

Selling your business? When to tell your employee – the art of consultation

Without question, the number one issue that challenges employers when they sell their business is the question of when to consult. Employers will often ask at what point do my employees need to be informed. That question is usually quickly followed by how long can we hold off. Therein lies the problem because consultation is not about informing employees at the last possible point in the transaction; consultation requires an employer to keep an open mind and consult before decisions are made.

If a Vendor does not get the consultation aspect of the sale right they run the risk of facing a multitude of personal grievance claims, having disenfranchised employees right up to completion which could adversely affect trading and then face the prospect of the profit on completion reducing to far less than was anticipated.

So, what does the law require and when is the right time to consult?

Well the first part of that question is relatively straightforward to answer, but the second aspect is more nuanced. Commercial reality cannot be ignored and needs to play a part in decision as to the timing of consultation along with an assessment of risk.

It is important to remember that employees cannot be sold and neither can their employment agreements. The Employment Relations Act 2000 requires an employer, acting in good faith, to consult on an asset sale when the vendor proposes making any decision that is likely to

have an adverse effect on the continuation of employment. In order for that obligation to be given effect to the employees must be provided with relevant information, including access to that information, and an opportunity to comment before the decision is made subject to any commercial and confidentiality reasons.

A proposal is something more definite than the contemplation of a possibility and it is always difficult to determine when a proposal has crystallised into a definitive course of action. However, consultation, in order for it to be genuine and meet the good faith test, must occur in my view before a Business Sale and Purchase Agreement (BSPA) is entered into. That is because at that point the decision has been made, the employer has contractually agreed with a purchaser to sell the business, subject to any specific conditions.

If it is not practical to consult earlier then consultation must occur before the BSPA goes unconditional. If consultation occurs before the conditional terms are satisfied, there is still an opportunity for a vendor to walk away from the transaction. Once the BSPA goes unconditional, there is zero opportunity. All decisions have been finalised and we are now talking about informing employees of the sale rather than trying to be constructive in maintaining a productive employment relationship.

That is the legal answer, but as intimated commercial factors come into play when it comes time to consult. Any decision around consultation might be influenced by the likelihood of the sale proceeding and of employees being offered jobs. If the Vendor has contractually secured with the purchaser offers of employment for all their employees on the same terms and conditions of employment then the risk of a personal grievance or the potential for an employee to become unhappy because there was insufficient consultation is going to be negligible.

On the other hand if the Vendor's workforce is heavily unionised then consulting early is highly recommended. The Vendor will want the Union onside and will want to

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work together to secure employment for as many employees as possible and ideally this will happen pre contract.

When it comes to consultation employees almost universally want to know the same things. What does it mean for them? Are they going to be offered employment? What are they going to get paid, who is the purchaser, is the purchaser going to recognise my annual and sick leave entitlements or do I have to start building them up for scratch? Do I have my same job and is it at the same place? These common questions and more importantly the answers can also determine when consultation should practically occur. If the vendor can answer these questions then consultation can occur much earlier, but if the vendor does not have all the relevant information then consultation can quickly become an exercise in futility.

While there will be a myriad of reasons why a vendor may not want to consult earlier when it comes to vulnerable employees, who are protected under the Act there are statutory timeframes that must be met. Inevitably that means consultation must start early so the timeframes can be complied with. Similarly, if the Vendor does not have a robust technical redundancy clause in their employment agreements and is required to contractually provide their employees with 6 weeks' notice of termination then consultation, as a matter of necessity, will have to occur early. If it does not then the employees may be offered employment with the purchaser, but the Vendor will have to potentially still pay out contractual notice if the lead in time is insufficient.

On any transaction, any consultation is better than no consultation. You do not want to be the vendor who is the unfortunate and costly position of telling their employees at 4pm that the business has been sold and the next day the purchaser will be making offers of employment to most, but not all. That is not consultation and will end up being an expensive and costly lesson.

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