Employee consultation – why it's now more critical than ever

BY SEAN MILLARD

Employers are now required by law to spend much more time talking with their employees about a growing list of issues. Long gone are the days of an employer being able to dictate how work is to be undertaken and on what terms.

Recent changes to the regulation of flexible work arrangements and parental leave, as well as the commencement of the model National Work Health and Safety legislation (WHS regime) in 2012, have increased the need for many employers to discuss with their employees how and when work is to be carried out.

Employers operating Victorian businesses will be well familiar with their obligations to maintain a safe workplace and work practices under the *Victorian Occupational Health and Safety Act 2004*. One of the key objectives of the *Act* is to promote greater involvement and co-operation between employers and employees on workplace health and safety issues. This extends to employers and employees exchanging information about risks, and measures to eliminate or reduce those risks, as well as employee representation when discussing health and safety matters.

Under the national WHS regime, however, responsibility for occupational health and safety is now on all participants involved in conducting a business or undertaking. This change in focus emphasises the importance of consultation between those that come into contact with each other during the course of undertaking business.

The increasing incidence of employees making allegations of bullying provides a good example of why consultation with the workforce is required. For instance, in addition to explaining what might constitute bullying to employees, what should also be made very clear is the difference between bullying and reasonable management action. As explained by VECCI's Richard Clancy on page 32, from 1 January 2014, a worker who alleges that they have been bullied at work will be able to apply to the Fair Work Commission (FWC) for an order to stop the bullying. Because of this new jurisdiction, workplace consultation will become even more important if employers are to reduce the prospects of a visit to the FWC.

Safe Work Australia has been engaged in the development of a proposed code of practice on preventing and responding to workplace bullying under a harmonised WHS regime. More recently it has been suggested that guidelines, as opposed to a code, may eventuate. Whatever the outcome, once finalised and released, this code or set of guidelines is likely to affect how the conduct of employers, whether covered by the OHS Act or the WHS regime, is assessed with respect to allegations of bullying. One would expect both the FWC and WorkSafe Victoria to make use of whatever is adopted in carrying out their functions.

As noted in a separate code of practice, *WHS Consultation, Cooperation and Co-ordination*, issued under the WHS regime, consultation does not mean telling workers about health and safety decisions or actions after they have been taken. It requires that workers are:

- made aware of health and safety matters as soon as possible
- encouraged to ask questions about health and safety
- encouraged to raise concerns and report problems
- encouraged to make work health and safety suggestions
- involved in the problem solving process
- properly informed of the outcome of the consultation and decisions made.

While specifically relevant to the WHS regime, this code provides ideas on how employers might go about approaching their workforce in relation to other issues, such as flexible work arrangements and the accommodation of impairment or caring/family responsibilities.

The need for greater levels of consultation does not start and stop with workplace legislation; it also arises under court-made law. For a number of years, there has been increased consideration by Australian courts into the notion of an implied mutual duty of trust and confidence within the employer-employee relationship. The Federal Court recently established that there is such an implied term in Australian employment contracts. While not addressing a failure to consult as such, this decision could have significant implications for employers if they are found to have breached this duty and greater consultation may be what is expected of employers for them to comply.

Employers should be hoping that Father Christmas delivers a reversal of that decision on appeal to the High Court. In the meantime, they need to be cognisant of the potential obligations this implied duty may impose with respect to redeployment processes, bonus schemes and the like. Further, what will not be underestimated is the readiness of workers to assert their rights.

Traditionally, awards and enterprise bargaining agreements have required a level of consultation between the employer and their workforce/the related union about redundancies, wages, hours of work and health and safety issues. Take a peek at what will be required from 1 January 2014 in agreements with respect to changes to rosters and hours of work – more consultation.

Finally, remember the importance of responding to employees who are parents or carers, those who have to bear impairments or violence at home, or those who are aged over 55, when they wish to discuss work arrangements. Since 1 July 2013, the National Employment Standards have provided a right for these employees to request flexible working arrangements and such a request may only be refused on reasonable business grounds.

Like it or not, to comply with the law we have to encourage and support a two-way conversation with our employees and sooner rather than later on these matters.

Sean Millard is the Principal of CCI Lawyers, VECCI's associated law firm. CCI Lawyers can provide legal advice on all manner of workplace relations claims and matters. For assistance, phone VECCI on 03 8662 5222 or CCI Lawyers on 03 8662 5210.