

“VISION IN THE WORKPLACE”

Issue Fifty-four, July 2011

We apologise for the recent “stand-still” of our “*Vision in the Workplace*” newsletters. Our firm was involved in a very high-profile and time-consuming matter over the last couple of months which has put the drafting of our newsletters on hold. In this edition of “*Vision in the Workplace*”, we look at this high-profile matter which concerns a decision of the Supreme Court of New South Wales regarding the enforceability of post-employment restraint clauses. We also outline Fair Work Australia’s Minimum Wage Panel’s Decision to increase the national minimum wage, and the new paid parental leave scheme which came into effect on 1 July 2011. Finally, we look at a recent decision of the Federal Magistrates Court of Australia which sees an employer in breach of discrimination law when an employee was dismissed after exacerbating a health concern unrelated to work.

Restraint of Trade

Stevens & Associates Lawyers recently acted in a high-profile employment dispute between Seven Media Group (“**Seven**”) and James Warburton, in which the Supreme Court of New South Wales (“**the Supreme Court**”) once again considered the lawfulness of post-employment restraint clauses in employment contracts.

This high-profile matter revolved around Network Ten Holdings Limited’s (“**Ten**”) poaching of Seven Network’s esteemed Chief Sales and Digital Officer, James Warburton. During Mr. Warburton’s employment at Seven, he had agreed to participate in a Management Equity Plan which offered access to share bonuses, but imposed a condition that Mr. Warburton would not join a competitor for a minimum period of twelve months following the expiry of his fixed term contract (“**the Restraint Clause**”). Seven argued that the Restraint Clause prevented Mr. Warburton from taking up employment with Ten until October 2012, whereas Mr. Warburton wanted to start in 2011 at the end of his fixed term contract. After considering both parties’ evidence and arguments, his Honour Mr. Justice Pembroke of the Supreme Court determined that Mr. Warburton could commence employment at Ten on 1 January 2012 (“**the Decision**”).

Restraint of trade clauses protect confidential, company-specific information by limiting the ability of former employees to take up employment with a rival organisation immediately after leaving their former employer. Without such a clause, employees are free to use sensitive business information such as plans, client lists, pricings and new product development information from their former employer to the potential detriment of their former employer. It is normally difficult for the former employer to prove that this sensitive information has been used against them.

Whilst employers can rely on the implied term of confidentiality, sometimes this protection is inadequate, particularly where employers have had unrestricted access to customers and clients. Well-drafted restraint of trade clauses act as an insurance policy for employers, and developing clear restraint clauses is encouraged in all businesses. In particular, restraint of trade clauses are vital for employers who employ staff in risk areas of the business, who may have the potential to affect the business’s goodwill. By clearly defining the responsibilities of both the employee and the employer, restraint clauses make it easy to demonstrate a breach of a formal agreement, and in this way they are a simple but effective means of minimising the potential for conflict.

Arguably the most important lesson for employers to take from the Decision is that clauses purporting to restrict the trade of an employee will only be enforceable if they are necessary for the reasonable protection of the legitimate interests of the employer. We successfully argued that imposing a twelve month restraint of trade clause on top of the balance of the unexpired term of his employment contract was unreasonable, because it would result in Mr Warburton being quarantined from Seven’s confidential information, without being able to take up his CEO position with Ten, for more than nineteen months. Justice Pembroke read down the restraint to its lowest denomination, namely three months.

Stevens & Associates Lawyers has provided advice to many businesses on how restraint of trade clauses can protect sensitive business information and minimise future conflicts. For advice on restraint clauses, please contact Nick Stevens, Megan Bowe or Liza Isho.

Annual Wage Review Decision 2010-2011

Following a decision of Fair Work Australia’s (“**FWA**”) Minimum Wage Panel (“**the Panel**”), FWA has ordered an increase to the national minimum wage from \$569.90 per week for a thirty-eight hour week to \$589.30 for adult employees (or \$15.51 per hour). For employers with minimum wage workers, being award/agreement free employees (other than junior employees, disabled employees and employees to whom a training arrangement applies), this represents an increase in weekly wage costs of \$19.41 per minimum wage worker. Corresponding amendments have also been made to the minimum rates for junior, apprentice and disabled workers.

In addition, the Panel has also granted a uniform percentage increase of 3.4% across all Modern Awards. The decision to grant a uniform increase, rather than dollar-amount increases specific to each award, reflects the Panel’s aim to prevent an ongoing compression of award relativities and to maintain the real value of award wages.

It is imperative for employers to recalculate their wage rates to ensure general award compliance, or where an Enterprise Agreement is being contemplated, to ensure

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If you would like assistance in confirming whether you are paying your employees the correct wages, penalties, loadings and allowances, please contact Nick Stevens, Megan Bowe or Liza Isho.

Paid Parental Leave Scheme has Commenced

As noted in our August/September 2010 "Vision in the Workplace" newsletter, from 1 July 2011, employers must pay eligible employees up to eighteen weeks of paid parental leave at the National Minimum Wage of \$589.30 (current) gross per week ('PPL').

Employees eligible to receive PPL may include full-time, part-time, casual, seasonal, contract and self-employed workers. Eligible employees must have been in paid work and worked continuously for at least ten months of the thirteen months prior to the birth or adoption of the child, and must have earned an adjusted taxable income of \$150,000 or less in the financial year prior either to the birth or adoption of their child, or the date of their claim, whichever is earlier.

PPL is being funded by the Australian Government, so employers should provide the Family Assistance Office with their bank account details, and their relevant employees' pay cycle details in order to receive PPL funding to forward on to eligible employees. Normal PAYG arrangements apply to PPL payments; and employers must also provide pay slips and include all PPL payments in annual and part-year payment summaries.

The Australian Government has reasoned that by encouraging increased workforce participation of primary carers, PPL seeks to benefit employers by aiming to improve long-term retention of staff and thus preserving workplace knowledge, and reducing the costs of training new employees that would be necessary if employees were to resign or move to another employer.

The re-elected Labor Government has also pushed back the commencement of its paid paternity leave scheme from 1 July 2012 to 1 January 2013. Paid paternity leave will provide eligible working fathers and partners with two weeks paid paternity leave, also at the national minimum wage. Prime Minister Julia Gillard has confirmed that paid paternity leave will be means tested, although the income of the primary carer of the child will not count towards the income test. Further, paid paternity leave may either be taken on its own or in addition to other family payments, such as the Baby Bonus, PPL and Family Tax Benefit.

For more information on PPL and administering the same or paid paternity leave, please contact Nick Stevens, Megan Bowe or Liza Isho.

Discriminated Employee Awarded over \$63,000

The Federal Magistrates Court of Australia ('the Court')

has ordered an employer who breached the *Disability Discrimination Act 1992 (Cth)* and the *Sex Discrimination Act 1984 (Cth)* to pay their former employee \$25,000 in damages for the breach, \$33,394.50 in lost wages and \$5000 in interest.

The employee prepared food at a shop and mobile van, and was a single mother of four children. The employee suffered from Crohn's disease (which is irritated by fatigue and stress) which required her to wear a colostomy bag. When the shop was under new management, the employee was required to change her work conditions from three hours a day, two days a week (three days of the van and one day in the shop), to five days a week, working only in the van, on longer hours and without a break.

After two weeks of running the van under these new conditions, the employee fell ill as symptoms of her Crohn's disease were "exasperated". After numerous attempts to contact her employer, the employee finally spoke to the employer and was advised that her "job was safe" and that she could "take the rest of the week off". Notwithstanding this, the employee noticed an advertisement for her role in the local newspaper. After numerous attempts to contact the employer, the employee was advised that she was not dismissed but rather had abandoned her employment as she "just didn't come back". The employer further stated that she "needed reliable people" as employees and made improper comments regarding the employee's colostomy bag.

The employee claimed that she was discriminated against, on the basis of her disability, sex and family responsibilities. Federal Magistrate Nicholls found that the employer dismissed the employee's employment "not because she absented herself from work, but because she carried a colostomy bag...and had other more visible signs of her various medical conditions." Further, FM Nicholls stated other employees "who did not suffer from any disability...were treated differently (and favourably)...even to the extent that one of them had been reported for poor performance...yet the employer's continued her employment."

Turning to the employee's claim of discrimination based on family responsibility, FM Nicholls held that the "real reason" for the employee's termination of employment was her disability. The Court also found that her family responsibilities were a reason for the termination. FM Nicholls held that the employer "seemed oblivious" to the employee's family responsibilities and "at worst...displayed a disregard for her circumstances."

Finally, in relation to the employee's sex discrimination claim, FM Nicholls accepted the claim stating "while [the employer] was accommodating to other women...[the employer] sought to impose changed working conditions on [the employee], in particular, longer working hours, resulting in family difficulties for her."

For advice on anti-discrimination obligations and changing the working conditions of employees, please contact Nick Stevens, Megan Bowe or Liza Isho.

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