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Employment Law Update

September 2010

The latest edition of the Coleman Greig Employment Law Update provides a useful and timely review of the way in which Fair Work Australia addresses certain issues.

In the Update we have provided an overview of recent decisions regarding unfair dismissals as well as a range of issues that have been considered by the FWA over the last 12 months and how they have been viewed. It certainly makes for interesting reading and reminds us all about the care that should be taken when dealing with employees and employment issues.

Adverse Action and Non-Employees

"Adverse action" is a new concept under the Fair Work Act. Under the Act, an employer must not take adverse action against an employee because the employee either:

- has or has not exercised a workplace right; or
- proposes to, or proposes not to, exercise a workplace right.

Nor should the employer seek to prevent the exercise of such a right.

"Workplace rights" include freedom from discrimination, freedom of (industrial) association, raising safety issues, and so on. As yet, there are very few FWA decisions providing guidance on how these provisions will work, and their outer limits.

Employers need to be aware that this protection also extends to prospective employees.

So, for example, it would be "adverse action" to refuse employment, or offer employment on less favourable terms, for a discriminatory reason such as colour, sex or nationality.

And it would be "adverse action" to refuse to employ someone, or offer employment on less favourable terms, because they were (or weren't) a member of a union.

Employers also need to be aware that once a complainant alleges that an action or threatened action is motivated by an intent which would contravene the adverse action provisions, the employer has to establish that the conduct was not carried out unlawfully, ie that the reasons for the action did not infringe the law. This means employers need to be alert to potential issues of this kind, and keep very good records (a good paper trail) to demonstrate the legitimate reasons for the decision.

Coleman Greig Lawyers can provide training to your HR team, and to managers and supervisors responsible for recruitment and managing employee performance, to help them identify risky situations and act to manage risks in those circumstances.

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Should You Accept a Resignation, or Allow it to be Withdrawn?

Resignations can be tricky things.

On the face of it, a resignation means that the employment is terminated by the employee, not the employer, so the question of unfair dismissal does not arise. It has always been the law that a resignation, once accepted, cannot be unilaterally withdrawn. However, sometimes the employee should be allowed to reconsider.

For instance, when an employee resigns in anger and then seeks to withdraw the resignation reasonably promptly, an unreasonable refusal to allow him or her to do so (particularly with a long serving employee or an employee with other mitigating circumstances) may amount to an unfair dismissal.

In a recent FWA case, an airport security employee was interviewed by police and charged concerning her actions with a bottle of perfume confiscated from a passenger. The employee, in a distressed state, told her supervisor that she wished to resign, and left. A week later, the employee asked to return to work, armed with medical certificates referring to depression as an explanation for her immediate reaction and her absence.

FWA expressed the rule as follows: in some cases, when a worker resigns in an emotional state there may be a duty upon the employer to review the employee's employment status if, within a reasonable period of time, the employee re-engages the employer in a positive manner. An employer aware that a resigning employee has an illness or psychological condition might have a duty to enquire, at its own initiative, into the employee's situation before accepting the resignation.

In the case of the airport employee, the employer was not aware of the employee's depressive condition. It had not urged the employee to resign and it had made genuine endeavours to persuade her to stay, but she remained adamant that she was resigning. In these circumstances therefore it was the employee's duty to promptly clarify her employment status, not the employer's. The termination thus arose from the employee's actions so her unfair dismissal claim could not proceed.

What should employers do?

When an employee resigns it is important to record acceptance of the resignation sooner rather than later. However, when there are circumstances to suggest that the employee was not thinking clearly at the time it is worthwhile to verify the resignation before formally accepting it, or to consider positively any prompt approach made the employee to re-establish employment.

Coleman Greig's Employment Law Team aims to provide prompt real-time advice and solutions in urgent situations such as those that arose in this case: whether to terminate employment or to accept the resignation, or whether to renew employment when the employee tries to do so. These are all points at which you might need to make a quick decision, and our Team is here to help with practical risk management advice based on the technical rules, but also taking into consideration the broader commercial perspective.

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Are Restraint Clauses in Employment Contracts Worthwhile?

Employment contracts often contain restraints on employees: clauses that prevent the employee from working for a competitor for some period after the end of the employment relationship, or poaching employees, customers or suppliers after the conclusion of the relationship.

Employers (and employees contemplating a move to a competitor) often ask whether these clauses are worth the paper that they are written on.

The enforcement of restraint clauses is difficult because the courts start from the proposition that it is not legitimate to restrict competition in this way. However, it is well established that restraints that are reasonable and protect a legitimate interest of the employer, are enforceable.

"Legitimate interests" include protecting the relationship with customers for a reasonable period after the employee leaves, protecting continuing employees from being solicited by an influential ex-employee, and using a non-competition restraint to prevent an employee from using confidential information in his or her head which cannot be protected effectively in any other way.

There are many reasons why such restraints may not be enforceable in particular circumstances, but if the restraint is not in the contract in the first place, there is no scope at all to restrain a departed employee.

The art of creating a strong restraint clause lies in tailoring it to a specific set of circumstances to try to ensure that it will be reasonable and therefore enforceable should circumstances require. A reasonable clause is more likely to make an employee (and his or her lawyer) think twice. With restraint clauses, one size definitely does not fit all.

Enforcing such a restraint is an expensive exercise, since it involves going to the Supreme Court seeking an urgent injunction, and cost is often the reason why a restraint is not actively enforced. However, in the right circumstances, such restraints may well be enforceable.

Case study

In a recent case in which Coleman Grieg acted for the employer, an employee gave a month's notice that he was leaving. A week after giving notice, he disclosed that his new employer was the employer's largest and most direct competitor. He was then put on "garden leave" for the rest of the notice period.

The employer checked his recent email usage and discovered that various items of confidential information had been emailed to the employee's personal email account, contrary to various policies of the employer, for which there was no obvious innocuous explanation. The employee maintained that he had sent the documents to himself for work purposes and had not breached confidentiality (particularly by forwarding them to his new employer, or intending to do so), but refused to alter his intention to work for the direct competitor.

At first, the competitor supported the employee. However, after our client insisted on the restraint and raised the confidentiality issues, the competitor decided not to engage his services. The employee then consented to enforcement of a 12 month restraint, and to forensic examination of his personal laptop to verify what had (or had not) been done with the confidential information.

An outcome such as that shows other employees that restraints are indeed worth the paper that they are written on. But there are some strategic decisions to be made in choosing whether to run a particular case: while this will demonstrate your seriousness about enforcing restraints, an unsuccessful case will prove to all that the restraint is unenforceable.

Restraint clauses need to be carefully drafted and kept up to date in a current employment contract (a new contract for each new position taken on as the employee is promoted).

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Unfair dismissals: Do not pass "Go!", salary caps and employees behaving badly

Listed below are some of the more salient points from recent interesting decisions concerning unfair dismissals and the indexing of the salary cap:

Do not pass "Go"

Fair Work Australia (FWA) has held that it can strike out an unfair dismissal application as having "no reasonable prospects of success" at a preliminary stage if it was to form the view that the application has insufficient weight and quality of evidence to succeed after a hearing. In such a case, the ex-employee has to provide an outline of his or her case that is sufficient for FWA to form a preliminary view as to whether the case has sufficient substance to be permitted to go to trial.

FWA adopted these principles in a case concerning an employee whose employment had been terminated after an investigation found that he/she had engaged in conduct with sexual connotations and recounted sexual experiences to other employees, uninvited.

FWA found that the employer's investigation was thorough, fair and balanced, and that the employee's account of events was "very unconvincing", and therefore struck out the application without proceeding to a full hearing.

Employers need to raise the issue of "reasonable prospects" at an early stage in an appropriate case, to take advantage of this option.

The Salary Cap

The current threshold for unfair dismissal claims for non-award employees is an annual remuneration of $113,800 (from 1 July 2010, indexed annually).

"Remuneration" means wages or salary, salary-sacrificed amounts, and the value of non-monetary benefits (agreed, or established by FWA, if feasible), but does not include statutory superannuation, bonuses or commission where the amount cannot be determined in advance, or reimbursements such as expenses

Bad Behaviour by Employee Reduces Compensation

The unfair dismissal provisions include a provision allowing FWA to reduce compensation when a dismissed employee has engaged in misconduct.

In a recent FWA case, an employee of a transport company was found to have overcharged customers, and to have kept the profit to subsidise staff social events. The employer botched the investigation by conducting cursory interviews, failing to tell the employee that he was entitled to have a support person attend the disciplinary interview, and dealing inconsistently with other employees involved (one was warned, one was promoted and some suspicions were not pursued at all). In the circumstances, FWA held that the employee had not been given "a fair go all round".

However, FWA held reinstatement would be entirely inappropriate as a remedy, because the relationship of trust had been destroyed by the employee. Further, any amount of compensation would have been modest at best: and the employee's misconduct allowed FWA to reduce the compensation to nil.

Employee misconduct may relieve you of any liability to pay compensation for a dismissal that is found to be unfair. However, the other lesson is that it is important, even in what may appear to be cut-and-dried situations, to follow a rigorous and consistent process of investigation, in order to be seen to treat the employee fairly and therefore deter any claim and avoid the complications of a hearing such as the one that arose in this case.

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Discrimination and vicarious liability: being liable for your employee's actions

Employers can be liable for the conduct of their employees, without the employer or its management having been either aware of, or involved in, the discriminatory conduct.

Discrimination legislation generally includes provisions for vicarious liability of the employer. Conduct of employees can therefore result in employer liability, unless the employer can demonstrate that it took all reasonable steps to prevent the employees engaging in the discriminatory conduct.

Proving this will usually be difficult: it will be a rare case where there is nothing more the employer could have done to prevent the conduct in question. Having policies in place, and educating employees about those policies, will help, but will not be a sufficient defence if the complainant can point to other things the employer could have done. If lower level supervisors knew of, or should have known of, discriminatory conduct, but did nothing about it, and did not tell higher management, the employer will still be liable for the discrimination.

It is therefore critical for businesses to ensure that all levels of management are familiar with discrimination issues and are clear as to their responsibilities to report any inappropriate conduct so that higher levels of management can take the necessary steps.

As we commented in a recent Alert concerning events in David Jones and the NSW State of Origin team, anti-discrimination action is never done: employees' knowledge on this point needs to be refreshed regularly, with particular care to include all managers and supervisors.

Coleman Greig Lawyers can provide training to your HR team, and to managers and supervisors responsible for recruitment and managing employee performance, to help them identify risky situations and act to manage risks in those circumstances.

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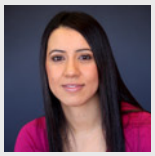

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