

EMPLOYMENT UPDATE

OCTOBER 11

EMPLOYMENT ISSUES DURING BUSINESS SALES

In this Employment Update, we discuss the importance of taking into account employee issues during the sale of a business.

► IN THIS ISSUE

Should all employees be offered ongoing employment?	1
Transfer of industrial instruments, employment contracts and policies	1
Recognising continuity of service	2
Vendor restraint	2
Employee Records	3

We have all heard the saying that the most important asset of any business is its employees, and yet, when it comes to buying a business, employment issues are commonly overlooked with due diligence usually focussed on the financial performance of the business.

However, consideration should also be given to relevant employment issues as some of the decisions made in this regard could have a significant impact on the business once the purchaser assumes control.

Here are our top five key employment issues that both vendors and purchasers should not ignore during the business sale process.

1. Should all employees be offered ongoing employment?

A due diligence undertaken in relation to employees will assist purchasers to make an informed decision as to whether they wish to offer employment to all or some of the employees. This will also influence the terms and conditions contained in the business sale agreement. This process will also be of significant interest to vendors given the possible redundancy payment implications for any employees that do not receive an

offer of employment from the purchaser.

Vendors should ensure, and purchasers should check, that employees have been paid correctly and that PAYG and superannuation have been paid. The business sale agreement should also contain warranties and indemnities to this effect. The parties will also need to consider the accrued leave entitlements and work out how these entitlements are to be treated. More on this later.

2. Transfer of industrial instruments, employment contracts and policies

In some instances, it may not be beneficial to the purchaser's overall business to have a particular industrial instrument transfer from the vendor to its business on the transfer of employees.

There are steps the purchaser may be able to take to remove itself from coverage of a transferring instrument, although the starting proposition is always that the *Fair Work Act 2009* (Cth) (Act) provides that



Employment Law Specialists

www.aitkenlegal.com.au

► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment	Employee Entitlements	Contractor Agreements
Redundancies	Employment Contracts	Contractor Issues
Workplace Health & Safety	Enterprise Bargaining	Statutory Leave Issues
Discrimination & Harassment	Enterprise Agreements	Workplace Training
Unfair Dismissal Claims	Employment Policies	Workplace Investigations
General Protection Claims	Misconduct & Poor Performance	Transmission of Business



an industrial instrument will transfer with employees on a transfer of business where the employees work remains the same or substantially the same.

However, an order may be sort from Fair Work Australia to the effect that a transferring instrument not apply to the transferring employees if the purchaser can demonstrate that the transferable instrument would have a negative impact on the productivity of the purchaser's workplace; or the purchaser would incur significant economic disadvantage as a result of the transferable instrument covering the purchaser; or issues with the synergy between the transferable instrument and any workplace instrument that already covers the purchaser; or generally it would be in the public interest to grant the order.

Importantly, the Act has broadened what is considered to be a 'transfer of business' to include where there is a transfer of the ownership or beneficial use of assets, but also where there is outsourcing and insourcing arrangements between the new and old employer.

Purchasers should also check any existing employment contracts and policies for employees and make sure that they are comfortable with

their terms, particularly any termination clauses in circumstances where the employment contracts are novated to the purchaser through the business sale process.

3. Recognising continuity of service

If there is a transfer of employees through the business sale process, then the Act provides:

- a) *Any period of service of the employee with the first employer counts as service of the employee with the second employee; and*
- b) *The period between the termination of employment with the first employer and the start of the employment with the second employer does not break the employee's continuous service with the second employer ... but does not count towards the length of the employee's continuous service with the second employer.*

In effect, this imposes upon the purchaser an obligation to recognise the employee's period of service for the purpose of such entitlements including annual leave, personal/carer's leave, long service leave, notice and redundancy payments and unfair dismissal.

However, an often overlooked section of the Act also provides that if the purchaser decides not to recognise the employee's service with the vendor, then there will be no continuity of service with respect to annual leave and notice and redundancy pay. Additionally, the purchaser may, by notice, require the employee's period of service to start again for the purposes of the unfair dismissal provisions under Division 2 of Part 3 of the Act. This, in effect, may mean the transferring

employees would have to serve another minimum period of employment (probation) – a handy option to allow purchasers an opportunity to evaluate the employees of the business after settlement.

However, the purchaser is required to recognise the period of service of the transferring employees for the purposes of personal/carer's leave as well as long service leave (subject to the relevant State provisions). In these circumstances, the purchaser should ordinarily seek an adjustment to the purchase price of the business in accordance with the terms of the business sale agreement.

While the purchaser can certainly take on all of the accrued leave entitlements and seek an adjustment to purchase price of the business with the vendor, the option of restarting the period of service for transferring employees with respect to annual leave and, more importantly, the minimum period of employment, is one that should be given serious consideration by purchasers.

4. Vendor restraint

It goes without saying that the parties should give due consideration to vendor/key person restraint in order to protect the goodwill in the business that the purchaser is acquiring. The exact nature of the restraint will vary depending on the circumstances of each transaction, however, the parties will need to reach an agreement as to whether a restraint is included, and if so, the timeframe and area that the restraint will operate having regard to what would be considered reasonable.

▶ AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment
Redundancies
Workplace Health & Safety
Discrimination & Harassment
Unfair Dismissal Claims
General Protection Claims

Employee Entitlements
Employment Contracts
Enterprise Bargaining
Enterprise Agreements
Employment Policies
Misconduct & Poor Performance

Contractor Agreements
Contractor Issues
Statutory Leave Issues
Workplace Training
Workplace Investigations
Transmission of Business

5. Employee records

All employee records should be transferred to the purchaser at the time the employees transfer. If the purchaser has any issues post-settlement in relation to the location or content of employee records, this should be dealt with promptly and a request be made to the vendor for it to provide the records. Employers may be prosecuted for failing to keep employee records.

Key Points: When considering a business sale, decisions taken with respect to employees can have a direct impact on the profitability or otherwise of the business after settlement. In particular, the impact of any transferring industrial instruments and the flow on effect to any existing businesses or employees of the purchaser should be given great weight.

While there is the option to make adjustments to the purchase price to take into consideration the employee entitlements, there will be no opportunity to make adjustments for the impact of a transferring instrument. Accordingly, consideration needs to be given as to whether an application should be made to Fair Work Australia to seek an order declaring the transferring industrial instrument has no application to the purchaser.

Also, a decision on whether or not to recognise transferring employees' period of service can have a significant impact on both the purchaser and the vendor, not only in relation to adjustments to be made to the purchase price, but the possibility of allowing the purchaser greater flexibility in evaluating employees post-settlement without the risk of an unfair dismissal claim.

As such, the parties should consider and treat employees just like any other asset of the business during a business sale process and ensure that the due diligence process does not overlook or underestimate their impact on the business both before and after settlement.

Mark Bunch

Partner

+61 7 5593 1665

▶ AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment
Redundancies
Workplace Health & Safety
Discrimination & Harassment
Unfair Dismissal Claims
General Protection Claims

Employee Entitlements
Employment Contracts
Enterprise Bargaining
Enterprise Agreements
Employment Policies
Misconduct & Poor Performance

Contractor Agreements
Contractor Issues
Statutory Leave Issues
Workplace Training
Workplace Investigations
Transmission of Business

WE CAN HELP YOU WITH

- ▶ Contracts of Employment
- ▶ Enterprise Agreements
- ▶ Understanding the *Fair Work Act* and other legislation
- ▶ Termination of Employment & Redundancies
- ▶ Employee Misconduct & Performance Issues
- ▶ Discrimination, Harassment & Workplace Bullying
- ▶ Workplace Health & Safety
- ▶ Workplace Policies & Employee Handbooks
- ▶ Employee Entitlements & the Fair Work Ombudsman
- ▶ Reviewing & Appealing Workers' Compensation Determinations
- ▶ Unfair Dismissal & General Protection Claims

FOR MORE INFORMATION PLEASE CONTACT

AITKEN LEGAL

Sunshine Coast Office

Level 1, Regatta Corporate,
2 Innovation Parkway,
Birtinya Qld 4575

PO Box 256 Wurtulla Qld 4575

Phone: 07 5413 4000

Fax: 07 5413 4099

Email: info@aitkenlegal.com.au

Gold Coast Office

Level 6, The Rocket
203 Robina Town Centre Drive
Robina Qld 4226

Phone: 07 5593 1665

Fax: 07 5593 1668

Email: info@aitkenlegal.com.au



LISA AITKEN

Managing Partner

lisa.aitken@aitkenlegal.com.au



CHRISTOPHER CAMPBELL

Partner

chris.campbell@aitkenlegal.com.au



MARK BUNCH

Partner

mark.bunch@aitkenlegal.com.au



Disclaimer: The information contained this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Aitken Legal does not accept liability for any errors it may contain. Liability limited by a scheme approved under professional standards legislation. [Contact Aitken Legal here.](#)

▶ AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment

Redundancies

Workplace Health & Safety

Discrimination & Harassment

Unfair Dismissal Claims

General Protection Claims

Employee Entitlements

Employment Contracts

Enterprise Bargaining

Enterprise Agreements

Employment Policies

Misconduct & Poor Performance

Contractor Agreements

Contractor Issues

Statutory Leave Issues

Workplace Training

Workplace Investigations

Transmission of Business