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## NEWSLETTER

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### Staff Announcement

We are delighted to welcome a new member to the **Swayne McDonald** legal team. **Carol Barr** has joined us at our **Botany Junction** branch office (*cnr Te Irirangi Dr & Ormiston Rd*). Carol has over 20 years of experience in property transactions gained in the course of working with three East Auckland Law Firms since the mid 1980's. Her legal work has centred on Residential and Commercial Conveyancing, Subdivisions, Mortgage Securities, Business Sales and Purchases, Leases, Wills and Deceased Estate Administration. In addition to Carol bringing to us her wealth of Legal Practice experience, she is also a "Fellow" of the New Zealand Institute of Legal Executives, and has recently completed a 3 year diploma course at Waikato University Law School – graduating in 2006 with a Diploma in Legal Executive Studies. Carol can be contacted by phone on 265 2700 or by email at [carol@smlaw.co.nz](mailto:carol@smlaw.co.nz). She looks forward to being of service to you!

### 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

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.

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## 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.

## Explaining Powers of Attorney

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Any individual may give another a power of attorney to manage his or her affairs pursuant to the Personal Protection of Property Rights Act 1988 ("the Act").

The Act provides for two types of powers of attorney:

### 1. An Enduring Power Of Attorney As To Property

This confers upon the person who is appointed ("the donee") the right to act in respect of all the property affairs of the person he or she is appointed by ("the donor"). Alternatively, it can be restricted to certain types of property. For example, a person who is intending to be absent from the country may wish to appoint an attorney to negotiate the sale of a specific asset such as a house or company shares and the power of attorney would therefore be restricted to those assets only.

### 2. An Enduring Power Of Attorney In Relation To Personal Care and Welfare

This confers upon the donee the right to make decisions concerning the personal care and welfare of the donor of the power of attorney. It can be particularly useful in the case of elderly people who wish to appoint family members to make decisions concerning the sort of care they should receive.

However, there are certain matters which are specifically excluded. For example, the donee cannot refuse consent on behalf of the donor to any standard medical treatment or procedure intended to save life or prevent serious damage to health.

In both instances, the donor may stipulate that the power of attorney is not to be revoked even if the donor becomes mentally incapable.

### Who Should You Appoint?

Given the wide powers that the donee of a power of attorney can exercise on behalf of the donor, it is most important that if you are considering appointing

an attorney then the proposed person should be someone whom you implicitly trust. You should know them well enough to be confident they will carry out your wishes and generally deal with your property and personal affairs in a manner that you desire.

Only one person can be appointed at any given time as an attorney for personal care and welfare but two or more can be appointed to deal with property. In that instance, you should consider whether they should be appointed jointly (which means both attorneys must act together) or jointly and severally (which means they can act either together or separately).

A power of attorney may be revoked at any time by the donor giving written notice to the donee. However, if you wish to do this it is prudent to inform your bank as well as any other third parties who may have dealt with your attorney. A power of attorney is also revoked on the death of the donor.

A power of attorney can only be used for a property owned by the donor in their personal capacity. It cannot be used to deal with property in which the donor has an interest in another capacity, for example as a trustee of a trust. Furthermore, it can not be used to authorise the donee to act on the donor's behalf in his or her capacity as a director of a company.

### Do You Need A Power Of Attorney?

A power of attorney is useful particularly if you are travelling or living overseas and wish to ensure there is someone available to deal with your affairs in your absence. It is also useful in case of illness or mental incapacity.

However, before appointing an attorney, careful consideration should be given as to whether it is appropriate to give the donee general power to act on your behalf or restrict it to specific matters only.

The appointment of an attorney is an important step and you should always seek advice from your solicitor before signing a power of attorney.

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