

### “VISION IN THE WORKPLACE”

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In this edition of Vision in the Workplace, we look at the recent developments to the Bill seeking to curb excessive termination payments and in developments to the Bill pertaining to States referring their industrial relations powers to the Commonwealth. We also look at two recent cases, one dealing with an effective dismissal and the other with a Company which was not entitled to rely on its HR Policy.

#### Bill to Curb Excessive Termination Payments Passed

You may recall from our May edition of the *Vision in the Workplace* Newsletter that the *Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009* (**‘the Bill’**) was released. The Bill sought to amend the *Corporation Act 2001* by strengthening and clarifying the regulatory framework pertaining to termination payments and benefits offered to company directors and executives. Both the House of Representatives and the Senate have now passed the Bill. Accordingly, the Bill will commence the day after it receives Royal Assent and will only apply in relation to contracts which are made, renewed or varied after the date of commencement.

##### The Bill will:

- **lower the threshold required for shareholder approval of a termination benefit to one (1) years base salary** (which amends the current standard of a termination benefit reaching up to seven (7) times a recipients annual remuneration before shareholder approval is required);
- **expand the number of positions which will require shareholder approval for termination benefits.** A person who holds a managerial or executive office in the company during the current financial year, if the person’s details were included in the directors’ report for that previous financial year, will now be covered;
- **make the definition of “benefit” broader** and requires that the commercial and economic substance of conduct is to prevail over its legal form;
- **still require that shareholder votes on the approval of termination benefits take place prior to the director/executive departing from the company.** Accordingly, the Bill will retain the current requirement for the shareholder vote to be held at any time prior to the termination benefit being paid out.

For further information on the implications of the Bill on your business, please contact Nick Stevens or Liza Isho.

#### Revised State Industrial Relations Referral Provisions

Ms. Julia Gillard, Deputy Prime Minister and Minister for Employment and Workplace Relations, Education and Social Inclusion, has introduced the *Fair Work Amendment (State Referrals and Other Measures) Bill 2009* (**‘the Amendment Bill’**) to amend the Fair Work Act 2009 (**‘the Act’**) and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (**‘the Transitional Act’**) by allowing a smooth transition to the new IR scheme.

##### The Amendment Bill will:

- give effect to State references of workplace relations matters to the Commonwealth that take effect after 1 July 2009 and on or before 1 January 2010 (Sch 1, s30L). Accordingly, the Bill will give effect to the references of the South Australian, Tasmanian and Victorian Governments in joining the national industrial relations system, as reported in our June/July 2009 edition of *Vision in the Workplace*. Queensland has agreed in principle to refer the balance of its private sector workplace relations powers subject to resolution of some related issues. **New South Wales has not yet made a formal decision** and Western Australia is the only State to publicly declare that it will not refer its powers;
- enables States to refer matters that would extend the application of the Act by extending the meaning of the terms defined in the Act, including ‘national system employer’ and ‘national system employee’ to include any employer or any employee in a referring State (Sch 1, s30M)
- enables State Ministers who have responsibility for workplace relations matters to intervene in court proceedings and make submissions in relation to matters before Fair Work Australia, if the State Minister believes it is in the public interest to do so (Sch 3, Pt 1, s569A, s597A)); and (PTO)

#### Nick Stevens – A Recommended Lawyer

The Australasian Legal Business (ALB) has recently listed Stevens & Associates Lawyers as one of the top tier Sydney firms in its “Employment 09 – Recommend Law Firms” Report. The Report is compiled by combining research among companies, peers and other sources. ALB commented that “*Nick Stevens was good for individual employment issues.*”

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## Demoting Parent held to be Effective Dismissal

The Federal Magistrates Court of Australia has held that an employee who was requested to work in a more junior position upon her return from maternity leave was effectively dismissed by her employer.

The Employee took maternity leave in October 2007. Upon her return in April 2008, the Employee was informed that her previous Centre Manager position was unavailable but was informed that the "Second in Charge position was available", which the Employer acknowledged was of a "lower" position than that of Centre Manager. Furthermore, the Employer stated that the Employee was not reinstated into her previous position because "she failed to perform her duties satisfactorily leading to that Centre not receiving accreditation."

The Employer alleged that the Employee had left the centre she worked at in a "very disorganised" state upon taking maternity leave and as such needed "a lot further training" to be Centre Manager. Additionally, the Employer stated that the Centre "failed its validation due to the incomplete work of" the Employee, "due mainly to her inexperience and lack of knowledge in that area."

Federal Magistrate Lucev found that the Employee "was entitled to return to her position as Centre Manager...on the termination of her maternity leave." Furthermore, Federal Magistrate Lucev found that the Employer, by refusing to reinstate the Employee to her former position and rather reinstating to the lower position of Second in Charge, had dismissed the Employee.

Although the Employer alleged its conduct was a result of an assessment of the Employee's performance, the Court held that the Employer's reasons for its treatment of the Employee were "entirely spurious."

This case highlights the need to manage employees prior to their commencement of parental leave as failure to do so may result in constructive dismissal. For assistance in managing your employees before and after leave, please contact Nick Stevens or Liza Isho.

## Company not entitled to rely on HR Policy

The Supreme Court of NSW has held that an Employer could not rely on a HR Policy introduced some time after an Employee commenced employment.

The Employee commenced employment on 1 March 2007 until 1 November 2007. The Employee's contract (**'the Contract'**) stated: "Any changes to compensation package will be added as an appendix to this contract after being agreed and signed by both parties" and that the Employee must comply with all Policies and Procedures "as varied or issued from time to time, including without limitation to security, workplace discrimination, harassment, alcohol and drugs, and acceptable uses of online services."

At the time of the Employee's employment, there were no policies and guidelines. However, a manual entitled "Policies and Procedures Manual" was published in June 2007 (**'the Manual'**). A section in the Manual provided: that employees would not receive commission for invoices not settled prior to their last day with the Employer.

Upon leaving his Employer, the Employee sought commission valued at \$52,616.70 for work done but was rejected. At first instance, the Local Court of New South Wales held that the Employee was not entitled to commission as he failed to complete placement folders as required by the Manual in order to receive commission.

On appeal, Justice Davis of the Supreme Court of NSW stated the Employer is not "entitled to alter the basis of the Employment Contract by means of the promulgation of the Policies and Procedures Manual formulated some months after the employment contract was entered into." Further, although the Contract stated that the Employee must abide by policies "without limitation", Davis J held that the words "without limitation" could not be read in an unqualified way because the matters listed, such as workplace discrimination are directed to the "way employees are bound to behave".

Further, Davies J stated that although the Employee's failure to complete the placement folders was a failure to comply with lawful directions, it did not disentitle him to commission unless there was a term in the Contract stating that the Employer "could withhold the payment of commission for a particular breach."

This case highlights the necessity of having appropriately drafted employment contracts and policies and procedures. It further reminds employers that a breach of an employment contract by an employee does not ultimately result in employers ignoring their obligations under the same.

If you would like us to review your employment contracts and/or policies and procedures to ensure they comply, please contact Nick Stevens or Liza Isho.

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