good cause to dismiss and that John's dismissal was implemented in a procedurally fair manner.

### What Should The Employer, Bill, Have Done?

Putting aside the issue of whether John's lateness to work justifies dismissal, there are a number of basic elements to procedural fairness in the context of managing employment relationships that Bill may have failed to carry out. These are:

- John should have been warned of the misconduct and given an opportunity to improve or correct the conduct. If the misconduct is serious, John should also have been told that he may be dismissed for ongoing misconduct.
- Bill should have carried out a full and fair investigation of the facts before taking any action and then communicated his findings to John.
- John should have been given a real opportunity to be heard and to offer an explanation as to the alleged misconduct.
- The reasons for John's dismissal should have been given to him before the dismissal was effected.



Turning now to the question of whether Bill had good cause to dismiss John in these circumstances, it is unlikely that the Authority and/or the Employment Court would consider

lateness to work as a justifiable basis for John's dismissal. In December 2004, amendments to the Act saw the addition of a statutory test to determine whether a dismissal or other action by an employer is, are, or was justifiable. Simply, the objective test would consider whether Bill's actions were those of a fair and reasonable employer (in all the circumstances) at the time that John's dismissal occurred.

As it transpires and although John claims that he cannot recall Bill having spoken to him about persistent lateness to work, Bill believes the issue had been addressed with John before. On investigation, it became apparent that the reason

John was 10 minutes late every day was because his bus arrives outside the workplace at that time. Having considered John's explanation for ongoing lateness, Bill believes he reasonably requested John to catch an earlier

bus and ensure that he was at work on time. Bill also believes that since this request it was necessary to speak to John on several occasions without any improvement on John's part.

The next edition of this newsletter will examine (with reference to Bill and John's situation) the remedies John may be entitled to if he is successful in his personal grievance claim for unjustified dismissal and the implications for Bill in not having a written employment agreement setting out the terms of the employment relationship with John.

## Buying A Business

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You have had enough of working as an employee, and wish to take advantage of the benefits of owning your own business. You are about to make an offer to the vendor of a business and to instruct your lawyer to deal with the matter on your behalf. What happens next? Some of the issues that need to be considered are discussed below:

### Share Purchase Or Asset Purchase?

There are two ways of buying a business. The first is to buy the shares in the company which owns the business. The second is to buy the assets of the business. These include the plant, equipment and the goodwill.

As buying shares in a company can also mean acquiring that company's debts and liabilities, the second method is the most commonly used in the purchase of a business. By acquiring the assets, you have the freedom to incorporate your own company to become the owner of the business, thereby enabling you to start with a "clean slate".

### Due Diligence

"Due Diligence" describes the process of investigating the business and ascertaining whether it is in fact as the vendor has represented it. The vendor should provide access to the company's books and accounting records. You should then undertake an investigation (preferably with your accountant) to satisfy yourself that the company is profitable and that any projections as to earnings which may have been provided by the vendor are realistic and achievable.

The due diligence process can be carried out either before or after an agreement for sale and purchase is signed. Where it is to be carried out after an agreement has been signed, the agreement will need to include a "due diligence" clause which provides, amongst other things, that if the outcome of your investigation is unsatisfactory, for whatever reason, then you can cancel the agreement.

**Warranties**

“Warranties” are representations made by the vendor about the business. The sale and purchase agreement will include standard warranties but if the vendor has made specific representations about the business that have played a major part in your decision to buy it, then the agreement should specifically record these. It is vital to communicate such matters to your lawyer who can then ensure any such representations are included in the agreement.

**Lease**

If the business is being operated on leased premises, then the lease will need to be transferred to you or your company. This is

known as an “assignment of lease”. As part of your due diligence investigation, you should check the terms of the lease carefully to ensure they are acceptable. In particular, beware of a lease that only has a short term to run and has no right of renewal. You may find the landlord has other plans for the building and you will be unexpectedly faced with expensive relocation costs.

The above is an outline only of some of the issues that arise when purchasing a business. You should seek legal advice in relation to those issues which are particularly relevant to your transaction.

## Building Consents – What To Look For

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When purchasing a property, it pays to investigate the history of the buildings on the land. If there are no records of building consents having been issued by the council, then at best the buildings may have been constructed without council approval and may not comply with the building code. At worst, they may be dangerous for use and occupation.

**Background To The Building Consent Process**

The Building Act 2004 (“the Act”) governs all building works in New Zealand. It states that such work must comply with the building code. The code is made up of regulations which prescribe the functional requirements for buildings and the performance criteria they must comply with for their intended use.

Before undertaking building work, the owner of the property needs to obtain approval from a building consent authority. In most cases, the building consent authority is the local council. Council approval for building work is known as a “building consent”.

Once construction is complete, the council will inspect the work to ensure compliance with the conditions of the building consent and the building code. If the council approves the work, then it issues a code compliance certificate.

Under the Act, it is an offence to carry out any work that is not in accordance with the terms of the building consent. Also, until such time as a code compliance certificate has been issued, it is an offence to occupy the building.

**What Happens When Building Work Has Been Done Without A Building Consent?**

Building consents cannot be issued retrospectively. However, if the work has been completed and a building consent was required but not obtained, then an application to the council for a “certificate of acceptance” may be made. This involves the council inspecting the work to determine if it complies with the building code. If it does, then it may issue a certificate of acceptance. However, such a certificate cannot be issued if the building work was carried out prior to 1992 as the building code was not in existence prior to that date.

It is not uncommon to come across properties where the buildings on the land have been constructed with a building permit or consent but the work has either never been completed, or if it has, the council has not approved it. If the work was carried out prior to 1 January 1993 and provided that the building is not “dangerous” or “unsanitary” as defined in the Act, then the council cannot take any action to require the owner to complete the work in accordance with the original building permit.

**LIM Reports**

The best way to check that there are no unauthorised buildings on a property is to obtain a Land Information Memorandum (known as a “LIM report”) before you buy it. This includes a summary of all records held by the council in relation to the property including details of building permits, consents, code compliance certificates and certificates of acceptance.

It is worth remembering that although the absence of permits or consents may not pose a problem while you live in the property, it may well become a problem once you decide to sell it. For that reason, a LIM report is money well spent. It could save you a great deal more at a later date.

## Enduring Powers Of Attorney And The Family Court

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In the last newsletter we focused on the benefits of enduring Powers of Attorney. In doing so we emphasized the need for the Donor to have complete trust in the person being appointed Attorney.

In 2001 the Law Commission produced a report entitled "Misuse of Powers of Attorney". The Commission suggested a law change may be required given the lack of accountability for Attorneys appointed under the legislation. The report notes that although the Family Court has power to intervene, there is often an understandable reluctance to instigate a process which will result in the attorney being brought before the Court, particularly as that person is more often than not a family member.

Whilst the current legislation prevails, it is important to publicise the Family Court's role.

### Powers Of The Family Court

An Attorney can apply to the Court for directions. Alternatively, other persons including the Donor, who are disaffected by the Attorney's decision, may apply to have a decision reviewed.



Usually it is a member of the Donor's family, other than the Attorney, who makes the application. Although such applications are not common, when they do occur they often raise issues as to whether the Donor had capacity when signing the documentation or alternatively whether a decision has been made in the best interests of the Donor. This occurs usually where other family members believe the Attorney is not an appropriate person to take on the role or has made an inappropriate decision, often to benefit themselves rather than the Donor.

Such applications will usually pitch family members against family members. The end result, understandably, is an inclination by the Court to revoke the Power of Attorney and replace the Attorney with a professional Trust company.

This legal procedure can be costly, difficult and emotionally charged for all involved. Most Donors would not wish to intentionally place their family in such a situation. It is therefore all the more important to give careful consideration to the person you appoint as your Attorney.

## News In Brief

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### Legal Definitions

Letters and documents prepared by your lawyer may contain words which are generally only used by the legal profession.

These words are often referred to as "legalese". In this issue, we explain some of the legal terms which you will find in an agreement for the sale and purchase of land.

#### Fee Simple

This term is used interchangeably with the word "freehold". A fee simple estate in land continues until such time as the owner dies without leaving heirs in which case the land reverts to the Crown. In practice this happens very rarely as most properties will pass either by will, or if the owner dies without leaving a will, then under the terms of the Administration Act 1969.

#### Leasehold

A leasehold interest in land is created under the terms of a lease. When the lease comes to an end, then the land reverts to the owner of the freehold and the leasehold state is "merged" with the freehold.

#### Crosslease Title

This refers to a "composite title" which combines freehold and leasehold interests. It is made up of an undefined share in the freehold of the land and a defined leasehold interest in respect of the buildings on the land.

#### Unit Title

Unit titles (or Stratum titles), were created by the Unit Titles Act 1972 to enable individual ownership of units within a larger building complex.

#### Land Covenants

These refer to restrictions regarding the use of land. They are particularly common for new residential subdivisions where the developer wishes to ensure a high quality of development and will include such matters as specifications for the materials to be used in the construction of buildings on the land.

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