SQUIRE SANDERS

WORKPLACE VIEW

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50 Shades of Restraint

Beware when Engaging Shackled Employees

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Post-employment contractual restraints of trade are an essential means of protecting a business from departing employees, particularly those at a senior or executive level or those with specialist knowledge or skills. Former employers are increasingly using court action to enforce restraints against former key employees who attempt to ignore restrictions imposed on them by their previous employment contracts.

Recent Developments

In April 2014 the NSW Supreme Court upheld a 6 month restraint against an advertising executive and ordered him to pay his former employer AU$300,000 for the contract breach. He and his wife were also ordered to pay a further AU$233,000 for fiduciary breaches.

The courts are however still exercising caution when dealing with restraint claims and will look to ensure the restraint is reasonable and proceedings have been fairly brought. In a decision of the same court in the following month it was held that a 6 month non-compete restraint against a former Fairfax executive could not be enforced by Fairfax. This was not because the restraint was unreasonable but as a result of Fairfax's delay in seeking to enforce it. Also of relevance to the court was the fact the former Fairfax executive had given undertakings not to poach clients or use confidential information.

Employers and Post-employment Restraints

The flipside of these restraint enforcement cases is the potential liability of the new employer when they employ someone they know is subject to a restraint.

The new employer needs to be cautious to ensure it does not induce a breach of contract (a tortious cause of action). This can occur if a new employer knows of the restrictions imposed on an employee under a previous contract of employment and intentionally interferes (whether directly or indirectly) with the former employer's contractual rights.

Conspiracy is another claim which can arise in a post-employment restraint context. This occurs where the new employer and the employee are found to have conspired for the purpose of damaging the former employer's business, trade or other interest.

While these types of claims are not common in Australia, and court actions have been few and far between, there is a growing trend of former employers taking steps to show they are prepared to take action to protect their business. The first step usually taken is to issue a letter of warning to the new employer, alerting them to the restraint on the employee they have recently employed and putting them of notice of potential claims. This highlights the need for employers to exercise caution when engaging new employees that may be subject to post-employment restraints.

Cost Claim Against New Employer

Last year in *HRX Pty Ltd v Scott* [2013] NSWSC 451 (**HRX v Scott**) the NSW Supreme Court took the rare step of imposing costs on the new employer in a restraint case, even though the new employer was not a party to the proceedings.

In that case, Mr Scott resigned from HRX and went to work for a competitor Talent2 in breach of a non-competition clause in his HRX employment contract. HRX commenced proceedings in the Supreme Court against Mr Scott for a breach of his post-employment restraint. Talent2 initially funded Mr Scott's defence and only withdrew funding once it realised Mr Scott was in breach of his contract with HRX.

The court imposed costs on Talent2, because it was of the view that "*but for the funding by Talent2, the litigation would not have been necessary*". Most notably, the court stated:

> "*it was incumbent upon employers who effectively poach their competitors' employees to ensure that those employees are not acting in breach of their obligations to their former employers, particularly where the consequence of such breach is a benefit to the new employer.*"

There are a number of lessons to be learned from HRX v Scott including the need for new employers to exercise caution in becoming extensively involved in or offering support to employees who are involved in post-employment restraint proceedings commenced by their former employer.

What Does this Mean for Employers?

In order to protect your business from future claims, it is important you conduct your due diligence on any potential employee by:

- Inquiring whether they are subject to any post-employment restraints;
- Considering whether any restraint imposed on the new employee is enforceable and whether your company wishes to bear the risk of a potential future claim by employing that person;
- Considering making any offer of employment conditional on the new employee undertaking that there are no impediments or restrictions on them entering a new employment agreement;
- Ensuring you do not become extensively involved in any restraint of trade proceedings commenced by the former employer of your employee where your company is not a party; and
- Refraining from taking any action which could be seen as persuading, procuring or inducing a breach by the employee of their former employment contract.

WORKPLACE VIEW

Employer Reminder

Many of you would be aware the new anti-bullying regime under the *Fair Work Act 2009* (Cth) (**FW Act**) provides that 'reasonable management action carried out in a reasonable manner' will not constitute bullying. Employers who are performance managing or disciplining employees should therefore be mindful to ensure their actions are within the bounds of what is reasonable. In its first substantive bullying decision the Fair Work Commission (**FWC**) in *Ms SB [2014] FWC 2104* took a broad and practical view of what constitutes '*reasonable management action*' and provided guidance on what actions may be considered reasonable.

The FWC found making vexatious allegations, spreading rude or inaccurate rumours and conducting an investigation in a 'grossly unfair' manner, was unreasonable conduct barred by the new anti-bullying laws. However, the FWC cautioned that findings on whether management action is unreasonable will depend on the nature of the actual conduct and the context, which must be supported by sufficient evidence. The Commissioner listed various principles in considering whether management action was reasonable, including:

- Management actions do not have to be perfect or ideal to be considered reasonable;
- A course of action may still be 'reasonable action' even if particular steps are not;
- The action must be lawful and not be 'irrational, absurd or ridiculous';
- Any unreasonableness must arise from the actual management action, not the applicant's perception of that action; and
- Whether the action involved a significant departure from established policies or procedures and if so, whether the departure was reasonable.

The Commissioner found the relevant management action in the circumstances of the case was reasonable and comprised '*everyday actions to effectively direct and control the way work is carried out*'.

Client Quiz

In the case of *Commonwealth Bank of Australia v Barker (Case A1/2014)* the High Court of Australia is currently deliberating whether or not a particular term is implied into Australian contracts of employment. Of the four terms below which is it currently considering:

(a) an employer's duty to provide work?

(b) an employee's duty of fidelity and good faith?

(c) an employee's duty to exercise reasonable care and skill?

(d) a duty of mutual trust and confidence?

The first correct entry emailed to isla.rollason@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Hot Off the Press!

The Fair Work Commission has determined:

- Modern Award minimum wages will increase by 3%; and
- The national minimum wage will rise to AU$640.90 per week (an increase of AU$18.70 per week), or AU$16.87 per hour (an increase of AU$0.50 per hour).

These determinations will have effect from 1 July 2014 – it is critical employers ensure they meet these new minimum requirements in making wage payments to avoid underpayment claims.

Legislation Update

Legislative Instrument	Status	Key Proposed Changes
Occupational Safety and Health Act 1984 (WA) (**OSH Act**)	The introduction of work-place health and safety (**WHS**) laws are on hold.	Since 2012 the WA government has been indicating that it intends harmonizing the State's WHS laws with other Australian states and territories. In April this year, the Department of Mines and Petroleum (**DMP**) ministerial advisory panel announced that the WA State Government was likely to introduce two new WHS bills (one for the resources sector and one for general industry), to replace the OSH Act and bring WA in line with the model WHS legislation that has already been adopted by nearly all of the States and Territories. However it seems this is unlikely to happen any time soon. The State Budget, handed down in May this year, made no reference to the new WHS legislation. Further, the Budget did not allocate any additional funds to the DMP or WorkSafe WA for the implementation of any new WHS laws and reduced the Department of Commerce's funding for the provision of advice and regulatory services in the areas of OSH, energy safety, labour relations and construction standards. The Attorney-General and Minister for Commerce, Michael Mischin has made a number of comments which suggest the State Government is still considering the potential implications of adopting the model WHS legislation and has not made a final decision on whether or not it will be implemented in WA.

Events Update

Squire Patton Boggs, Perth 2014, Australian Labour and Employment Breakfast Series

Perth

Level 21, 300 Murray Street, Perth

Wednesday 25 June 2014: The Fair Work Act 2009 – an Update on Recent and Proposed Changes

Wednesday 27 August 2014: Employee Privacy

Wednesday 26 November 2014: Safety Prosecutions – Lessons Learned

Sydney

Level 10, 1 Macquarie Place, Sydney.

Wednesday 16 July 2014: Executive Employment Issues

Recent Awards

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L&E Team "Top Listed" in Occupational Health & Safety Law

Doyle's Guide
Kylie Groves Leading Employment and Workplace Relations Lawyer

Best Lawyers
Bruno Di Girolami and Andrew Burnett Recognised in the area of Occupational Health & Safety Law and Bruno di Girolami Employment Benefits Law.

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