

The Jackson Russell report

MAY 2009

Welcome to our client newsletter for May 2009.

The start of the year has brought with it a challenging and uncertain economic environment for both personal and business matters. But, while there is a noticeable degree of anxiety and uncertainty, we are also seeing cautious optimism in many areas.

We believe in the current business and economic climate it is important to confront and deal with situations, be they present circumstances, or planning for the future, rather than try and ignore them and have them become overwhelming or too difficult to deal with.

The new Government has introduced measures in response to the changing economic environment and in this issue our Employment Law partner Glenn Finnigan discusses the new 90 day employment trial period for small and medium sized businesses. Partner Mark Sullivan and his litigation team provide some timely reminders on debt collection and Mark joins partner Darryl King with an article discussing the duties for directors of a company that is financially stretched.

A point to remember when coping with, or managing in changing times, is the importance of consulting your professional advisor if you are contemplating changes to the structure of your personal or business affairs. At Jackson Russell we can talk you through the changes you may wish to make and have the expertise to help you identify the best action to take, and to see you through the process in a timely manner.

New 90 day employment trial periods By Glenn Finnigan

As part of a package to assist workers and businesses cope with the effects of the recession, the government has amended the Employment Relations Act to allow trial employment periods for new employees of small businesses.

Overview

The trial period provisions apply only to employers of fewer than 20 people, employment agreements entered into after 1 March 2009, and employees who have not previously worked for that employer. A trial period is not automatic. It needs to be included in the employee's employment agreement. The revised Act requires specific wording for the trial provision.

Because this provision needs to form part of the employment agreement, its inclusion could be the subject of good faith negotiations between employer and employee parties. Because this provision needs to form part of the employment agreement, its inclusion could be the subject of good faith negotiations between employer and employee parties. If a trial provision is part of an employment agreement, it allows either the employee or the employer to terminate the employment relationship during the 90 day trial period.

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Building Renovations – Fonterra Centre

We are currently experiencing some disruption to our normal working conditions as the owners of the Fonterra Centre renovate the exterior of the building. Our normal carparking arrangements are changed as we have 2 temporary client car parks in the basement area, and at various times we are experiencing considerable levels of noise which can often be quite clearly heard in telephone conversations. We do apologise for any inconvenience caused as a result of these works. We are told by the contractors the project is scheduled for completion in June.

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New 90 day employment trial periods ...continued from page 1

The employee cannot bring a personal grievance action against the employer for a dismissal within the 90 day trial period.

If a dispute exists on the termination the employee and employer may attend mediation relating to the dismissal but may not progress the matter further through the Employment Relations Authority or the Employment Court.

In order for a termination to come under the new law, notice must be given before the end of the trial period, regardless of whether the termination takes effect before, at, or after the end of the trial period.

Transfer and rehiring employees

The narrow definition of "employee" for the purposes of the trial provision means that an employer cannot simply terminate an employment agreement with an employee and then re-hire them so as to prolong the trial period. This also means that an employee being transferred within the company, and therefore entering into a new employment agreement with the same employer, may not be subject to a trial period.

Other important points for employers

Employers need to realise that in the new law does not affect other employee protections such as the ability to bring claims for discrimination, or obligations to operate a safe work place.

The good faith obligation to consult with employees when considering a proposal which may affect their employment does not apply in relation to dismissal in a trial period. But there may be other contractual obligations employers usually include in their employment agreements that mirror the consultation obligation. Because of the risk of those obligations resulting in claims employers will need to consider whether these should continue to be included in employment agreements alongside 90 day trial provisions.

Eligible employers wishing to take up the advantages offered by the new law will need to amend their employment templates to include the relevant clauses to set up the trial period.

Impact of the changes

The proponents of this law change are confident there should not be a major change in employment practices and the law will encourage small businesses to take a chance with taking on staff. In the current employment market we think best recruitment practice will be as important as ever while the new law helps deal well with hiring mistakes it is no substitute for careful hiring decisions in the first place.

Please contact Jackson Russell's employment team if you would like help with your employment documentation or if you have any questions or concerns regarding the new law and its impact on you if an employee or your business if an employer.

Meet our new Associates

Zandra Wackenier – Family Law



The partners at Jackson Russell are pleased to announce the appointment of two new Associates within the firm.

Zandra Wackenier was appointed in December 2008. Zandra is Jackson Russell's senior family lawyer, and leads a team of lawyers providing a family law service. She joined Jackson Russell in June 2006.

Caroline Harris – Litigation



Caroline Harris has been appointed an associate in March 2009. Caroline joined Jackson Russell as a law clerk in November 2002, whilst she finished her studies. She completed her law professionals in 2003 and shortly after that was appointed to the permanent staff. Caroline works in Mark Sullivan's litigation team.

Meet our new Staff Member

Mahesh Lala – Commercial/Property



Mahesh Comes to Jackson Russell after several years working experience with two other Auckland law firms. He works in Darryl King's commercial/property team.

Mahesh went to Auckland Grammar School and his law degree is from the University of Auckland. Mahesh is married with a young child and he is very active in hockey and some would say fanatical about cricket.

Surviving the recession – when your company is financially stretched

By Darryl King and Mark Sullivan

Businesses are currently facing difficult trading conditions and an increasing number are not surviving. If you are a director of a company you need to be aware of the strict duties imposed on you - and your potential personal liability - if your company becomes financially stretched.

This article takes a practical look at some of the issues for directors when times get tough.

Key director duties

While shareholder liability is (generally) limited to the amount of the shareholder's investment, the law imposes duties on directors personally. If a director fails to comply with those duties he or she may be found liable to compensate the company and creditors of the company. There are also substantial penalties, including fines or even imprisonment.

Key director duties relevant to a company that becomes financially stretched include obligations on directors to:

- not agree (or allow) the company's business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors (termed "reckless trading")
- not agree to a company incurring an obligation unless the director believes on reasonable grounds the company will be able to perform that obligation
- act in the best interest of the company and for a proper purpose
- ensure proper financial records are maintained

The "reckless trading" duty referred to above is particularly relevant for a company that becomes financially stretched. While the duty is owed to the company, the courts have held that a director of a company nearing insolvency must have regard to the interests of the company's creditors. A director who is found to have breached this duty may be ordered by the court to contribute to the assets of the company which are available to its creditors upon liquidation or to make a payment directly to a creditor.

Duties apply to companies large and small

Director duties apply for small "one man band" companies through to large corporates.

Obligations when times get tough

The courts have held that if a company becomes financially stretched, directors must undertake a sober assessment as to the company's likely future income and prospects. Directors should seek professional advice promptly while the company still has options. Available options may include obtaining additional capital investment, renegotiating bank funding, selling a business or assets, negotiating improved arrangements with creditors or restructuring the company. If directors decide to continue trading the directors should seek advice on the risks and take care in the management of the company to avoid personal liability. If a company has little or no equity, directors should consider carefully whether continuing to trade has reasonable prospects of generating cash to pay both pre-existing debt and future trading commitments.

Sleeping directors

The courts have sounded a warning to inactive directors that all directors must take proper steps to guide and monitor the management of the company. A director cannot leave to management or another director the duties of running the company and ensuring compliance with legal obligations.

Test for solvency

A company is insolvent under company law if it ceases to be able to pay its debts as they fall due (cashflow insolvency) or it has an excess of liabilities over assets (balance sheet insolvency).

Statutory demands

A statutory demand is a written demand for a debt owed by a company. Once the demand has been served on a company, the company has 10 working days to dispute the debt by filing an application to the court to set aside the demand or 15 working days to pay the debt. If the debt is neither disputed nor paid within 15 working days then the creditor can apply to the court to place the company into liquidation.

If you receive a statutory demand it is imperative that you consult us immediately to see what options are available. The time limits are critical. You can only dispute the demand if an application and affidavit are filed within 10 working days from your receipt of the demand.

Protection of personal assets

Directors and people considering accepting a director appointment may wish to take steps to protect their personal assets from creditor claims, including by establishing a trust. While you cannot establish a trust to avoid creditors in the short-term, over time a trust can protect assets from creditor claims.

Conclusion

The present economic environment and increasing company failures is a timely reminder for the need to be alert to solvency issues and to act swiftly.

If you have any concerns about the solvency of a company for which you are a director or if you would like to discuss director duties and creditor protection further, please feel free to speak to your usual Jackson Russell contact, or Darryl King or Mark Sullivan.

Surviving the recession – getting paid

By Mark Sullivan

The credit crunch and recession has either directly or indirectly affected the cashflow of most businesses. The prevailing mentality of both consumers and businesses to hold on to funds for as long as possible (or to divert funds to repay other debts) is effecting the flow of money from customers to suppliers and retailers and to manufacturers. No-one appears to be immune and even landlords are finding that they need to be more accommodating with tenants.

In the past, when a business has encountered cashflow issues it has not been too difficult to find additional capital or funding from a bank to carry the business whilst also chasing slow paying debtors. Obtaining additional bank funding is no longer as easy. This article discusses two practical steps you can take to facilitate getting paid by your debtors.

Credit and supply terms

In the current environment it is prudent for suppliers of credit to adopt stricter credit policies and chase debts more vigorously. If you are a supplier of credit, whether goods or services, then this is an opportune time to review your written contracts to ensure there are robust signed terms and conditions in place to protect your business in the event of a customer default. Your terms should include a right to recover all legal costs and interest on unpaid debts, and a personal guarantee if you are dealing with a company.

If you are a supplier of goods, then it is essential that your terms and conditions are current and you are aware of your rights and the formal procedures required to protect your interest in goods supplied. If you are supplying non-consumer goods your terms should include a security interest and you should promptly register the security on the Personal Property Securities Register (PPSR). This may give you the right to recover the goods or the monetary proceeds from the sale of the goods. Simply explaining these rights to a debtor can often result in payment. If you find that you have to exercise these rights, then it is likely the debtor is insolvent and having a registered security interest gives you a better chance of getting paid.

Debt collection

It goes without saying that the key to debt collection is to be proactive and not let the debt get stale. If you are chasing a debt, then it is reasonable to assume others are chasing too. The old adages of “always being prepared” and “first in, first served” could never be truer in the current environment and if you adopt these policies then you should stand a better chance of surviving in this difficult environment.

We have an experienced team which can assist you with the review of your existing contracts, help with PPSR registration and the collection of difficult debts. We are always mindful of ongoing commercial relationships and the need to achieve a cost effective recovery.

Please feel free to speak to your usual Jackson Russell contact, Darryl King (for terms of trade) or Mark Sullivan or Caroline Harris (for debt collection).

Disclaimer

The information contained in this newsletter is of a general nature and should be used as a guide only. Every effort has been made to ensure the accuracy of the information published, but readers are requested to seek legal advice before acting upon this information and should not rely on what is published in this newsletter.

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CUSTOMER PARKING

