STEVENS & ASSOCIATES
LAWYERS

"VISION IN THE WORKPLACE"

Issue Fifty Two, November 2010

In this issue of Vision in the Workplace, we look at decisions in Fair Work Australia regarding the timing of adverse action and dismissal claims and also Division 2B State Awards. We also look at the introduction of the *Sex and Age Discrimination Legislation Bill 2010 (Cth)* which introduces a newly appointed Age Discrimination Commissioner and amends the *Sex Discrimination Act 1984 (Cth)*. In addition, we look at the *Public Holidays Bill 2010 (NSW)* which clarifies the status of public holidays in New South Wales and provide an update on "cascading" restraint of trade provisions. Finally, Stevens & Associates Lawyers is pleased to remind you that we will be hosting a free Breakfast Seminar on 2 December 2010, to outline the implications and expectations in industrial relations from the second term of a re-elected Labor Government.

Adverse Action and Dismissals

You may recall from our August/September 2010 issue of "*Vision in the Workplace*", we reported on "adverse action" claims which may be commenced by employees when, for example, their employment is terminated. Deputy President Sams of Fair Work Australia (**'FWA'**) has recently confirmed when an adverse action claim involving the termination of an employee's employment may be commenced under section 365 the *Fair Work Act 2009 (Cth)* (**'the Act'**). Section 366(1)(a) of the Act states an Application under section 365 of the Act must be made "*within 60 days after the dismissal took effect*". [emphasis added]

The relevant enterprise agreement provided for six (6) months' notice of termination if the employee failed to attend a directed medical examination and the employer concluded that the employee was not fit to carry out his usual duties. On 1 June 2010, an employee was given notice of termination of his employment in accordance with the enterprise agreement. Accordingly, the employee was to be employed by the company up until 1 December 2010.

The employee filed an application with FWA to deal with a General Protections Dispute under section 365 of the Act (**'the Application'**). In considering the Application, Deputy President Sams had to consider whether the Application was made prematurely as the employee, although provided with notice of termination, continued to be employed by the company.

Deputy President Sams confirmed that the words "has been dismissed" "*can only mean that an event has already occurred or taken place…the event is the dismissal of the employee, not the giving of the notice of dismissal*". Accordingly, the Application was dismissed for want of jurisdiction. Deputy President Sams confirmed the employee "*has 60 days after 1 December 2010 to lodge an application for FWA to deal with alleged contraventions of the Act involving his dismissal*".

Although the issue did not arise in this case, we consider it prudent to note there are sections of the Act that do allow an employee to commence an adverse action claim during the course of their employment.

For more information on adverse action claims and/or dismissing employees, please contact Nick Stevens, Megan Bowe or Liza Isho.

Introduction of Age Discrimination Commissioner

The Federal Government has introduced the *Sex and Age Discrimination Legislation Amendment Bill 2010 (Cth)* (**'the Bill'**) which:

1. strengthens the protections in the *Sex Discrimination Act 1984(Cth)* (**'the SD Act'**); and

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Invites you to a special breakfast seminar
at The Grace Hotel, Sydney
on Thursday, 2 December 2010.

"Second Term of Labor – What to Expect in IR under a Gillard Government?"

Free Breakfast Seminar
for our clients to discuss and review the implications and expectations from the second term of the Labor Government

Where: The Grace Hotel
77 York Street, Sydney

When: Thursday, 2 December 2010

Time: 7:00am for 7:30am – 9:00am
Breakfast included

Please contact David Wells on (02) 9222 1691 or email dww@salaw.com.au by Monday 29 November 2010 to book your seat.

Bookings Essential as seats are filling up!

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2. amends the *Age Discrimination Act 2001(Cth)* (**'the AD Act'**) to establish an Age Discrimination Commissioner in the Australian Human Rights Commission.

The key amendments made by the Bill:

- extend the protection from discrimination on the grounds of family responsibilities to both women and men in all areas of work;
- provide greater protection from sexual harassment for workers and students;
- ensure the protection from sex discrimination applies equally to women and men; and
- establishes breastfeeding as a separate ground of discrimination.

The Explanatory Memorandum to the Bill states the AD Act makes discrimination on the basis of age, unlawful in certain areas of public life, such as employment, but does not provide for a "*dedicated Age Discrimination Commissioner to advocate for the rights of people, particularly older Australians, who experience age discrimination*." Accordingly, the Bill will create a "*stand-alone position of Age Discrimination Commissioner for the first time at the federal level*."

The Bill will also amend the *Australian Human Rights Commission Act 1986 (Cth)* and the *Fair Work Act 2009 (Cth)* to include a definition of "Age Discrimination Commissioner".

If you would like more information on the Bill, reviewing anti-discrimination policies or avoiding discrimination claims from employees, please contact Nick Stevens, Megan Bowe or Liza Isho.

Changes to Public Holidays in NSW

The *Public Holidays Bill 2010 (NSW)* (**'the Bill'**) has been introduced to replace the *Banks and Bank Holidays Act 1912 (NSW)* (**'the BBH Act'**) and amend and clarify the status of public holidays in New South Wales.

For 2011, the Bill declares that standard public holidays will be the same as those that currently apply under the BBH Act. However, where Australia Day falls on a Saturday or Sunday, there will be no public holiday on that Saturday or Sunday and instead the following Monday will be a public holiday. Presently, for Australia Day, a substitute public holiday day on the following Monday is only provided where Australia Day falls on a Sunday. Where Christmas Day or Boxing Day falls on a Saturday, that day will be a public holiday. However, where either of these days falls on a Sunday, that day will not be a public holiday. Instead, the following Monday will be a public holiday. Further, from 2011, Easter Sunday will be recognised as a public holiday.

From 1 January 2012, the Bill provides a list of standard public holidays that will apply and notes that:

1. where Christmas Day or Boxing Day falls on a Saturday or Sunday, then there is to be an additional public holiday on the following Monday or Tuesday. Accordingly, where Christmas Day or Boxing Day fall on a Saturday, there will be an additional public holiday the following Monday. Further, where Christmas Day or Boxing Day fall on a Sunday, there will be an additional public holiday the following Tuesday; and
2. where New Year's day falls on a Saturday or Sunday, there will be an additional public holiday on the following Monday; and
3. Anzac Day will be observed on 25 April irrespective of the day of the week it falls on.

Accordingly, with the introduction of the Bill, employees will now be entitled to be paid penalty rates they would not have previously received. For more information on the Bill and your employees' entitlement to public holidays, please do not hesitate to contact Nick Stevens, Megan Bowe or Liza Isho.

Division 2B State Awards – Phasing Schedules

On 5 November 2010, President Giudice, Senior Deputy President Acton and Commissioner Hampton of Fair Work Australia (**'the Full Bench'**) delivered a decision which affects Division 2B employers and employees.

Division 2B employers/employees are those non-constitutional corporations and other non-corporate entities now covered by the Act as a result of the New South Wales Government referring its industrial relations powers to the Federal Court on 1 January 2010. These employers/employees are covered by instruments known as Division 2B State Awards, which essentially reflect the terms of the relevant state award applying to those employers at 31 December 2009. Division 2B State Awards are to be terminated on 31 December 2010 and the relevant employers and employees will then become covered by a modern award. To assist Division 2B employers in the transition to the modern awards, the Full Bench has varied the model phasing schedules within modern awards to take into account Division 2B employers and employees (**'the Schedules'**).

The Schedules state, "*where a minimum wage, loading or penalty rate in a Division 2B State award immediately prior to 1 February 2011 was lower than the corresponding minimum wage, loading or penalty rate in this award, nothing in this schedule requires a Division 2B employer to pay more than the minimum wage, loading or penalty rate in this award.*"

The introduction of the Schedules is likely to result in some significant wage increases for Division 2B employees. The Full Bench itself stated, "*we acknowledge that in some awards there will be a significant increase on 1 February 2011...[bearing] in mind...that modern award minimum wages were increased by $26 in July 2010 but minimum wages in Division 2B States awards were not.*"

Although employer groups argued to delay the commencement of the Schedule for six (6) months, being July 2011, to enable employers familiarize themselves with their new obligations, the Full Bench disagreed given that wages for Division 2B employees had "*not been adjusted since 2009*."

For advice in preparing for the 1 February 2011 increases, please contact Nick Stevens, Megan Bowe or Liza Isho.

Restraint of Trade Update

As you may recall from our August/September 2010 *Vision in the Workplace* Newsletter and our letters of 28 September 2010 (**'the Letters'**), we have recently reviewed our standard "cascading" restraint of trade clause in light of recent case law, namely the case of *OAMPS Insurance Brokers v Peter Hanna [2010] NSWSC 781* (**'the OAMPS Decision'**). The OAMPS Decision clarified the validity of "cascading" restraint of trade provisions. However, as noted in the Letters, we cautioned that the OAMPS Decision may be appealed.

The OAMPS Decision was in fact appealed by Mr Hanna who was subject to the restraint in the OAMPS Decision **('the Appeal'**) and on 19 October 2010, a full bench of the New South Wales Court of Appeal, Justice Allsop, Justice Hodgson and Justice Handley dismissed the appeal and upheld the validity of the "cascading" restraint in the employee's contract stating "*the restraint deed was not void for uncertainty. It was clear that the various restraint periods and areas were part of separate and independent provisions, all capable of being understood and complied with without breaching any other*."

Accordingly, the reviewed "cascading" restraint clause we provided in our Letters remains corrected and is unaffected by the Appeal.

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