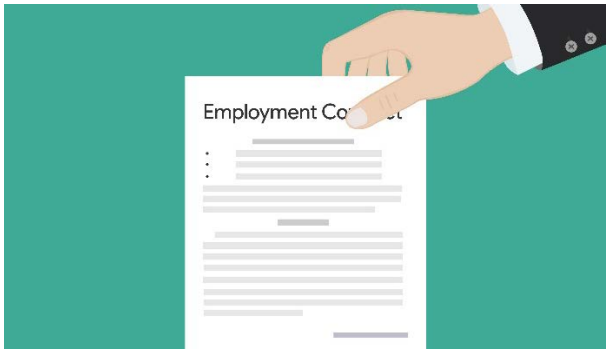
STEVENS & ASSOCIATES LAWYERS

October 2024

A VISION IN THE WORKPLACE

Our October edition of Vision includes:

- Breaching Post-Employment Restraints: a $500,000 lesson;
- The Federal Court hands down an interim order to reinstate an employee terminated during their probation period; and
- A new study on the rising popularity of non-compete clauses and their impact on workers.



Breaching Post-Employment Restraints: A $500,000 Lesson

A recent Federal Court decision, *AEI Insurance Group Pty Ltd v Martin (No 4)* [2024] FCA 1110, highlights the potentially costly consequences for employees who breach post-employment restraint clauses contained in an employment contract. In this case, Craig Martin (**Mr. Martin**), a former account manager at AEI Insurance Group Pty Ltd (**AEI**), was ordered to pay $500,000 in damages after soliciting clients to follow him to a direct competitor, MA Brokers.

Case Overview

Mr. Martin had been the "*face of the business*" in AEI's Queensland operations for over a decade, playing a significant role in building client relationships in the heavy vehicle insurance sector. He resigned from AEI in August 2022 and shortly after commenced employment with MA Brokers, a direct competitor. AEI began proceedings when it became aware that 45 of its clients had moved to MA Brokers following Mr. Martin's resignation.

AEI sought to enforce the restraint clause in Mr. Martin's employment contract, which prohibited him from soliciting or accepting business from AEI clients for 12 months after the termination of his employment. AEI argued that Mr. Martin had breached this clause by directly or indirectly encouraging clients to move their business to MA Brokers.

Judicial Findings

The Court accepted AEI's argument that Mr. Martin had breached the restraint clause. While AEI's case was largely circumstantial, evidence such as client

communications, letters of appointment and Mr. Martin's own actions in contacting clients shortly after his resignation supported the conclusion that he had solicited business in breach of his contract.

Justice Thawley found that Mr. Martin had directly solicited 16 clients and had a role in the movement of an additional 29 clients to MA Brokers. The Court noted that Mr. Martin's actions were aimed at leveraging the client relationships he had developed during his employment with AEI, which constituted a breach of his post-employment obligations with AEI.

Despite challenges in gathering evidence, such as the destruction or tampering of Mr. Martin's mobile phones, the Court ruled that AEI's restraint clause was reasonable and enforceable given the nature of Mr. Martin's role and his extensive involvement with AEI's client base. The restraint was specifically designed to protect AEI's legitimate interest in maintaining its customer connections.

Damages and Restraint Clauses

AEI sought damages for the loss of income from clients who transferred to MA Brokers. Justice Thawley assessed AEI's potential losses at over $600,000 but settled on awarding $500,000 after considering that some clients might have moved without solicitation or could have left AEI irrespective of Mr. Martin's actions.

Key Takeaways for Employers and Employees

1. **Enforceability of Restraint Clauses:** This case highlights the enforceability of reasonable restraint clauses, particularly when they are designed to protect customer connections developed during employment. Employers should ensure that these clauses are clear, reasonable and tailored to the specific circumstances of the employment.
2. **Importance of Evidence:** While direct evidence may not always be available, circumstantial evidence such as client communications and documents can be sufficient to establish a breach of restraints. Employers should act swiftly to secure any relevant evidence when enforcing restraint clauses.
3. **Significant Financial Penalties:** For employees, this case highlights the significant financial risks of breaching post-employment obligations. Mr. Martin's failure to comply with his restraint clause led to a $500,000 judgment against him which is a stark reminder that breaches of contractual restraints can result in substantial penalties.

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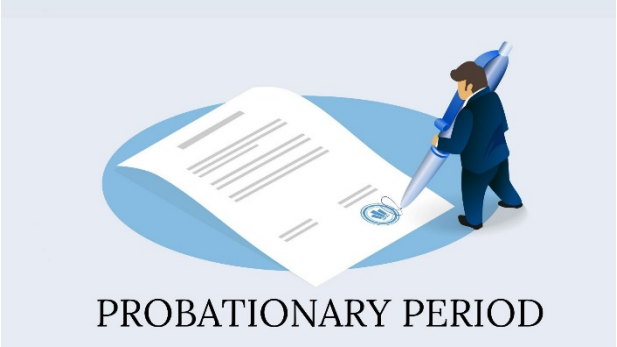
If you have any questions about post-employment restraint clauses and how they may impact you as an employer or employee, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.



Court Orders Reinstatement of Employee Terminated During Their Probationary Period

During late September 2024, the Federal Court handed down an interim order in the case of *Dabboussy v Australian Federation of Islamic Councils* [2024] FCA 1074, which granted an injunction requiring an employer to reinstate an employee following a summary dismissal which occurred one-day prior to the employee's eligibility to make an application for unfair dismissal.

Background

Mr. Dabboussy was summarily dismissed by the Australian Federation of Islamic Councils (**the Company**) at 4:40pm on 3 September, the day before he would have become eligible for unfair dismissal (**the Dismissal**).

Preceding the Dismissal, an allegation of misconduct had been raised against Mr. Dabboussy by an employee at the Company. Mr. Dabboussy was stood down on 9 August 2024 whilst an investigation by an external investigator was conducted into the misconduct allegation against Mr. Dabboussy (**the Investigation**). On 3 September 2024, one day prior to Mr. Dabboussy's eligibility to access unfair dismissal under the *Fair Work Act 2009* (Cth) (**the FW Act**), the findings of the Investigation were not finalised. Following an 'emergency' meeting of the Company's Executive Council on 3 September 2024, Mr. Dabboussy was summarily dismissed at 4:40pm that same afternoon.

Probationary Periods and Unfair Dismissal

A 6-month probationary period is commonly used by employers to assess a new employee's suitability for ongoing employment. This 6-month period coincides with an employee's eligibility to

access unfair dismissal, except for small businesses where eligibility arises after a 12-month period.

Summary of the Decision

Mr. Dabboussy commenced proceedings in the Fair Work Commission, alleging that the dismissal constituted adverse action that was instigated for the 'substantial and operative reason' of depriving him the right to make a claim for unfair dismissal. Nicholas J of the Federal Court found that the decision to terminate Mr. Dabboussy's employment occurred in haste. Referencing the Executive Council's 'emergency meeting', the fact that Mr. Dabboussy had already been stood down, and the unfinalised status of the Investigation report, it was determined that there was no strong evidence indicating why this haste was necessary. As such, Nicholas J held that a 'substantial and operative' reason for terminating Mr. Dabboussy's employment was to deny him the right to bring an unfair dismissal claim under the FW Act, which constituted unlawful adverse action.

In considering orders to be made, the Court considered the financial impact on Mr. Dabboussy and the impact of his return to work for other employees in light of the misconduct allegations. Ultimately, the Court made an interim order reinstating Mr. Dabboussy and preventing the Company from terminating his employment without leave of the Court.

Key Takeaway

A probation period of either 6-months or 12-months, coinciding with an employee's eligibility to access unfair dismissal, is commonly utilised by employers. However, employers must be aware that terminating an employee immediately prior to the end of this period to deny the employee the right to make a claim for unfair dismissal may constitute adverse action.

If you have any questions about this case and how it may impact you as an employer or employee, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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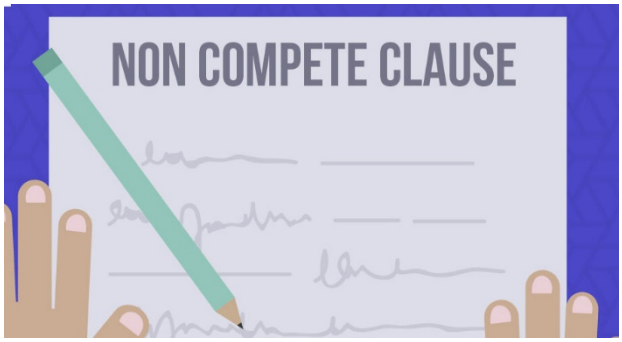

The Impact of Non-Compete Clauses on Employees

A recent study has provided new data regarding the use and impacts of non-compete clauses (**Non-Competes**) and non-disclosure agreements (**NDAs**) in Australian Employment Contracts (**the Study**). Utilising data from the Australian Bureau of Statistics (**the ABS**), the Study found that the increased use of Non-Competes by Australian employers has contributed to low wage growth and job mobility for employees subject to these conditions.

Non-Compete Clauses

Non-Competes in Employment Contracts impose restrictions on an employee's ability to commence employment with a competitor of the former employer, either in the same or similar industry, for a prescribed period of time and geographical area upon termination of employment.

Traditionally, justification for non-competes arose from the practical necessity of firms to protect their trade secrets and client relationships. Whilst incorporated for the benefit of the employer, employees may benefit from these clauses too, in that they encourage investment by firms in staff training, as employees are disincentivised from moving quickly between employers.

The Study also analysed the impact of NDAs. NDAs similarly prevent the disclosure of confidential information gained during the course of employment, offering an alternative for employers to protect trade secrets and confidential information without negative implications on labour mobility for workers.

Findings

It was found that employment contracts of approximately 1 in 5 Australian workers contain a Non-Compete. According to the Study, the proliferation of Non-Competes in the past five years has contributed to a fall in labour mobility, which sits at a record low level despite a strong labour market. Consequently, the Study found that employees with contracts containing a Non-Compete were earning 4% less than similar workers, who instead were subject to NDAs. Furthermore, it was found that employees with Non-Competes were subject to lower wage growth

and reduced bargaining power arising from these restrictions on pursuing new employment opportunities. Whilst Non-Competes have been traditionally utilised in higher-skilled professions, the Study found that workers in lower paid and lower-skilled occupations were also subject to Non-Competes, despite the potential lack of legal enforceability of such clauses.

Implications

With the Albanese Government considering introducing legislation to mitigate the restrictions of Non-Competes on the employees, findings of the Study prove supportive of the proposed legislative restrictions.

If you have any questions about Non-Compete clauses or NDAs and how they may impact you as an employer or employee, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.