

Welcome to the spring edition of *Commercial eSpeaking*. This edition bring you articles that cover current issues in business.

If you would like to know more about any of these topics, or indeed any other legal matter, please don't hesitate to contact us. Our details are above.



## Second thoughts

**What happens when your employee wants to retract their resignation?**

We all know that people can sometimes say things in the heat of the moment which, on reflection, they didn't really mean. What happens when your employee quits suddenly, perhaps by storming out of your workplace as a result of a disagreement? As an employer, can you take this as a resignation? What happens if your employee has a change of heart and wants to return to work?

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# Second thoughts

## What happens when your employee wants to retract their resignation?

We all know that people can sometimes say things in the heat of the moment which, on reflection, they didn't really mean. What happens when your employee quits suddenly, perhaps by storming out of your workplace as a result of a disagreement? As an employer, can you take this as a resignation? What happens if your employee has a change of heart and wants to return to work?

Most employment agreements will provide a notice period that any employee must give when they want to end their employment. This allows you some time to find a replacement and make arrangements for the handover of work.

Sometimes, however, your employee may quit without giving any notice. This often happens after a disagreement or argument between an employer and employee, when you may be looking to investigate your employee's performance or conduct, or perhaps a stressed employee reaches 'breaking point' and decides they can't work another day in the role.

Sometimes your employee's words and intentions are clear. For example, they may actually say, "I quit" or words to that effect. Sometimes, however, the situation

is not so clear. What if your employee says, "I can't take this anymore, I'm leaving" and walks out part-way through the working day? Is that a resignation?

## What is their real intention?

For an employee to resign, they must unequivocally convey an intention to end their employment. Being absent from work briefly without explanation, or walking away to cool off, will generally not amount to a resignation. If there is any doubt as to the intention conveyed, you should be cautious before acting on an apparent resignation.

In the situation where they walk out halfway through the day, they may have intended to simply take the rest of the day off (rightly or wrongly) and return to work the next day. The easiest way to remove any doubt is to ask them. That is not always immediately possible, of course. But you should follow up with your employee at an appropriate time, which will often be after they have had some time to calm down.

## Cooling-off

What happens if your employee cools off and wants to retract their 'resignation' and return to work? Can they do that?

The starting point is that if your employee has resigned, they cannot retract the resignation unless you agree. Employment law, however, acknowledges that often even very clear resignations are given in haste and are not truly intended by your employee. Such resignations are often given in stressful and high-tension situations such as those we've mentioned. Because of this, employees are entitled to a brief 'cooling-off' period. This allows them time and space to think about what they really want to do. In those situations, you would be obliged to allow your employee to return to work if they changed their mind within a short period. If you don't accept your employee returning to work, your employee could have grounds to raise a personal grievance for unjustified dismissal.

## Employees changing their minds

Employees who wish to change their minds following a stomping-off style resignation should not dally. If they did not intend to resign in the first place, but it becomes apparent their employer is treating their words or actions as a resignation, then they should also immediately let their employer know. Not acting promptly could mean it is too late to return to work.

How long can an employee have for cooling off? That will depend on the particular circumstances, but at least 24 hours should be allowed. If their 'resignation' occurs on a Friday, in most cases your employee should be allowed to return on the following Monday.

## Our tips

If you have stormed off, or employ someone who has done this, then we suggest that:

- » Consider what was said. Was it definitely a resignation, or something less?
- » After an appropriate cooling-off period, if your employee has not made contact you should attempt to be in touch with them to check on their intentions. Your employee should notify you as soon as they think they may wish to return, and
- » If you cannot reach your employee after the cooling-off period, write to them recording their resignation and details of the end of their employment.

If you are faced with a change of heart, whether your own or from one of your employees, and you are unsure how to proceed, we have experts who can help. ■



# Receivership of construction companies

## Protecting your property and getting paid

In light of Ebert Construction's recent receivership, not taking protective measures opens subcontractors up to recovery and enforcement issues. If you are a subcontractor, you should think about how to prevent your tools and equipment (including cranes and scaffolding) from being seized and sold by a receiver, and to ensure you have the best chance of getting paid.

## Protecting your tools and equipment

The first step to take is very practical. If you can, always take your tools and equipment home with you each night. When a construction company goes into receivership, the receivers lock the gates to the relevant construction sites which prevents you from collecting your tools and equipment.

If this is not practical (if you have supplied scaffolding, for example) there are other steps to take to ensure you recover your gear. Make sure any tools or equipment left on site are clearly labelled and distinguishable as your property.

If you have entered into a construction contract that could last for more than one year, you must also register a security interest on the Personal Property Securities Register (PPSR). If you do not do this, the receiver could sell your property and use the proceeds to pay other creditors.

To register on the PPSR you must:

- » Have a written contract that confirms you own all your property including any materials you supply
- » Ensure the other contracting party signs the contract, and
- » Register a security interest as an owner of that property on the PPSR. To be safe, you should register before you bring any property on site.

To find out more about the PPSR, go [here](#).

## Getting paid

Sometimes your head contractor may wish to retain monies owing to you as security for the performance of your obligations under the contract. Preferably, and where possible, you should avoid giving retentions as there are other ways to provide security

to the head contractor – for example, you could offer a performance bond. A bond is issued by your bank and, therefore, your money remains in your bank account and cannot be used by the head contractor for working capital or to pay its creditors.

If a retention is required, make sure you leverage off the 'right' to have your retention monies held in trust under the Construction Contracts Act 2002.

To obtain the best level of protection, however, and if you have the ability to do so, you should also take these additional steps rather than simply relying on the Act.

- » Insisting that retention monies are placed in a separate bank account for your benefit (or for the benefit of you and other subcontractors, as applicable)
- » Ensuring your contract records that retention monies are to be held in a separate bank account and that your interest in them can be registered on the PPSR, and
- » Ensuring the security interest is registered on the PPSR.

## Caught up in the Ebert Construction receivership?

If you have been adversely affected by this receivership, you must complete this specific [form](#) listing all of your property that has been left on any Ebert Construction sites and email it to [restructuring@nz.pwc.com](mailto:restructuring@nz.pwc.com)

We understand the receivers will be releasing their first report by late September. The report should provide further information about the financial health and future of Ebert Construction.

## Take steps to secure your property and ensure you get paid

The fragile state of the construction industry means that Ebert Construction may not be the last of the big players to face difficulties. If the receiver shows up and you haven't taken steps to protect your tools and equipment, and any money you are owed, there is a real risk that you could lose your property and never get paid. ■

## Business Briefs



### European Union: privacy law update

The General Data Protection Regulation (GDPR) adopted by the European Union (EU) came into effect on 25 May 2018 and applies globally. GDPR establishes a consistent set of requirements to protect EU citizens from privacy and data breaches. Any New Zealand entity that collects, uses or discloses personal information of EU citizens must comply with GDPR. Not complying could result in a fine of up to the greater of 4% of your organisation's global annual turnover or €20 million.

*New Zealand situation:* the Privacy Act 1993 controls how New Zealand-based agencies collect, use, store and disclose

'personal information'. The legislation implements a principles-based system administered and enforced by the Privacy Commissioner; there's more information on that [here](#). A New Zealand-based entity could therefore be subject to both our own Privacy Act and GDPR. While there is significant overlap between GDPR and our own legislation, GDPR has a higher standard of compliance and more specific requirements. As such, continuing with your Privacy Act compliance regime in relation to EU information is not likely to satisfy the GDPR requirements.

If you process EU information, we recommend you undertake a privacy review/impact assessment to ensure that your operations, policies and processes are compliant with the GDPR. There is more information and tools available [here](#) at the Privacy Commission.

Even if GDPR does not apply to you, this is a good opportunity to review your current operations, policies and processes. ■

### Commerce Commission action in respect of extended warranties

The Commerce Commission has reinforced its position on extended warranties and consumer protection as shown by the recent charges brought against PB Technologies Ltd (PB Tech). PB Tech pleaded guilty to 14 charges brought by

the Commission for shortcomings in its extended warranty agreements.

The Consumer Guarantees Act 1993 already provides consumers with protection when goods do not comply with any of the specified warranties. However, to encourage consumers to purchase, retailers sometimes offer extended warranties as add-ons.

When offering extended warranties, retailers must provide clear information explaining the benefits of the extended warranty – in addition to benefits already provided by the legislation. It is a legal requirement for retailers to provide customers with a summary of these benefits. They must also give customers a copy of the extended warranty and inform them of their cancellation rights should they choose to purchase an extended warranty.

PB Tech was also warned about their use of 'bait advertising' when they supposedly sent a newsletter advertising discounted Apple watches to about 100,000 people when they only had 14 watches available at that price. The Fair Trading Act 1986 prohibits misleading representations about goods or services, including their availability.

PB Tech will be sentenced in September. ■

### Workplace culture crackdown

The recent #metoo movement has drawn worldwide attention to workplace

harassment. The New Zealand government has responded by collecting data about workplace harassment through confidential complaint lines and signalling clear expectations of New Zealand workplace culture.

Harassment may never be totally stamped out. However, your business can take steps to minimise harm and create a safer environment for your staff. These include:

- » Implementing effective policies that set out your organisation's expectations regarding harassment and setting up procedures for dealing with complaints
- » Ensuring that complaints are thoroughly investigated and treated seriously, and
- » Creating an ongoing relationship of trust and confidence that helps to ensure your employees feel comfortable approaching their managers (or alternative representatives) about harassment.

If any business does not adjust and address harassment issues, it risks the possibility of adverse publicity and legal action in the form of personal grievances and/or human rights complaints.

There is now a great deal of information to help any organisation. Employment New Zealand's [website](#) is a good place to start. ■