Is it worth their weight?

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With a bevy of international court cases shining a light on the obligations of foodservice businesses, **Jonathan Kaplan** fires out a warning signal.

It was recently reported in the media that a Brazilian court had ordered McDonald's to pay a former franchise manager $US17,500 because he gained 29kg in weight while working there for 12 years.

The 32-year-old man complained that he was forced to sample food products each day to ensure quality standards remained high because he feared the random visits of 'mystery clients' employed by McDonald's to report on food, service and cleanliness.

The report stated that the man also protested that McDonald's offered free lunches to employees, compounding his calorie intake while on the job.

It is not known whether McDonald's is appealing.

In an unrelated matter, coffee chain Hudsons has been criticised for the launch of a milkshake containing 400mg of caffeine in each drink.

The Australian Medical Association warned the high dose of caffeine in the Hudsons drink had the potential to cause heart palpitations, diarrhoea and headaches in some consumers, and was a danger to young people and pregnant women. "You can't ban these drinks, but this one is definitely pushing the limit. It's disturbing," Dr Hambleton, AMA is reported saying.

So what could the obligations be for employers towards employees in a claim based on the McDonald's-type case described above, and what are the risks for owners if a customer suffers ill effects after consuming a Hudsons-type milkshake?

Let's first take a look at the implications of encouraging employees to eat by tasting in the course of their employment, or providing them with free food.

Under the provisions of the Occupational Health and Safety Act 2004 (Vic), employers must provide and maintain for their employees a working environment that is safe and without risks to health, and ensure any such risks to health and safety are eliminated as far as is reasonably practicable.

Conversely, the obligations include a duty on employees to take reasonable care for their own health and safety at the workplace, as well as cooperate with their employers with respect to any of the employers' steps taken to comply with its statutory obligations.

Although the breach of the Act would seem to provide the grounds for a claim by an employee, it is doubtful whether such a claim would succeed on its own against an employer without including a claim for negligence under common law as well. Under the common law principles, an employer owes a duty of care not to harm an employee's interests if it is reasonably foreseeable to the employer that the employee would be harmed by the employer's acts and omissions. So it seems that an employee might have the best chance of success if the employee satisfied a court on ordinary common law negligence principles that an employer owed a duty of care.

The principles seem to revolve around whether an employee is able to show that it was reasonably foreseeable by the employer that the 'tasting' constituted a risk of harm. It is arguable that if a person of normal weight becomes obese by the direction of their employer to taste food regularly, that person is at risk of suffering physical harm.

What then is the situation in the food-tasting example? How could an employer minimise the risk of any claim, and what are the obligations of the employer? Put simply, the test the employer would need to consider is: What would a reasonably prudent person in the employer's shoes do?

If a claim were to be made against the employer under the Act or in a civil claim, it would be useful if the employer was able to assert that it had established some guidelines, such as directing the employee not to swallow the food when tasting, as is the case with wine tasters. In these circumstances it might be difficult to criticise an employer for breaching any duty to its employee.

And what about free food? Well it's a double-edged sword. Don't provide a free meal and you might be called tight. Provide it and you could get sued if an employee puts on weight. The answer might lie in providing a meal during their break at discounted price, thereby removing the temptation of free food. Is it not well-known that if you overeat you're going to put on weight? The onus surely rests with the employee.

Looking at the Hudson situation, consider whether an owner owes a customer a duty of care? What sort of warning could an owner provide in relation to the products it sells?

So, what if a customer with a heart condition becomes ill after consuming excessive amounts of caffeine contained in a milkshake? Should the drink be accompanied by an appropriate warning appearing on the menu, perhaps similar to the warning on takeaway coffee cups that they contain hot coffee, or that a food product contains nuts? It is a concern that without such a warning there is a risk that a claim might be brought by someone affected by drinking the Hudsons-type product.

There is FSANZ legislation requiring warnings for certain drinks that contain excessive amounts of caffeine. Whether milkshakes fall into that category is debatable. Careful research before marketing high-caffeine products is therefore imperative.

With easy access to 'no win, no pay' legal services and class action litigation, business owners need to be extra vigilant in the demands they make on their employees or the products they market to the public by seeking good legal counsel. Either that, or make sure you have adequate indemnity insurance.