STEVENS & ASSOCIATES LAWYERS

NEWS

"VISION IN THE WORKPLACE"

April 2016

In this edition of *Vision in the Workplace,* we review two recent decisions: the first, a Court of Appeal decision, re-examines the interaction between employment policies and contracts; the second, in the Federal Court of Australia, highlights the additional safeguards afforded by express contractual protection of intellectual property and confidential information. We also warmly welcome, and introduce to you, our new Senior Solicitor Megan Cant.

Beware: The Chameleonic Employment Policy

A recent decision of the New South Wales Supreme Court, Court of Appeal ('**the Court of Appeal**') has again highlighted the enigmatic nature of employment policies and representations, acting as a caution to employers when making promises to employees, and drafting employment contracts and workplace policies.

In late 2008, Mr McKeith and Mr James were retrenched from their employment with ABN AMRO Group ('**ABN**') as part of, and following, an acquisition by the Royal Bank of Scotland Group ('**RBS**'). Central to the disputes in ***McKeith v Royal Bank of Scotland Group PLC; Royal Bank of Scotland Group PLC v James*** **[2016] NSWCA 36**, concerns the operation of a 'closed' redundancy policy ('**Policy**'), and notably, whether it had been incorporated into Mr McKeith's and Mr James' employment contracts.

The Policy made provision that payment in the event of redundancy:

1. would include accrued contractual and statutory entitlements;
2. could include a 'severance payment' ('**the Severance Payment**'); and
3. might include, on an ex-gratia basis, a discretionary amount in respect of bonus entitlements that might become payable for the calendar year in which the redundancy occurred ('**the Ex-Gratia Payment**').

On termination of their employment, neither the Severance Payment nor the Ex-Gratia Payment were made to either Mr McKeith or Mr James.

On appeal, the Court of Appeal held:

1. the Policy had been incorporated into Mr McKeith's employment contract, but Mr McKeith's claim against ABN failed because ABN had not made any contractual promise to Mr McKeith that the Policy would continue to be applied post-acquisition;
2. RBS had promised to Mr McKeith and Mr James that ABN would apply the Policy post-acquisition, and that this promise caused Mr McKeith and Mr James to enter into new employment contracts with RBS. RBS' promise, that the Policy would continue to apply to Mr McKeith and Mr James for two years, was made in consideration of each continuing in their employment to assist the acquisition. RBS breached Mr McKeith's and Mr James' employment contracts by withholding the Severance Payment, but did not breach their employment contracts by withholding the (larger) Ex-Gratia Payments because the Policy did not confer any 'right' to a discretionary payment; and
3. Despite a clause in Mr James' employment contract that employees must '*abide by all company policies and practices currently in place*', the Policy was not incorporated into Mr James' employment contract - key to this finding was the fact that the Policy was deliberately made unavailable to employees, including to Mr James, who was also not provided with a copy of the Policy at the time of entering his employment contract.

The Court of Appeal awarded Mr McKeith and Mr James damages in excess of $375,000 and $430,000, respectively, for the Severance Payment, plus interest.

This decision highlights the importance of proper drafting of employment contracts, to ensure that a workplace policy is not incorporated; and to avoid making promises to employees that the employer cannot fulfill. We await to see if the parties will apply for special leave to appeal to the High Court of Australia.

If you would like more information about drafting workplace policies and employment contracts, or the interaction between the two, please do not hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

Permanent Restraint for Former Employee Who Set Up Rival Business

In the recent case of ***APT Technology Pty Ltd v Aladesaye; In the Matter of APT Technology Pty Ltd (No 2)*** **[2016] FCA 203;** the Federal Court held Mr Aladesaye, a former employee of APT Technology ('**the Employer**'), to be permanently restrained from disclosing the Employer's confidential information and/or intellectual property.

Mr Aladesaye was summarily dismissed prior to the Employer taking action in court, after almost 6 years of service, as it came to light that he had set up a business in competition with the Employer and in doing so, had made use of its confidential information in breach of the express terms of his contract of employment and his common law and statutory duties.

Mr Aladesaye's employment contract with the Employer contained clauses which effectively required him to:

- devote his time and energy to the employer;
- refrain from direct or indirect involvement in or with any similar or competing business;
- refrain from copying, retaining or reproducing any confidential information of the employer; and
- agree that intellectual property created during his employment was the property of the Employer.

Mr Aladesaye was operating a rival business out of the Employer's previous office, which had been closed to cut costs. He had also, in the course of establishing the rival business, *'"persuaded" the employer to sell to him the company's monitoring equipment, without disclosing that he was the purchaser of such equipment.'*

Computer analysis further showed that Mr Aladesaye had copied the Employer's database, had sent confidential emails including the Employer's template documents to his personal email address and to an email address for his rival business, and that he had provided new clients with reports using the Employer's templates.

In addition to the restraint, Justice Foster ordered Mr Aladesaye to pay half of the Employer's costs of the proceedings, remarking that the Employer was justified in bringing the proceedings however it went to extravagant efforts to obtain evidence to establish the extent and quality of Mr Aladesaye's breaches, the cost burden of which ought not to be shouldered by Mr Aladesaye.

If you would like more information on restraints, or protection of confidential information and intellectual property generally, please contact Nick Stevens, Megan Cant or Jane Murray.

EOFY Breakfast Seminar

Stevens & Associates Lawyers invites you to attend our annual EOFY free Breakfast Seminar to be held on Thursday, 9 June 2016.

Liberal or Labor?

How Your Vote Could Shape Industrial Relations

When: Thursday, 9 June 2016

Where: The Lane www.thelanesydney.com.au
Shop 3, 20 Hunter Street, Sydney

Time: 7:15 / 7:30 am to approx. 9:00 am
(Breakfast served from 7:30am)

RSVP: Please RSVP to David Wells via email dww@salaw.com.au or (02) 92221691 by Monday, 6 June 2016. Spaces are limited.

Farewell Emily and Welcome Megan!

Stevens & Associates Lawyers has farewelled Emily Aitken as she has accepted an opportunity at an international employment law firm. We wish Emily all the best in her future endeavours and are pleased to extend an excited and warm welcome to our new Senior Solicitor, Ms Megan Cant.

Megan joins us with a wealth of experience in industrial, employment and work health and safety matters, and has particular interests in the proactive management of employment and industrial relations, and the efficient resolution of disputes.

We are confident that Megan will offer tailored and pragmatic advice and solutions to our clients and look forward to you all meeting Megan soon.

(Ph) 02 9222 1691 (Fax) (02) 9232 0166