

Buying or Selling a Business – Consider the Employees

Introduction

It is not unknown for the Brookfields employment law team to receive enquiries from vendors or purchasers after they have entered into an unconditional contract to buy/sell a business, asking what they should do with the employees.

There are a few prudent and simple steps that each party can take to ensure that “employee issues” are dealt with efficiently and with certainty. Both the vendor and the purchaser parties should bear in mind that there is a third party (the current employees) with a vested interest in the transaction.

For the purposes of this article the business being sold does not employ “vulnerable employees”. “Vulnerable Employees” are those employed in specified industry sectors and occupations as provided in the Employment Relations Act 2000 (“ERA”). These employees have special protections when a business is being sold.

A Prudent Purchaser - Due Diligence

The signing of a sale & purchase agreement, which fails to deal with the parties obligations to the employees of the business, shows the parties haven't done their homework.

Most sale & purchase agreements provide for the purchaser to conduct due diligence. This is to protect the purchaser as they can obtain full access to the records and assets of the vendor, which they can use to confirm the veracity of the vendor's representations.

The purchaser will no doubt use the due diligence process to focus on the economic indicators of the business' state of health to determine whether they are purchasing it at a fair market price. They will pore over the “books”, examine the value of plant and equipment, stock and goodwill. They will carefully scrutinise depreciation schedules, the trading history and financial projections all with the aim of avoiding the purchase of a “lemon”. What attention, however, are they paying to the employees? After all, aren't we repeatedly told that the employees are a business' most “valuable asset”?

A prudent purchaser will request details of the wage bill as part of the due diligence process. They will want to know about the employees' terms and conditions of employment. To assist them in understanding how the business functions, they should find out what each employee does and how this contributes to the operation. Once this is understood, a prudent purchaser will take into account whether there are operational efficiencies that can be achieved through reorganisation.

It will also allow them to give proper consideration as to whether they will offer new employment to some or all of the employees, and under what terms and conditions. Unless the purchaser agrees to do so, the purchaser has no obligation to offer employment to the current employees. However, if the purchaser does want to retain some, or all, of the current employees they are free to offer terms and conditions of their choosing (subject of course to meeting minimum legal requirements).

Any negotiations which are to take place with the vendor that relate to the employees need to be finalised prior to settlement. If they are not, the purchaser will in all likelihood be faced with the situation where on day one of their ownership all former employees of the vendor simply turn up for work as usual. It will be the purchaser's (now the new owner's) responsibility to sort out what happens from here while the vendor is likely to be not the least bit interested, uncontactable and probably on a island somewhere in the Bahamas.

Employment Related Liabilities

In addition to examining the employees' conditions of employment, a prudent purchaser will have found out well before settlement, the business' employment-related liabilities. These are likely to include employees' accrued annual leave, alternative holiday entitlements, and possibly long service leave and redundancy entitlements. If the purchaser is going to employ some or all of the current staff then discussions need to take place with the vendor about whether the employment is going to be treated as continuous, or whether the employment with the purchaser will be the commencement of a new employment relationship. There are financial obligations which will either become the purchaser's or the vendor's responsibility, depending on this decision.

As can be seen, due diligence should extend to considering the employment issues in any sale and purchase transaction involving a business with employees.

For more information, please contact Paul Wallace.

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