

## “VISION IN THE WORKPLACE”

September 2016

In this edition of *Vision in the Workplace*, we explore the consequences of procedural errors in the dismissal process. We also consider a recent decision of the Supreme Court of NSW, where a restraint of trade provision was upheld to protect trade secrets from a rival firm. Finally, we examine a Fair Work Commission judgement which provides critical insight into the rights and obligations of employees supplementing their primary employment income.

### **Beware: Procedural errors render dismissal unjust**

A recent Fair Work Commission (‘FWC’) decision has demonstrated the importance of procedural fairness in dismissal proceedings. Platypus Shoes Pty Ltd’s (‘**the Respondent**’) store manager, Mr Jimenez (‘**the Applicant**’) was dismissed for serious misconduct on 9 October 2015. The allegations against the Applicant included the following:

- Misuse of a 20% immediate family discount on shoes to a non-family customer;
- Theft of \$220 in respect to the sale of the shoes and failing to record the sale for one week;
- Removal of shoes on unpaid layby;
- Fraudulent recording of time worked; and
- Removing four boxes of shoes from the store without explanation

Commissioner Ian Cambridge labelled the Respondent’s allegations as “*mischaracterised*” and urged the Respondent to exercise caution and avoid “*strong, inflammatory language*” when making allegations of criminality. The Commissioner held that only one of the Respondent’s allegations of serious misconduct was founded, that is, the Applicant’s failure to properly record and receipt the cash gained from the sale of shoes to a friend. Notwithstanding this, Commissioner Cambridge found the Applicant’s explanation for the alleged misconduct “*regrettably unconvincing*” and sufficient to constitute a valid reason for his dismissal.

Despite this, the Respondent was criticised for its “*manifestly erroneous*” and “*unjust*” approach to the dismissal process which included:

- Predetermining that the Applicant was guilty of theft from the outset of the dismissal process, which “*contaminated*” the investigative process;
- Allowing the Applicant to continue working up until the “show cause” meeting, despite predetermining his dismissal;
- Refusing to allow the Applicant a support person during the “show cause” meeting; and

- Deceiving the Applicant about the true purpose of the “show cause” meeting

The Commissioner found that what would have been “*an entirely fair dismissal without notice*” was rendered unreasonable and unjust due to the Respondent’s “*procedural errors*.” The Applicant was awarded \$1,100 compensation, an estimate of one weeks’ pay. If you seek any advice and/or guidance relating to ensuring procedural fairness in the dismissal process please contact Nick Stevens, Megan Cant or Jane Murray.

### **Legal battle to protect trade secrets successful**

Stevedore DP World Australia (‘**the Plaintiff**’) has won a recent legal battle to protect trade secrets after the Supreme Court of NSW upheld a restraint of trade provision the Plaintiff imposed on a former employee. The Plaintiff’s former terminal manager Bruce Guy (‘**the Defendant**’) was ordered to serve out a three month garden leave period as well as a separate three-month restraint period before joining rival firm Asciano.

The Defendant argued that the three month garden leave period should count towards the restraint period, contending that the Plaintiff would effectively have a six month restraint of trade period that exceeded the three month restraint provision in his employment contract. The Defendant also submitted that the restraint period should begin immediately after termination, arguing that this provision was enacted *after* he gave notice that he accepted a job with Asciano and was subsequently placed on garden leave.

Justice White, however, did not agree that placing the Defendant on garden leave constituted a termination of employment.

The garden leave provision in the employment contract required the defendant to remain contactable and available for work by the company telephone whilst still being paid. Accordingly, the Court recognised that the restraint period did not start until the garden leave period had been served out.

In determining the reasonableness of the restraint, the Court found that the Defendant's extensive knowledge of the plaintiff's: expansion plans, revenues, earnings and profit margins, represented "*confidential information and trade secrets.*" Justice White acknowledged that the Plaintiff could potentially suffer "*irreparable harm*" if its confidential information which the Defendant obtained during the course of his employment was disclosed to benefit rival firm Asciano. Despite the Defendant's contention that he had "*no independent recollection*" of confidential information, Justice White found that the "*extended restraint period was reasonable*" given the confidential nature of the information that the defendant was privy to.

Whilst restraint clauses should not go so far as to prevent competition in a market, they act as an important protection of confidential information. Justice White acknowledged that the case was heavily weighted towards the Plaintiff as he would be at a "*risk of doing an injustice*" if he ruled in the Defendant's favour.

Swift and diligent legal action is necessary to successfully enforce restraint periods. If you are seeking more assistance with restraint of trade clauses in employment contracts please contact Nick Stevens, Megan Cant or Jane Murray.

### **Moonlighting Uber employee sacked**

A recent judgement by the Fair Work Commission has shed light on workers moonlighting as Uber drivers, after a Perth man, Mr Jacob (**'the Applicant'**), was dismissed for failing to declare that he drove for the ride sharing platform. The Applicant's employment was terminated last year from his printer position at Western Australia Newspapers Ltd (**'the Respondent'**), a few months after rumours arose that he was supplementing his income through Uber.

The Commissioner heard that the Applicant was undertaking work outside of his employment with the Respondent for six months. Contrary to the express terms in his employment contract which provided that he must not engage in any "*other work*" without requesting and receiving permission from management. The Applicant's second job was discovered when he drove a manager of the Respondent home.

In a meeting on 9 June 2015 the Respondent brought the relevant contractual clause to the Applicant's attention who subsequently denied being employed by Uber, claiming it was his wife that was involved with Uber. The Applicant also denied driving the Respondent's manager home until he was shown a receipt which named the Applicant as the relevant driver. The Respondent was concerned that the night-time Uber job was interfering with the Applicant's "*fitness for work and ability to perform his printing duties.*" The Applicant was notified of his obligation to inform the Respondent of any additional work he was performing. The Respondent expressed a willingness to negotiate regarding the Applicant's role as an Uber driver providing he submitted a formal request, however the Applicant refused to do so.

The Applicant argued that driving for Uber did not constitute employment, as all money was paid to his wife and he was not a registered Uber driver. Furthermore, even if the Applicant's actions did amount to working a second job, he argued that this was no more than an "*error of judgement*" on his behalf, based on a genuinely held mistaken belief that he was not technically working for Uber.

However, the Commissioner found that the Applicants actions rendered the dismissal fair for the following reasons:

- The Applicant conducted work outside of his employment with the respondent, contrary to contractual requirements;
- The Applicant deliberately misled and lied to his employer on a number of occasions; and
- The Applicant unreasonably refused to provide his employer with records of his driving history, which were readily available to him

Commissioner Williams stated that in this case "[the Applicant] *was very much the architect of his own demise*", as he denied the opportunity for cooperation and transparency regarding his work with Uber, and rather chose to continue lying to his employer, amounting to "*misleading and dishonest*" conduct. If you have any questions regarding employees supplementing their employment income, please contact Nick Stevens, Megan Cant or Jane Murray.

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