STEVENS & ASSOCIATES LAWYERS

NEWS

"VISION IN THE WORKPLACE"

June 2016

In this edition of *Vision in the Workplace,* we examine a development in the interplay between employment and the Australian Consumer Law in relation to pre-employment discussions; we also discuss the issue of employees use of social media and suspension; and consider a recent Fair Work Commission decision pertaining to micromanagement and bullying. We would also like to extend our "thanks" to all of those who attended our End of Financial Year Breakfast Seminar.

Beware of Pre-employment discussions

A recent Federal Court of Australia ('**FCA**') decision has somewhat clarified the application of the Australian Consumer Law to representations made to prospective employees designed to entice the employee into accepting an offer of employment.

In *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd (Trustee)* [2016] FCA 430, the FCA held that certain conduct which occurred during the pre-employment negotiation phase was in fact, conduct in "*Trade or Commerce*" within the meaning of the Australian Consumer Law.

The Applicant, Ms Rakic was employed between 2013 and 2014 as the General Manager of Johns Lyng ('**the Employer**'). In the month prior to the commencement of Ms Rakic's employment, the Employer made representations to Ms Rakic pertaining to its profitability, assuring Ms Rakic that the employer would maintain its profitability and that sales would likely increase or remain consistent ('**the Representations**').

The Representations directly related to Ms Rakic's employment, as her salary was substantially lower than her salary expectation and the salary received in her previous job, but the difference was compensated by a 2.5% profit share.

In the 2013 – 2014 financial year, the Employer failed to meet the profit it had represented to Ms Rakic and terminated Ms Rakic's employment in circumstances of redundancy.

The FCA found that Ms Rakic relied on the Employer's misrepresentations (which were without basis) in accepting the Employer's offer of employment; she suffered detriment in leaving her previous stable employment and accordingly the Employer had breached the Australian Consumer Law. Ms Rakic was awarded $333, 422 for loss and damage and an additional $16,529 for a separate cause of action pertaining to her contractual entitlements.

The decision is a reminder that employers must tread carefully during pre-employment discussions and negotiations, whether formal or informal, particularly where the employer is making a representation without knowing, or being reckless as to the truth of, such representation. For more information on managing pre- employment negotiations, please contact Nick Stevens, Megan Cant or Jane Murray.

EOFY Breakfast Seminar – Thank you

Stevens & Associates Lawyers thank all who attended our End of Financial Year Breakfast Seminar on Thursday 9 June 2016.

We trust all guests enjoyed the breakfast, presentations, and the opportunity to mingle before a busy day at work. We thank guests for their positive and constructive feedback which will assist us with selecting topics for our Christmas Breakfast Seminar in December, the date of which will be confirmed closer to the event.

Social Media Strife – the need for clear boundaries

As social media continues to proliferate, employees and employers alike need to be wary of how they navigate social media platforms and how and when, social media activity may warrant disciplinary action, including dismissal.

Two recent suspensions in the tertiary education sector have demonstrated that social media conduct is no longer shrouded by anonymity and that employers are increasingly being forced to consider whether social media conduct is inappropriate and whether it forms a ground for suspension or dismissal.

Conversely, employees are disputing such decisions, prompting questions about when private online conduct can be sufficiently associated with employment to warrant disciplinary action.

In April this year, a Deakin University ('**Deakin**') academic was suspended for a series of conduct on social media platforms which Deakin considered to be inconsistent with its image.

The Academic in question, Associate Professor Hirst, tweeted an opinion about Sky News viewers which used language of a sexual nature. He further posted a photo of a knitted beanie with profane language encouraging his Twitter followers to wear the beanie, saying, "*I've got mine on today, it's a subtle hint to your boss*". Both Tweets were posted under his personal Twitter handle "@Ethical Martini".

The incidents were the impetus for Associate Professor Hirst's suspension without pay and ultimate termination of his employment for serious misconduct. At the time of writing, the National Tertiary Education Union are representing the Professor with a view to reinstatement.

Whilst the Professor's conduct appears, at least, tangentially associated with his employment, a second suspension of a La Trobe University ('**La Trobe**') academic in March this year has attracted greater controversy. The La Trobe academic and co-founder of its affiliated "Safe Schools Program" ('**SSP**') Ms Roz Ward was suspended with pay from her employment for two days for labelling the Australian flag "*racist*" on her private Facebook page commenting that the flag should be replaced with a red socialist flag.

Despite Ms Ward posting the comment as an ostensibly private opinion, La Trobe reportedly suspended her, stating that her comments "*undermined the public confidence in the [SSP and] damages the reputation of the program.*"

La Trobe received significant backlash from media and legal commentators over its suspension decision with Ms Ward threatening to commence proceedings. Ms Ward was permitted to return to duties after two days' suspension however media reports indicate Ms Ward may file a General Protections Application for Adverse Action.

Whilst many of the Fair Work Commission's decisions relating to social media arise in circumstances of dismissal, the recent suspensions bring to the fore the possibility of an adverse action claim should an employer suspend an employee (with or without pay) for social media activity.

To mitigate risk, employers should consider implementing clear measures, such as a social media policy and should bear in mind employees' rights to privacy and to expression of pol itical opinion.

If you would like any more information about managing social media use during and outside of the workplace, or with drafting social media policies please don't hesitate to contact Nick Stevens, Megan Cant or Jane Murray.

Fine line between Micromanagement and bullying

The recent Fair Work Commission decision ('**FWC**'), *Carroll v Karingal Inc* [2016] sheds new light on how certain management styles may amount to bullying.

The FWC found that the management style of Karingal Inc's Audit and Risk Manager, Mr Carroll ('**the Manager**'), caused considerable "*distress and anxiety*" to Karingal staff under his management.

The Manager was dismissed by Karingal following an investigation into his conduct, which found that he had breached Karingal's codes and policies to the extent that his conduct amounted to bullying.

The Manager's management style (which was labelled by the staff, and accepted by the FWC as "*micromanagement*") included:

- Checking the work of culturally and linguistically diverse staff in a condescending manner and making "*snide comments*" about their English skills whilst doing so;
- Exhibiting intimidating and aggressive behaviours;
- Implementing additional and unnecessary tools which appeared to decrease productivity, and instead disproportionately focusing on whether the details in spreadsheets met the Manager's expectations rather than whether the substance was sufficient; and
- Refusing to allow staff to attend meetings with internal stakeholders alone despite this being their previous practice.

In dismissing the Manager's application for Unfair Dismissal, the FWC found that the Manager's "*significant and systematic micromanaging"* did amount to bullying *(*even though the Manager believed that *"he was doing the best by his employer and his staff*") in breach of Karingal's employment policies, and therefore amounted to a valid reason for dismissal.

If you would like more information about workplace conduct which may constitute bullying, please contact Nick Stevens, Megan Cant or Jane Murray.

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