

Commercial eSpeaking

ISSUE 54
Summer 2020

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ESTD. 1883

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Welcome to the first edition of *Commercial eSpeaking* for the decade. We hope you enjoy reading these articles, and find them interesting and useful.

To talk further with us on any of the topics in this e-newsletter, or on any other legal matter, please be in touch. Our contact details are to the right.



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Rewarding value and increasing engagement

Bringing a key employee or a family member into your business by offering them a shareholding can be a powerful motivator and a significant indicator of how much you value their contributions to your success. We discuss a number of issues you should consider before asking a prospective shareholder to sign on the dotted line.

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Commercial eSpeaking
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Shareholdings for employees or family members

Rewarding value and increasing engagement

Bringing a key employee or a family member into your business by offering them a shareholding can be a powerful motivator and a significant indicator of how much you value their contributions to your success. However, the process should be done carefully with a robust shareholders' agreement and company constitution, as there are many facets of the company-shareholder relationship that must be agreed upon to ensure a harmonious future between yourself and the new shareholders.

The circle of trust

First and foremost, your shareholders should be people whose values are aligned with those of your business. Even if they are minority shareholders, there are circumstances in which you will have to rely on their good judgement. The easiest way to prevent disagreements down the road is to carefully consider their business sense, character and propensity

for confrontation before embarking on shareholder discussions.

The majority shareholder issue

There is a misconception among business owners that 51% or more share ownership is a 'controlling stake'. While that is correct for general resolutions, if a special resolution of shareholders is required, anything less than a 75% ownership will put you at the mercy of your fellow shareholders. Given that a special resolution of the shareholders is required for any major transaction, this could cause significant difficulties for you if they do not agree with your proposed actions. There are also a few decisions that require the unanimous consent of the shareholders, such as changing the constitution.

Cashing in shares

There is always risk that new shareholders will 'cash in' their shares when it becomes profitable for them to do so, or they receive a better offer of employment

elsewhere. To prevent your shares being used as a cash bonus, you can incorporate prohibitions on the sale of shares within defined timeframes, or place a cap on the increase in share value over time.

The solution to this problem will be specific to the operating model of your business and how comfortable you are with employees holding shares if they are no longer involved in your company.

Rights of first refusal

Your shareholders' agreement should include the process to be followed if the new shareholders no longer want to be involved in your business. Often you will want to ensure that those shares do not get sold to a third party. Including a right of first refusal where you must be offered the shares back from your shareholder at a fair price is usually the most reasonable way to prevent this.

To retain key employees, it is also possible to include a prohibition on ownership of the shares if they cease to be an employee.

Relationships

If you have issued shares to some key employees or family members but not others, you should have a conversation with your other staff or family members as to why they were not included. If you don't, it could put a strain on working relationships between not only yourself and your employees, but also between all your employees and on family relationships.

The above points are just some of the many things to navigate when considering opening your company ownership to new shareholders. Despite the challenge of managing these hurdles, bringing in new shareholders can be a meaningful reward for ongoing loyalty, and it will help increase engagement and retention of key staff.

If you think this could be a valuable next step for your business, please contact us for advice. ■



Restructuring your business

Consultation is key

New year, new you – new business structure? Restructuring is common in the new year when business owners feel refreshed and ready to take on the next challenge. The process however, is often shrouded in uncertainty (and stress) for employees.

Following the correct procedure for a restructure will allow your employees time to feel heard and to ensure decisions are made in good faith. They need to know your plans so they can ask the right questions and get the required support during a restructuring process.

What exactly is restructuring?

Restructuring includes anything that is the addition of new roles (not to be confused with hiring more of the same role you already have), merging two or more existing roles, losing roles that are now surplus to your business requirements or any combination of those changes.

The Ministry of Business, Innovation and Employment (MBIE) provides a recognised procedure for businesses to follow. It is documented in clear and easy to follow checklists that are available [here](#).

Even if you follow the MBIE-approved procedures, there are common errors business owners make during a restructuring process.

Errors during the restructuring process can lead to grounds for a personal grievance (PG) being raised by one or more of your employees; dealing with a PG is a costly and time-consuming exercise for your business. In order to avoid a potential PG, you should ensure the restructuring process follows the MBIE-approved procedures and your employee's employment agreement, as well as avoiding some of the many pitfalls that are outlined below.

Working with employees

A common mistake made during a restructure is to skip consulting with your employees and present the proposal as a finalised plan.

Your employees must have the opportunity to comment and ask questions on the proposed restructure and, where relevant, make suggestions that may change the restructure proposal. Allowing your employees space and time to consider the proposed restructure and provide feedback is critical. It will help ensure that you treat your employees fairly

and take into consideration all possibilities for your restructure.

Employee rights

All employers must comply with their employees' rights; these are set out in a number of statutes (including the Employment Relations Act 2000) and in their employment agreements. A restructure does not allow you to avoid your obligations to your employees under their employment agreements, and it must never be used as a way to avoid performance management or standard termination procedures.

You must be mindful to honour all your employees' leave entitlements, minimum guaranteed hours and notice periods both during the restructure consultation period, and when changing or terminating an employee's role.

Employee support

A restructure can be a stressful and uncertain time for your employees. During the process you have an obligation to consider all the possibilities for an employee, particularly if their role is being made redundant. You must consider redeployment into a new role or where their skillset can be applied in your new business model; this is critical to ensure you are not unnecessarily removing their income security.

You must also, regardless of the changes occurring in your employees' roles, ensure you allow them plenty of time to prepare for meetings regarding the restructure. You must also make them aware they may bring a support person to any significant meetings regarding their role. A support person can be a professional, a friend or a family member of your employee. Their role is to provide comfort and support during those discussions.

Good faith

The overarching rule during the restructure is whether you are genuinely acting in 'good faith' with your employees. Acting in good faith also means following through on the restructure plan once it is finalised. You cannot make a role redundant, realise it was in error and then hire a new employee into that position.

Take your time

Instead of what could be a 'knee-jerk' reaction to a shifting market or new opportunities, ensure there is open communication and allocate plenty of time for a restructure. This will allow for a smooth transition with minimal distress to your employees, and lessen the risk of business disruption and personal grievances.

If you are considering a business restructure and are unsure if you are meeting all your employment law obligations and/or your employee's employment agreements, please contact us. ■



Business briefs

Unfair contract terms

The High Court has declared a contract term 'unfair' for the first time since the 2015 amendments to the Fair Trading Act 1986 (FTA) that make unfair contract terms unenforceable¹.

Home Direct Ltd sells goods to consumers online with delivery directly to a consumer's home. Consumers can buy goods from Home Direct on credit and pay them off over time. Home Direct's standard consumer contracts contained a voucher entitlement scheme. If a consumer continued to make direct debit payments to Home Direct after they had paid off their item, the additional payments would be converted into vouchers to be used to buy other items from Home Direct.

The scheme had two terms that, together, the court considered were unfair:

1. The vouchers were non-refundable, and
2. If not used within 12 months, the vouchers expired allowing Home Direct to keep the additional payments.

Under the FTA, a term in a standard consumer contract could be unfair if

it creates a significant imbalance in the parties' rights and obligations, is not reasonably necessary to protect legitimate business interests and causes detriment to a party.

This case highlights the need for businesses to review their terms of trade, particularly given that the government has announced its intention to extend these rules to include business-to-business contracts.



Businesses should be cautious when sending commercial electronic messages

The High Court recently imposed a \$36,000 fine against the New Zealand Trustees Association for sending 24,000 unsolicited commercial electronic messages². The Unsolicited Electronic Messages Act 2007 outlines the rules for anyone sending messages electronically with marketing or promotional material, known as 'commercial messages'.

There are three general guidelines that can help keep you within the law when sending a commercial message:

1. Ensure you have consent from the recipient to send them commercial messages
2. Include a functional unsubscribe facility in the message, and
3. Provide accurate sender information to the recipient.

You should not presume that because a person has provided contact details for another matter in the past that they have consented to receive further messages from your business.

Make sure you are aware of the rules and, if necessary, talk with us if you are considering a marketing strategy that will involve sending commercial messages.



¹ *Commerce Commission v Home Direct Ltd* [2019] NZHC 2943.

² *Chief Executive of the Department of Internal Affairs v NZ Trustees Association Charitable Trust* [2019] NZHC 2684.

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Business briefs

Mānuka honey trade mark disputes

An ongoing dispute for the MANUKA HONEY trade mark demonstrates the importance of identifying your intellectual property (IP) and protecting that IP in the markets in which you trade.

The Mānuka Honey Appellation Society (MHAS) in New Zealand has applied to register a certification trade mark for MANUKA HONEY, which would limit the use of the term 'Mānuka Honey' in New Zealand to strictly New Zealand-based products³.

If MHAS's trade mark application is successful in New Zealand, it will have little impact on the New Zealand market as almost all honey is produced domestically. However, MHAS also wants to register MANUKA HONEY in Australia, the US, UK, EU and China.

Australian honey producers oppose the registration of this trade mark. They argue that there is no scientific difference between the New Zealand mānuka tree and the Australian tea tree,

so the name *mānuka* cannot be limited to New Zealand honey. If MHAS's international trade mark applications are successful, Australian honey producers would be barred from using the term 'Mānuka Honey' in relation to their honey in the respective countries.

Intellectual property can be vital to your business. This dispute highlights the importance of identifying the IP in your business and making sure it's protected. ■



3 Re Manuka Honey Appellation Society Inc [2018] NZIPOTM 7.