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NEWSLETTER

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Dear Client

In this issue we address a number of current legal issues.

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EMPLOYMENT RELATIONS (FLEXIBLE WORKING ARRANGEMENTS) AMENDMENT ACT 2007

The Employment Relations (Flexible Working Arrangements) Amendment Act 2007 was given Royal Assent on 26 November 2007 and came into force on 1 July 2008.

The Bill was introduced by Green Party MP Sue Kedgley and was designed to address the perceived need of employees with young families who were simply dropping out of the work force rather than obtaining more flexible working arrangements to meet the needs of their family.

A Department of Labour survey found that most employees felt unable to broach the need for more flexible working arrangements with their employers because they felt they would be penalised for doing so. By providing a statutory framework this Act seeks to protect those employees who wish to choose how to balance work and family life.

Who may apply?

Any employee who is responsible for the care of any person and who has been working for their employer for not less than 6 months may make an application under the Act. There are no requirements that the employee be related to the person they are caring for and there is no definition of what the 'care' may involve.

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What are flexible working arrangements?

The employee may apply to vary their conditions of employment related to their hours of work, days of work, and/or place of work and this request must be in writing. The request made will entirely depend on the needs of the employee in caring for another person.

What information must be supplied?

The employee must specify:

- how they wish to vary their conditions of employment
- whether the request is to permanently vary their conditions of employment or for a specified period of time
- how the variation will allow them to provide better care for the person they are caring for,
- what changes the employer may need to make if the employee request is approved.

Can more than one request be made?

If a request is made the employee is not entitled to make another request under this part of the Act for another 12 months.

What the employer must do

The employer does not have to accept the request. The employer must notify the employee within 3 months whether their request has been approved or refused and, if refused, notify the grounds for refusal and provide an explanation of the reasons for their decision. If the employee is dissatisfied, he or she may refer the matter to mediation. If that does not resolve matters, the problem can be referred to the Employment Relations Authority for a determination.

What are the grounds for refusal?

The Act sets out the following broad grounds for refusal:

- a detrimental impact on the quality or performance of work
- additional cost
- inability to reorganise work

- inability to recruit additional staff
- insufficiency of work
- planned structural changes
- detrimental effect on ability to meet customer demand
- the potential to undermine the terms of a collective agreement where the request relates to working arrangements to which the collective agreement applies

What if the employer does not respond?

If the employer has not complied with their obligations under the Act the employee may refer the matter to a Labour Inspector for assistance in resolving the matter. The employer may be fined up to \$2000 by the Employment Relations Authority.

A review of the operation of these amendments must be carried out by the Minister of Labour as soon as is practicable after 1 July 2010.

PROTECT YOUR BUSINESS FROM BAD DEBTORS

Owners or managers of small to medium sized businesses will be increasingly aware of how the global credit squeeze is affecting New Zealand. As finance companies collapse, fuel costs escalate and interest rates rise (amongst other things) the pressure grows for everyone to cut costs and make savings. One common response from debtors to these pressures is to delay paying creditors – including you. Effectively they are using you as a low cost source of extended funding.

Planning how best to protect your business from bad debtors involves both practical and legal issues, as set out in the following paragraphs.

Take time at the outset to ensure the customer can and will pay. Sometimes the promise of a new order for work overrides common sense enquiries at the time about the customer's circumstances and their ability and willingness to pay the price you require.

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Ensure that you have full details of your customers before you commit to the work. This includes all of their contact details but also the legal name and type of entity. All too often creditors go to take enforcement action only to find they are missing details that compromise debt recovery. For example, you might assume your customer is John Brown trading as John's Timber Supplies only to find out that he was representing John Brown Limited trading as John's Timber Supplies. This can result in you having no action against John Brown personally, only his limited liability company, which might be insolvent.

If your customer is a small company, obtain a guarantee from the directors. It is often more effective to pursue a director personally, rather than a company.

Have written terms of trade that the customer signs before you supply the product or service. This makes it very difficult for the customer to dispute your terms at a later stage, which often happens if the terms are posted with an invoice, after supply, or not recorded in writing at all. Include terms that:

- state when payment is due
- set a default interest rate for late payment, and
- provide for recovery of full legal costs, should you have to take enforcement action.

If appropriate, include specific reference to creating a security interest pursuant to the Personal Properties Securities Act 1999. This will enable you to become a secured creditor. If you do this, you will also need to be aware of the process for registering a financing statement on the Personal Properties Securities Register at www.ppsr.govt.nz/cms, without which your security won't be complete and is likely to be ineffective.

Take steps as soon as a customer is late. Speak with them if possible. If not, write to them. Too often debtors are not contacted early enough and

a problem that could have been a minor one becomes a major one.

The overall key is to take care with your procedures and documentation at the outset of the transactions. It may require time and money to put everything in place but it will more than pay for itself over time.

Lawyers often deal with creditors who fail to recover some or all of their debt, despite having provided an excellent product or service, because they haven't taken enough care or obtained adequate advice when setting up their paperwork and procedures

CONFIDENTIALITY OF EMPLOYMENT MEDIATION

Confidentiality in employment mediation is crucial to the integrity of the mediation process. While the Employment Court decision in *Jesudhass v Just Hotel Ltd* cast some doubt over the extent of the requirement of confidentiality, the Court of Appeal has now clarified the position. The Employment Relations Act 2000 ("the Act") seeks to "...build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship..."

One of the ways the Act achieves its objective is to promote mediation as the primary problem solving mechanism and reduce the need for judicial intervention.

Typically a person raising a personal grievance under the Act will request mediation as a first step to resolving their grievance. Through the mediation process the parties discuss the issues, consider options and are often able to reach agreement with the assistance of the mediator. These agreements are binding on the parties and enforceable. They allow the parties to resolve disputes relatively quickly themselves, rather than face an uncertain outcome at the Employment Relations Authority or in the Employment Court.

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Section 148 of the Act provides that the parties must keep confidential: *"....any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation."*

The confidentiality requirement is designed to ensure that the parties can engage in free and frank discussion of the issues and get to the heart of the matter without fear that their words will later be used against them.

In 2006, the Employment Court in *Jesudhass v Just Hotel Ltd* considered the extent of confidentiality afforded at mediation. Mr Jesudhass was suspended by his employer, Just Hotel Ltd. He raised a personal grievance and sought mediation. Mr Jesudhass alleged that during mediation his employer advised that they would dismiss him as soon as the mediation was finished. Mr Jesudhass raised a second personal grievance, that of unjustified dismissal, and sought to bring evidence of those alleged statements in support of his claim.

The Employment Court found that evidence of conduct during mediation could be used where those communications were not made in a genuine attempt to resolve an employment relationship problem.

Just Hotel Limited appealed this decision successfully. The Court of Appeal overturned the decision and found that the purpose of Section 148 was to allow parties to speak freely and frankly without the fear that their statements could be used against them. This could only occur if statements made at mediation remained confidential. The Court found that all documents prepared for the purposes of mediation and all statements made at mediation were confidential and that only in some limited circumstances, such as where public policy dictates (for example evidence of criminal conduct), could the statutory veil of confidentiality be lifted.

This decision is consistent with ensuring that mediation is promoted as the primary problem solving mechanism under the Employment Relations Act 2000.

ENDURING POWERS OF ATTORNEY - SIGNIFICANT CHANGES

Enduring Powers of Attorney involve an individual, 'the donor', placing trust in a person, 'the attorney', to act competently in the donor's best interests. The donor of such a power who becomes mentally incapable is dependent on some other trusted person to make decisions for him or her. Sadly, this trust is sometimes abused, particularly by family members.

The Government realises the current legislation is inadequate and has enacted the Protection of Personal and Property Rights Amendment Act 2007 ("the Act"). The Act arises out of the Law Commission Paper "Misuse of Enduring Powers of Attorney", received Royal Assent last year and comes into force on 26 September 2008.

The Act makes the interests of the donor paramount. Where the donor has lost capacity, and decision making is taken over by an attorney, the donor still has the right to be consulted about their views. The Act places an obligation on the attorney to encourage the donor to develop the donor's competence to manage his or her own affairs in relation to his or her property.

New witnessing requirements

The Act introduces new witnessing requirements for all new Enduring Powers of Attorney. A lawyer, legal executive, or an officer of a Trustee Corporation must act as the witness. Legal executives are able to witness if they have at least 12 months experience, hold a current annual registration certificate issued by the New Zealand Institute of Legal Executives, and are employed by and under the direction and supervision of a lawyer.

The witness must explain to the donor the effects and implications of the Enduring Power of Attorney and his or her rights, and certify in the prescribed form that this has been done. At the time of signing, the witness must certify that he or she has no reason to believe that the donor lacks mental capacity and that the witness is independent of the attorney.

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New definition of mental capacity

A donor is deemed mentally incapable if he or she lacks the capacity to:

- make a decision about a matter relating to personal care and welfare
- to understand the nature of decisions about matters relating to his or her personal care and welfare
- to foresee the consequences of decisions about matters relating to his or her personal care and welfare, or
- communicate decisions about matters relating to his or her personal care and welfare.

A prescribed form has been issued for Health Practitioners to certify as to incapacity. The form must be used on all occasions when the donor's capacity is in question.

Proper Records to be kept

The attorney must keep proper records of each financial transaction entered into by the attorney while the donor is mentally incapable.

Suspension

The Act allows the donor who has been, but is no longer, mentally incapable to suspend the attorney's authority to act by giving written notice to the attorney. The suspension does not revoke the Enduring Power of Attorney and can be reviewed by a Court. However, an attorney whose authority is suspended cannot act unless a Health Practitioner has certified, or the Court has determined, that the donor is mentally incapable.

Easier access to Courts

A wider range of people can now apply to the Court regarding an attorney's actions. Any of the following people may apply to the Court to review a decision:

- the donor
- a relative or attorney of the donor
- a social worker

- a medical practitioner
- a trustee corporation
- the principal manager of any place that provides hospital care, rest home care or residential disability care
- any welfare guardian who has been appointed for the donor
- a person authorised by a body or organisation contracted by the Government to provide Elder Abuse and Neglect Prevention Services
- any other person, with leave of the Court

In Conclusion

It is hoped the Act goes some way to limiting situations in which it might be possible for Enduring Powers of Attorney to be misused or abused. Although compliance costs will inevitably be increased, this is considered a small price to pay to increase protection for a vulnerable donor.

SNIPPETSIt's Not Easy Being Green:
Commerce Commission Warns

With rising fuel prices and increased awareness of our 'carbon footprint', being Green has become all the rage - or perhaps more appropriately - envy. It should come as no surprise then that advertisers have pounced upon what is being dubbed 'greenwashing' as an essential tool for marketing. Indeed some have taken to it with such fervour, that in their bid to out-green the competition, the accuracy of the claims may be left wanting.

This has become a focus for the Commerce Commission who in issuing warnings recently noted that the "growing trend to greenwashing by businesses is cause for concern if the green, eco-friendly or sustainability claims are false or misleading". The Commission will be keeping a close eye on the issue, and where necessary,

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enforcement action will be taken under the Fair Trading Act.

Sale of Liquor (Objections to Applications)
Amendment Bill

Arising from the increasing concern of the effects of alcohol and alcohol abuse in the community, the proposed bill seeks to amend the Sale of Liquor Act 1989 in two significant ways. Firstly, an applicant for a liquor on-licence or off-licence will be required to undertake an evaluation of the social impacts on the community if the licence were granted. Secondly, any person or party may object to an application for an on-licence or off-licence. The objector must also be able to provide evidence of an adverse effect upon them if the application is granted.

The Liquor Licencing Authority will have additional powers to dismiss objections that it considers are without foundation. However, if the bill is passed, the process of obtaining a liquor licence will undoubtedly become much more cumbersome.

The Bill has had its first reading and public submissions are invited. The closing date for submissions is 15 August 2008.

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