

“VISION IN THE WORKPLACE”

Issue Thirty-five, August 2008

In this Edition of “Vision in the Workplace” we note that Unfair Dismissal reforms are set to be introduced before the substantive industrial relations legislation. We also look at a recent decision from the Administrative Decisions Tribunal ruling that certain safety concerns do not qualify as a statutory authority defence, and a decision of the Australian Industrial Relations Commission’s which overturns an earlier decision by the employer regarding abandonment of work, and two recent post employment restraint decisions.

Unfair Dismissal Changes

Deputy Prime Minister and Workplace Relations Minister Julia Gillard has stated that unfair dismissal changes could be introduced earlier than the substantive industrial relations legislation. As you would be aware from our previous ‘Vision’s in the Workplace’, the substantive legislation will consist of matters such as the 10 National Employment Standards.

In response to questions from the media, Ms. Gillard stated: *“What I’ve always said is the substantive bill, which will deal with unfair dismissal, would be in the parliament in the second half of this year. And we will look when the bill is through the Parliament – and I say ‘when’ obviously because we’ve got to deal with a Senate and Coalition which is still in the embrace of Work Choices...when the Bill is through the parliament we will obviously be bringing on-stream the parts that we can as soon as possible.”*

Ms. Gillard is under increasing pressure to introduce changes to unfair dismissal laws prior to the commencement of the substantive legislation on 1 January 2010.

One of the major changes to unfair dismissal laws set out in Labour’s *Forward with Fairness* Policy that it took to the last election, was a reduction in the definition of small businesses from 100 employees to 15 employees.

Legislation is expected to be tabled in the last week of Parliament this year which begins on 1 December 2008. The Legislation will of course be subject to the Senate.

For further information and/or advice to prepare your business for the upcoming industrial changes, contact Nick Stevens or Alicia Mataere.

Safety Concerns not a Statutory Authority Defence

The New South Wales Administrative Decisions Tribunal (“**the Tribunal**”) has ruled that a rail maintenance company discriminated against an Australian Supervisor of Macedonian decent on the basis of his poor literacy skills being an alleged safety risk.

The Employer demoted the 60 year old Supervisor to a non-supervisory role in 2006 after it updated its health, safety and environment program (“**HSE Program**”). The Employer was concerned about the risks to health and safety of other employees due to the Supervisor’s low level of literacy.

As a consequence of alleged safety risks the Employer claimed to have a statutory authority defence pursuant to section 54 of the Anti-Discrimination Act 1997 (NSW) (“**the Defence**”). However, the Tribunal disagreed.

The Tribunal held that the Defence was unavailable to the Employer because it was unnecessary to demote the Supervisor to meet safety requirements. The Tribunal indicated that other avenues were available, namely *“the cost effective and practical alternative”* of training the Supervisor in the new HSE program; and assisting the Supervisor in completing HSE forms and reports. The Tribunal held that safety concerns alone were not sufficient to substantiate the Defence.

This case highlights the fine balance between an employer’s strict safety and anti-discrimination obligations. It highlights how these obligations may need to be finely balanced. For more information or assistance in balancing your safety and anti-discrimination obligations, please contact Nick Stevens or Alicia Mataere.

STEVENS & ASSOCIATES LAWYERS

LEVEL 14, 14 MARTIN PLACE SYDNEY NSW 2000

GPO BOX 1925, SYDNEY NSW 2001

TELEPHONE: 02 9222 1691 | FACSIMILE: 02 9232 5388



Termination at the Initiative of the Employer

A Full Bench of the Australian Industrial Relations Commission (“**the Commission**”) has held that a woman who returned letters unopened and repeatedly failed to contact her Employer while on sick and workers compensations leave had not abandoned her employment and that the termination of employment was at the initiative of the Employer.

The Commission held that in determining such matters it is the facts which are relevant, and not subjective beliefs or reasonableness of conduct. Accordingly, whilst the woman failed to attend work and remained silent, she had not abandoned her employment as accused.

It was held there were “*a number of indications*” that termination was initiated by the Employer. For example, the Employer had written a letter to the woman stating that it considered that she had abandoned her employment. Furthermore, the Employee was a workers compensation claimant, which “*should have put the respondent on inquiry as to whether there were continuing medical certificates to cover the absence.*”

Moreover, it was held there “*was no basis to conclude that she intended to bring the contract to an end either by not providing a medical certificate, or by not communicating directly with the respondent or otherwise.*”

For more information or assistance in managing your employees, please do not hesitate to contact Nick Stevens or Alicia Mataere.

Recent Post Employment Restraints Cases

The England & Wales High Court has ordered a former recruitment Consultant Employee who left to set up his own rival business, to return all client information he had allegedly transferred to the database of a business social networking site (“**the Network**”).

The Employer alleged that the Employee copied the email addresses of some of its clients to locate them on the Network. The Employer argued the Employee was using its confidential information for its own undertaking, breaching his employment contract.

The Employee stated he invited clients to join the Network while he was still working for the Employer, as encouraged by the Employer. The Employee argued, once the information was on the Network, it was no longer ‘confidential information’ as it was visible to the Networks wide contact list.

Justice Richards disagreed, stating email addresses were confidential when still in the Employer’s possession and the Employee had moved them to a site where he would be able to access them once he ceased working for the Employer. It was held that this was done “*for the benefit of his post-termination business.*” Accordingly, the consultant was ordered to return the confidential information on the Network.

In another decision, the New South Wales Supreme Court has prevented a former executive from using “inside information” from his former employer and ruled that a 30-month restraint protecting clients and preventing the Executive from setting up in competition to the Executive’s executed Deed of Release (“**the Deed**”) was enforceable.

The Deed prohibited the Employee from conducting a similar business to the Employer’s, where he could use confidential information, or solicit the Employer’s clients.

The Employee began soliciting the Former Employer’s clients after he accepted a job with another organisation which was set up in direct competition to the Former Employer.

Justice Palmer observed the new organisation would provide the Executive with “*incentives of many millions of dollars*” to establish the business. His role would include developing a business plan; essentially the new Organisation would “*prey upon the existing member firms of [the Former Employer].*” The Former Employer was relying on the confidential knowledge the Executive had retained in seeking an injunction.

In determining whether to issue the injunction, Justice Palmer stated that there are two categories of confidential information, that which is “of its nature, so confidential or secret that the ex-employee cannot use it even if not bound by any contractual constraint”; and, that which “to a degree confidential, but because it is closely linked to the know-how and experience which an employee acquires in the course of employment in a particular field, it will not be protected by the Court except where there is a valid contractual restraint on the employee.”

This case involved the second category and outlined 11 indicators regarding whether information revealed to an employee is confidential. Justice Palmer stated the Deed did not prohibit “*using confidential information to the detriment of [the Former Employer],*” rather it prohibited the Employee “*from working in a role which he might be able to use confidential information to the detriment of [the Former Employer].*”

For more information on these 11 indicators or for advice in drafting an appropriate restraint clause and protecting your confidential information, please contact Nick Stevens or Alicia Mataere.

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LEVEL 14, 14 MARTIN PLACE SYDNEY NSW 2000

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