

The headline reads:-

Worker who stole \$1.2m from employer to buy 'nice things' jailed for more than six years

Hopefully, that was not your company.

White collar crime by company directors and employees is happening all around. The true extent of it is unknown and, in a technology enabled world, even with ongoing vigilance detecting theft can be difficult.

Unfortunately, theft will often be discovered only when there is a liquidity crisis. For example, when overdraft limits are reached or creditors are demanding to be paid yet there seem to be sufficient sales, no extraordinary bad debts and no apparent reason why cash should be short. Other times, the theft is discovered because of the actions of a whistle blower.

Before accusing anyone of theft, it is important to obtain *evidence of theft*. Unexplained transactions alone are not sufficient. Collecting the evidence is time consuming, can be expensive and may lead to dead ends. But the task cannot be avoided and forensic accountants may have to be engaged.

From a legal perspective, when a theft is discovered there are several issues to consider. These include: -

1. Removing the alleged perpetrator from the business
2. Reporting the matter to police
3. Directors duties and
4. Risk management strategies

Removing the perpetrator

An allegation of theft is very serious.

In any case where theft is suspected, good evidence is essential. In the early part of an investigation, only some thefts may have been detected. However, this is not a bar to take the steps needed to remove the perpetrator from access to company property. The true extent of the theft will eventually be determined.

Regardless of the reason for doing so, before terminating the employment of anyone, it is best to seek legal advice.

For example, the law requires that before dismissing a person from employment (including a person accused of theft) that person must be given the right to respond to the allegation. This allows the accused to provide a defence or legitimate justification for their actions. As dismissal is to be conveyed as a possible

outcome of the meeting (assuming that there is no legitimate explanation for the conduct), the employee should also have been given the opportunity to have a support person present at the meeting. Regardless of the conduct of the employee, not taking these steps exposes the company to a claim of unfair dismissal.

Putting an employee on “garden leave” whilst the extent of the theft is determined is also not possible unless the contract of employment allows that to occur. So, alternative strategies may be required.

Police Report

Section 134 of the Criminal Law Consolidation Act 1936 (SA) applies to the crime of theft. Reporting the theft to police involves providing them with a bundle of documents to help establish the case and then providing such other information that is required.

On conviction, the penalty is a term of imprisonment of up to 10 years.

There is nothing in the South Australian statute books that requires that the crime be reported. This is not the case in some other states. A decision not to report the crime would be justified where the directors of the company do not believe it to be in the best interests of the company to do so. This may occur where the reputational damage once the offence becomes public knowledge would be significant.

Directors Duties

A director of a company has a number of duties to the company at common law and under the Corporations Act 2001 (the Act).

The primary duty of a director is to act in good faith in the best interests of the company and was previously called the duty to act honestly. This is a common law duty and theft from the company for one’s own benefit is clearly a breach.

Where a director is in breach of their duty of good faith and fails to act in the best interests of the company, then the usual remedy against the director is a claim of damages. However, the reality is that by the time that the theft has been discovered, the money is well gone – possibly to support a lavish lifestyle or a gambling addiction.

Note that the removal of a director by the other directors is generally not possible. Directors are appointed by the members and usually are the only ones with the right to remove them. The procedures in the company’s Constitution or in the Corporations Act 2001 must be followed; and again, it is recommended that legal advice be sought before taking any steps to remove a director.

A pressing issue by the time a theft has been discovered is whether the company will survive. Having bled lots of cash it may be that a large injection of cash is required to prevent insolvent trading. If that is the case and money cannot be found, the appointment of a company administrator may be one of the only options to the company to provide an opportunity to trade out of difficulties.

Risk Management Strategies

There are many internal management practices that can be adopted to minimize the risk of theft. Of course, policies and procedures are nice to have, but they must also be enforced; and the risk officer’s role is not an enforcement one. Enforcement is the role of management.

Some of the useful policies and procedures to minimize the risk of theft include: -

- Require the bookkeeper/accountant to have regular holidays;
- Have limits on spending authorities – for everyone;
- Separate functions e.g. ensure that the person who authorises the payment of an invoice is not the person who authorises the transfer of funds;
- Require two signatories on expenditure authorisations, or two factor authentication – with different people making the authorisation;
- have an independent person reconcile the bank statement monthly;
- verify all credit card charges to make sure that they are business related;
- avoid related party transactions; and
- keep a close eye on cash, record all receipts and expenditures and reconcile regularly;

Ultimately, vigilance is the best deterrent to theft.

Conclusion

When a theft is discovered, it must be acted upon.

It will be disruptive. It will be expensive. But it needs to be resolved. Whether and how the theft becomes a matter of public knowledge, is an issue that also needs to be addressed.

Legal advice should be obtained on how to manage the consequences of the discovery as a matter of urgency. This includes advice on how to remove the thief from the business and recover stolen money.

So, although implementing protective measures before a thief can act is very important, as the even best systems in the world aren't fool proof there is no substitute for constant vigilance.

Jankus Legal has acted for several companies that have had the misfortune of a director or employee stealing from them. Should you require any assistance in this regard, please email christine@jankuslegal.com.au . As always, enquiries remain absolutely confidential.

This advice in the Article may not be suitable to you because it contains general advice that has not been tailored to your personal circumstances. Please seek professional advice prior to acting on any information.

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