

“VISION IN THE WORKPLACE”

Issue Fifty One, October 2010

In this issue of Vision in the Workplace, we look at a decision of the New South Wales Court of Appeal which finds an employee paying over \$500,000 in damages to their employer for breach of contract. We also look at a recent decision of Fair Work Australia dealing with independent contractor arrangements. Finally, Stevens & Associates Lawyers is pleased to inform that we will be hosting a free Breakfast Seminar on Thursday, 2 December 2010, to outline the implications and expectations in industrial relations from the second term of a re-elected Labor Government.

Employee pays over \$500,000 in Damages to Employer

A Full Bench of the New South Wales Court of Appeal (**‘the Court of Appeal’**), President Allsop, Justice Baston and Acting Justice Handley, have upheld a decision of Justice Ward of the Supreme Court of New South Wales who ordered an employee (**‘the Employee’**) to pay their employer (**‘the Employer’**) \$503,100 in liquidated damages for breaching an employment contract.

The Employee had entered into a two (2) year fixed term employment contract with the Employer expiring on 31 July 2009 (**‘the Contract’**). On 4 April 2008, in breach of the Contract, the Employee tendered his resignation (**‘the Resignation’**) and commenced working for a competitor (**‘the Competitor’**). The Employer did not accept the Resignation and obtained interlocutory and final relief restraining the Employee, until 4 October 2008, from working for the Competitor. The Employee was placed on paid “garden leave” pursuant to the Contract until 4 October 2008.

On 2 October 2008, the Employer directed the Employee to return to work on 7 October 2008 (**‘the Direction’**) but the Employee refused and instead re-commenced employment with the Competitor. The Employer treated this as a breach and repudiation of the Contract and wrote to the Employee, through their solicitor, to terminate the Contract and seek \$503,100 worth of damages calculated in accordance to the Contract.

The Employee argued that the employment relationship was terminated in April 2008 when the Employer was granted the injunction and as such, the Employer could not issue the Direction. Accordingly, the Employee argued that although the Contract “remained on foot, only those terms of the Contract which were not conditional or dependent upon the continued existence of the relationship of employer/employee could survive (and hence the obligation to obey a direction to attend work did not survive the repudiation of the employment relationship).”

However, the Court of Appeal confirmed that the Contract was still in force on 2 October 2010 when the Employer gave the Direction and the Contract entitled the Employer to terminate the Employee’s “garden leave” “and require him to report for work.” Further, the Court of Appeal found the Employer “had kept the Contract alive for the benefit of both parties” and the Direction “was an offer to reinstate” the Employee in his employment under the Contract. The Court of Appeal held that the Direction was “valid” and the Employee’s failure to comply with the Direction was “a further repudiatory breach” which entitled the Employer to terminate the Contract.

The Employee also argued that the Direction was a “device for terminating the Contract” and the Employer did not actually want the Employee to return to work. Justice Ward rejected this view
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LAWYERS

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 will fill up!

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and the Court of Appeal affirmed the same. It was established that the Employer was “ready, willing and able to perform the contract” and as such was entitled to recover the liquidated amount provided for in the Contract due to the Employee’s repudiation of the same. Accordingly, the Employee’s appeal was dismissed.

If you would like more information on drafting employment agreements and handling any termination or breaches of the same, please contact Nick Stevens, Megan Bowe or Liza Isho.

Contractor deemed “Employee”

A worker who was terminated from a company (**‘the Worker’**) has filed an application for unfair dismissal remedy (**‘the Application’**) against the company (**‘the Company’**). In response to the Application, the Company raised a jurisdictional objection that the Worker was engaged as an independent contractor and as such could not make the application pursuant to the *Fair Work Act 2009 (Cth)*.

The Worker was engaged by the Company through two (2) contracts, both of which required the Worker to maintain an Australian Business Number (**‘ABN’**) and invoice the Company. The contracts were entered into with the Worker personally and made no reference to any company or business conducted by the Worker. Both contracts also set Key Performance Indicators (**‘KPIs’**) and noted that payment was subject to the Worker meeting the KPIs. Finally, both contracts provided that the Worker reported to the Team Leader. The Worker also signed a confidentiality agreement with the Company.

In determining the nature of the relationship between the Worker and the Company, Commissioner Gooley of Fair Work Australia, summarised the common law approach to the determination of whether a person was an employee or independent contractor, by reference to a Full Bench Decision of the Australian Industrial Relations Commission (FWA’s predecessor):

Was the Worker conducting a business of his own?

Although the Company submitted the Worker had his own business card and email sign off with his business name and, submitted Business Activity Statements and invoices, this was considered “insufficient evidence” to conclude that during the time the Worker was engaged by the Company, he was conducting his own business.

The nature of the work performed and the manner in which it is performed

The Worker: performed skilled work with a level of independence, was free to arrange the time at which training assessment took place, had no fixed hours and, was free to accept or not accept work. However, Commissioner Gooley found that the Company “exercised strict control over what training and assessment took place.”

What were the terms of the contracts?

Commissioner Gooley found that the contracts did “not unequivocally indicate an intention of the parties to create an employer/employee relationship or independent contractor relationship.” Commissioner Gooley also noted that the language of a contract “is of course not determinative of the relationship.”

Commissioner Gooley then outlined the indicia of an employment relationship:

Whether the Company exercises, or has a right to exercise control over the manner in which the Worker’s work is performed, place of work, hours of work and the like. Commissioner Gooley found the Company exercised control or had the right to control how the Worker performed his work.

Whether the Worker works for others (or has a genuine and practical entitlement to do so)

Commissioner Gooley found that the Worker “may have been free to work for other” companies during his engagement with the Company but there was no evidence he did so.

Does the Worker have a separate place of work and/or advertises his/her services to the world at large?

Commissioner Gooley found that the Worker’s use of his “own email or business card is not evidence that [the Worker] whilst engaged by [the Company], advertised his services to the world at large.”

Whether the Worker provides/maintains significant tools/equipment

There was no evidence that the Worker required any particular tools/equipment.

Whether the work can be delegated or subcontracted

There was no contractual right to delegate or subcontract work and the Worker gave evidence that he had told the Company he could not engage someone else to do the job.

Whether the Company had the right to suspend or dismiss the person engaged

The contract provided that it could be terminated on four (4) weeks’ notice and did not state that the Worker could be suspended.

Did the Company present the Worker to the world at large as a emanation of the business?

The Worker was not required to wear a uniform nor was he provided with a Company business card or email address identifying him as an employee or agent of the Company. However, Commissioner Gooley found that in performing his training role, the Worker “was an emanation of the business” of the Company.

Was income tax deducted from the Worker’s remuneration?

No income tax was deducted and the Company paid GST on the services provided by the Worker.

Was the Worker paid a periodic wage or salary or by reference to a completion of tasks?

The Worker was paid by reference to completion of tasks and on an hourly basis for developmental projects. If the Worker’s students did not meet certain competencies, the Worker was not paid.

Was the Worker provided with paid holidays or sick leave? No

Did the work performed by the Worker involve a profession, trade or distinct calling in the part of the person engaged?

The Worker was required to hold both formal qualifications and professional experience but the services provided by the Worker were only performed to companies of a similar nature to the Company.

Did the Worker created goodwill or saleable assets in the course of his/her own work? No.

Whether the Worker spends a significant proportion of his remuneration on the business expenses

The issue could not be determined on the evidence available.

Commissioner Gooley held that the above indicia “favour a conclusion that [the Worker] is a contractor, after all employees don’t invoice their employer, charge GST, get paid only if someone is assessed as competent and, pay themselves drawings.” However, Commissioner Gooley, making reference to “the nature of the relationship” between the Company and the Worker, stated the Worker “was an integral part” of the Company and was subject to control by the same. Accordingly, the Worker was deemed an employee who could make the Application.

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