



Christchurch-based **Garth Galloway** is a partner with Chapman Tripp.

Getting the message

GARTH GALLOWAY asks: how can an employer demonstrate that health & safety training messages have been understood?

In a recent case arising from the drowning of a Taiwanese tourist, the judge commented that the victim's inability to understand English was a factor in her death.

Back in 2008 I acted for the driver of a commercial jet boat who was charged after the boat flipped and a Chinese tourist drowned. When Maritime New Zealand interviewed the driver they asked him to recount the safety briefing he gave to the Chinese passengers, none of whom understood English.

He described speaking in English and pointing to a card containing diagrams that was used during the briefing. The investigator said all of the passengers had said they did not understand the briefing, and asked the driver to explain how he knew that they knew what he was talking about.

It was a difficult question to answer. There was an interpreter on board who apparently made some comments to the passengers, translating what the driver said. And he showed the passengers some of the things he was referring to on the diagram. But could he prove that they understood what he was saying, when all of them said to the contrary?

The issue has stuck with me. How does an employer know that an employee understands what they are being told? With a significant change taking place in the demographics of New Zealand's population, I wonder how many employers could answer a similar question asked of them in relation to the training provided to their workforce?

In raising the issue, I am conscious that many of the dangerous industries – including agriculture – have a lot of recently-arrived foreign workers with a very limited understanding of English.

In the past few years I have turned up at a

The onus is on the employer to ensure that things are understood and, further, to be able to demonstrate that this is so.

number of rural properties following a serious harm accident and met workers who had barely any understanding of English. They have largely been employed in the dairying industry and have come to this country with no farming experience at all. Within a short time they are driving quad bikes, working in close confines with large animals and being exposed to other significant hazards.

I have also acted for employers with workers on construction sites where people have been seriously harmed, and where there have been similar language difficulties.

The issue of language is significant for employers as our population continues to diversify. Great care should be taken when inducting, training and supervising employees who have little or no English. The onus is on the employer to ensure that things are understood and, further, to be able to demonstrate that this is so.

BEYOND LANGUAGE

But I think the issue goes beyond just language. How does an employer know that any employee (English-speaking or not) understands what he or she is being told? Does a nod of the head by the employee suffice as being indicative of an appropriate level of understanding? It is incumbent on all employers to be able to demonstrate that the training provided to employees was of an appropriate standard and understood by them.

I am often confronted by a scenario where the people doing the training and subsequent supervision have had no training in how to

train or supervise. And so it is impossible for an employer to qualitatively measure the training. The trainers have often worked for the organisation for a few years before being promoted; they then find themselves being responsible for training and supervising – but they do not necessarily have the ability to do either. And if the training and supervision that they received was inadequate then the issues become generational (in a work sense).

TWO EXAMPLES

Employers should think very carefully about how they discharge their obligation to train and supervise employees. Two relatively recent examples highlight the point. In the first, a worker had his hand caught in a machine at a meat works. The training for the worker had been provided by an unidentified employee for a very brief period of time. There was no training matrix in place and so different trainers would do different things.

In the second, a farm worker was killed when the quad bike she was riding rolled on top of her. The employer had excellent written records of the training provided to the victim and the training was extensive and by a reputable external organisation.

The meat company was successfully prosecuted, largely on the basis that the training provided to the employee was inadequate. The employer of the deceased farm worker was able to avoid prosecution because, notwithstanding the tragic outcome, it was able to satisfy WorkSafe that it had discharged its obligation to train the employee appropriately.