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This Winter 2008 issue of Commercial eSpeaking *includes two employment topics, some commentary on the proposed changes to the 'associated persons' regime as well as two Business Briefs. We hope these articles are both useful and of interest to you. If you would like to see specific topics covered in future editions, please get in touch with us. The next edition of* Commercial *will be published in the Spring.*

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If you require any further information on any of the topics covered in Commercial e.Speaking, *then don't hesitate to contact us. If you do not want to receive this newsletter, please* unsubscribe.

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Flexible Working Arrangements
- Legislation comes into force on 1 July

On 1 July 2008 the new flexible working provisions in the Employment Relations (Flexible Working Arrangements) Amendment Act 2007 will come into force. The new law provides an employment right for employees with caring responsibilities to request changes to their working arrangements and places procedural obligations on employers when responding to a request.

In general terms the Act is a framework that gives employees the right to ask for a variation to the hours of work, the days of work and/or the location where the work is performed if the employee has the care of any person.

The reference to 'any person' is not restricted to the care of young or disabled children and may now include whanau, grandchildren, elderly parents and even friends.

The employee's request

Before an employee can request a flexible working arrangement they must have been working for the employer for at least six months and for not less than 1 hour a week or 40 hours a month.

When making a request the employees must:

- Put their request to the employer in writing
- State that the request is being made under part 6AA of the Employment Relations Act 2000, and
- Explain how the variation to their working arrangements will enable the employee to provide better care for the person concerned and what the employer needs to do to accommodate the request.

An employer is required to deal with the request as soon as possible, but no later then three months after receiving it.

Refusing a request

Employers are not compelled to accept a request, but they must consider it against certain criteria. An employer can refuse a request on a number of grounds listed in the Act. These include, but are not limited to, situations where flexible working will give rise to:

- The burden of additional costs
- A detrimental effect on the ability to meet customer demands
- Detrimental impact on quality or performance, and
- An inability to reorganise work among existing staff.

Furthermore an employer must refuse a request for flexible working arrangements if the arrangement would be inconsistent with the terms of any collective agreement which covers the employees.

On making a decision an employer must give written notice to the employee of their decision. If the request is refused the employer would need to outline the grounds for refusal and provide 'sufficient explanation' of the reasons for refusal.

If the employer does not comply with the procedural requirements following a request they can be liable for a penalty up to $2,100. The matter can be referred to a labour inspector, mediation and then the Employment Relations Authority.

Summary

From 1 July 2008 employers must be prepared to consider requests from employees with caring responsibilities for flexible working arrangements. Time will tell the impact of these new provisions but it is important for employers to know their obligations and ensure they comply with them in the time required.

Changes to the Taxation 'Associated Persons' Regime - New standard definition

The current 'associated persons' regime was the Inland Revenue Department's (IRD) legislative response to circumvent perceived avoidance of tax imposed on land dealers and builders. It was concerned at the gains arising from the sale of land within 10 years of acquisition by the holding of property by closely-related persons such as family members, wholly owned companies and family trusts. This regime is about to undergo quite a substantial makeover to tighten up the 'associated persons' rule.

Background

In order to counter the above holding structures, the IRD introduced section OD8(4) of the Income Tax Act 2004 defining 'associated persons' to be associated for tax purposes:

- Two companies, where a group of persons together own or control 50% of both companies
- A company and a person where the person or their spouse/partner/infant child/trustee of a trust (for any one of them as beneficiary) or any two or more of them together, own 25% of the company
- Two persons where one is the spouse/partner/infant child/trustee for the foregoing as beneficiary, and
- A partnership and any partner of it.

The IRD's concern with the above existing definition as applicable to land sales is that it does not treat the following relationships as associated persons, ie:

- Trustee and beneficiary of a trust
- Trustee and settlor of a trust
- Separate trustees of trusts with a common settlor, and
- A company and any person associated with another person who is associated with that company.

IRD proposed standard definitions

The IRD has proposed a new standardised definition of associated persons which has four features:

1. It will 'associate' the four groups/relationships referred to immediately above.
2. It contains more robust rules for the aggregation of fragmented interests among those closely associated in the company context.
3. It introduces a tri-partite test which will associate two persons if they are each associated with the same third person. This substantially widens the definition as a whole and will make it more difficult to circumvent.
4. It changes the associated persons tests for relatives to two degree of relationships as opposed to four.

Following submissions on this proposal, it is understood that the IRD has recommended various changes which include some limitation of the tri-partite test, exclusion from the definition of 'settlor' for those who provide services to a trust for less than market value, and doing away with trustee/beneficiary and settlor/beneficiary tests.

It is expected these changes will be enacted shortly with a likelihood of them applying at the beginning of the 2009/2010 financial year.

Because the changes are not retrospective, there should be no need to restructure existing property ownership entities where the property in question is recorded as capital under the existing regime. However, where the ownership structure is tainted by association under the current regime, then you may have to consider transferring property to a non-associated person in order to ameliorate the position.

There is perhaps a small window of opportunity to conduct a review before the new proposed legislation comes into force. However, it should be noted that if the proposal becomes law, much of the current accepted structuring to avoid tainting may become ineffective.

If you think your property holding structures may be vulnerable to this proposed legislation, please contact us as soon as possible for a review.

Written Employment Agreements for Your Staff are in Everyone's Best Interests

A number of organisations, and particularly smaller businesses, still appear to be operating without having written employment agreements for all their employees. We outline below why it is in an employer's best interest to ensure employees have written employment agreements.

It's the law

The Employment Relations Act 2000 stipulates that if an employee is not covered by a collective agreement then an individual employment agreement *must* be in writing. The repercussions for an employer not having written employment agreements can be serious. Last year an employer was penalised $3,000 by the Employment Relations Authority for failing to provide a written employment agreement.

Agreements can strengthen an employer's position

Although it is not uncommon for an employee's employment to be trouble-free for the entire term (and in these situations the written agreement is virtually never referred to by either party), it is when trouble arises within the employment relationship that a written agreement can be of most use to an employer.

An employment agreement can be drafted to give an employer specific rights, for example, an agreement can permit an employer to suspend an employee and it can also outline the conduct that an employer considers unacceptable and potentially dismissible. Without these provisions an employer does not have the ability to suspend, and there is more room for an employee to argue that their conduct was not a dismissible act.

Having a written employment agreement means there is also far greater certainty between the employer and employee in regard to factors such as the period of notice required if the employee wants to resign or if the employer needs to make an employee redundant. If no written agreement exists the period of notice would be determined by what would be considered 'reasonable' in the circumstances; a situation that is best avoided due the uncertainty created.

Written agreements as a guiding light

Irrespective of whether a business has manuals or other support material to deal with employment issues, the written employment agreement should be one of the first reference points when dealing with employment issues. These could range from matters relating to a commercial event that is about to occur that may affect an employee's employment or a concern is raised by the employee.

The employment agreement should be one of an employer's first reference points because it provides a guide to an employer on a number of fronts. Employment agreements are required by law to contain a thorough explanation of the process that will occur in relation to an employee's employment if a business is to be sold. In addition an employment agreement should cover the disciplinary process that will occur if misconduct is alleged and the process an employee must follow in raising a personal grievance.

Conclusion

Having an employment agreement for all your employees is not only a statutory requirement, but it also makes good business sense.

Good employers will ensure that they comply with the law and adhere to their obligations, and they also want to make certain that their employees are fully informed of their rights and obligations to them as employers and also to the business.

Business Briefs

Limited Partnerships Act 2008: Aligns New Zealand with overseas jurisdictions

The Limited Partnerships Act 2008 came into force on 2 May 2008 (repealing the special partnership provisions in the Partnership Act 1908). The legislation introduces a new business structure in New Zealand that is similar to limited partnership regimes in several overseas jurisdictions. One of the purposes of the Act is to '*[facilitate] the development of the venture capital industry in New Zealand*'.

Key features of the limited partnership structure are:

- A limited partnership, like a company, has a separate legal personality from its owners/the partners,
- The name of a limited partnership must include "*limited partnership*", "*L.P.*", or "*LP*",
- Limited partnerships are formed by the partners entering into a partnership agreement (mandatory) and registering the partnership with the Registrar of Companies. The partnership agreement does not have to be registered,
- A limited partnership is made up of at least one *limited* partner and one *general* partner, each having distinct roles. A limited partner (usually a passive investor) must not take part in the management of the business outside certain specified 'safe harbours' and generally will not be liable for the debts and liabilities of the partnership. A general partner is responsible for the management and business of the partnership and is jointly and severally liable with each other general partner for the debts, liabilities and wrongs of the partnership,
- A limited partner is not an agent of, and has no authority to bind, the limited partnership, a general partner or any other limited partner. A general partner is the agent of and can bind the limited partnership, but is not the agent of the other partners,
- Despite having a separate legal personality, a limited partnership itself will not pay income tax. Rather, each partner will pay income tax on their share of the profit of the limited partnership in their individual tax return. The taxation rules are similar (but not exactly the same as) the taxation of general partnerships, and
- A partnership interest will be a security under the Securities Act 1978, so any offer of a partnership interest to the public must comply with that legislation.

To take account of the new structure, various provisions of the Income Tax Act 2007 have been overhauled by the Taxation (Limited Partnerships) Act 2008, which came into force on 1 April 2008.

Government Review of Redundancy Payments

With the weakening economy it is likely there will be more redundancies. Despite a common misconception, employees have no statutory right to receive redundancy compensation in New Zealand. However the current review by the Restructuring and Redundancy Working Group of the adequacy of redundancy laws and provisions may have important consequences for New Zealand businesses as the Group reports its findings to Labour Minister Trevor Mallard at the end of this month.

Redundancy in New Zealand is generally determined by provisions in an employment agreement, so:

- If an employment agreement states that redundancy compensation is not payable or is silent on redundancy compensation, then compensation is not payable. However an employer must comply with the provisions about notice, and
- Where an agreement provides for redundancy compensation then the provision must be strictly followed. Common redundancy formulas refer to the length of service of an employee.

In order to justify a dismissal for redundancy, an employer must show good substantive commercial reasons for making the position redundant; that the position is truly redundant and that the dismissal has been carried out in a procedurally fair manner. An employer's statutory obligations of good faith will include consultation, providing the employee with relevant information and giving the employee an opportunity to comment on the redundancy.