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Workplace View

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Gardening Leave – Avoiding the Thorns!

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The recent case of *Actrol Parts Pty Ltd v Coppi (No 2)* [2015] VSC 694 provides an important reminder to employers on how to manage exiting senior talent through gardening leave. Though described in the case by the Supreme Court of Victoria as "*an unfortunate and condescending expression* [where] *the employer is entitled to direct a resigning employee to go home and tend the garden during the notice period*", gardening leave remains a useful tool for employers. It allows an employer to direct an employee who has resigned or been given notice of termination to stay away from the workplace during the notice period (while remaining on the payroll) thereby preventing the employee from commencing employment with a competitor while also maintaining their implied duties of loyalty, fidelity and confidentiality.

In the case, Mr Coppi had been employed as the National Sales Manager of Actrol, a refrigeration wholesaler, since 2010. In August 2014 he tendered his resignation and Actrol directed him to go on gardening leave for the duration of his four week notice period. During this time, Actrol required him to return his company-issued motor vehicle, iPhone, iPad and laptop computer. Mr Coppi, believing that Actrol had no right to place him on gardening leave and had repudiated the contract of employment by unilaterally removing his contractual benefits, commenced employment with Totaline, a competitor of Actrol's, nine days before the end of his notice period.

Actrol launched legal action claiming that Mr Coppi had breached his contract's implied duties of loyalty and fidelity by starting work with another company during his notice period and trying to poach an Actrol employee. Allegations of confidentiality breaches were also initially made, but these were not pursued in the absence of evidence that confidential information had been shared or misused. While the case involved several legal issues, the primary question for the court was "*whether the plaintiff was entitled to place the defendant on leave with pay during the resignation notice period.*"

In the absence of any right at common law or under the *Fair Work Act* 2009 (Cth) enabling an employer to direct an employee not to work, the **general rule** is that gardening leave must be conferred by an express term in an employment contract. In *Actrol* there was no such express term, but the court found that the term could be **implied** into Mr Coppi's contract because "*it was entirely reasonable for Actrol to protect itself from the risk of harm that might flow from* [Mr Coppi] *performing normal duties in the particular factual circumstances.*" Those particular circumstances included the fact that Mr Coppi, as a sales manager, was directly responsible for a number of sales representatives within a territory.

Furthermore, the company had reason to believe that Mr Coppi would go and work for a competitor. The court therefore found that the gardening leave term was necessary to give business efficacy to the contract because "*without it, Actrol would have to maintain Mr Coppi in a position where he would have continuing contact with its sales representatives and confidential information.*"

Despite finding that gardening leave was "*reasonable and equitable*" in the circumstances, the court went on to find that Actrol had repudiated the contract of employment when it withdrew Mr Coppi's work car and electronic devices (because this amounted to a unilateral reduction in his salary package). Mr Coppi argued that, by taking up employment with Totaline, he had accepted Actrol's repudiation and thereby terminated the contract of employment. Actrol contended that the contract had not been brought to an end because Mr Coppi had never directly communicated his acceptance of its repudiation. Interestingly, the court rejected Actrol's argument and held that "*the election of the innocent party* [i.e. either acceptance or rejection of the repudiation] *can be communicated to the defaulting party directly or indirectly and by words or conduct.*" In this case, the court accepted that Mr Coppi's acceptance of Actrol's repudiation was indirectly communicated to the company when its managing director telephoned Totaline and recognised Mr Coppi's voice on the answering machine.

In terms of an outcome to the case, the court has scheduled a further hearing to decide what, if any relief, should be awarded to Actrol.

Lessons for Employers

- Even though the court in *Actrol* implied a gardening leave term into the contract of employment this will not always be the case. It is therefore prudent for employers to ensure that there is an express provision in their contracts of employment which entitles them to place an employee on gardening leave for all or part of the notice period.
- Employers also need to be aware that in exchange for an employee's duty of fidelity while on gardening leave, the employer must keep the employee on its payroll and the employee must receive all contractual entitlements including benefits such as a car or phone. As seen in *Actrol,* removing any valuable benefit which forms part of an employee's salary package could amount to a repudiation of the employment contract.
- As businesses are settling into the new year it is a good time to review your employment contracts including considering whether your employment contracts currently contain adequate and enforceable provisions which protect your business from departing employees.

Employer Reminder

A recent Federal Court decision provides a timely reminder to employers to be vigilant about worker safety even when they are "off duty". In the case of *Westrupp v BIS Industries Limited* [2015] FCAFC 173, the court found that a FIFO worker punched in an on-site pub brawl suffered his injury in the course of his employment. The court rejected the employer's argument that, given the injury had occurred between two different shifts, it wasn't work-related. Instead, the court ruled that, due to the nature of his employment, the employee remained subject to the employer's codes of behavior for the duration of his two week swing. Therefore, even while the employee was "off duty", he was still participating in an overall period of work. The incident was consequently deemed to have occurred "at work", entitling the injured employee to workers' compensation.

Other cases where employees have been injured in "off duty" incidents that have been deemed to have occurred at work and resulted in awards of workers' compensation include:

- An incident when an employee was injured by a fire in his quarters while sleeping (*Danvers v Commissioner for Railways* (NSW) [1969] HCA 64)
- When an employee was injured while showering at a site camp (*Comcare v McCallum* [1994] FCA 975)
- When an employee was struck by a car while returning from their accommodation (*Comcare v Mather* [1995] FCA 1216)

Productivity Commission Alert

In December 2015 the Australian Productivity Commission released its *Workplace Relations Framework Productivity Commission Inquiry Report*, which made recommendations to repair, not replace, the current workplace relations system. Set out below is a summary of some of the most significant recommendations.

Enterprise Contracts

- This recommendation is for the introduction of a new form of statutory employment arrangement – the enterprise contract – which would allow an employer to vary an award for a class of employees to suit the needs of the business without having to negotiate with each worker individually.
- The enterprise contact would have to be lodged with the Fair Work Commission and subjected to a "no disadvantage test", ensuring no employee would be worse under the enterprise contract when compared to the relevant award.
- The objective of enterprise contracts is to strike a balance between the cost of administering separate agreements with individual workers and the complexity of negotiating new enterprise agreements, especially for small employers.

Penalty Rates

In the context of changing consumer habits such as greater demand for weekend services and increasing automation and online shopping activity, this recommendation is to align Sunday penalty rates with those on Saturday, creating a single weekend rate (though the rate may vary between the hospitality, entertainment and retail industries).

Unfair Dismissal Claims

In recognising that unfair dismissal laws are working reasonably well, the Productivity Commission emphasised "substance rather than process" in its recommendations to:

- Change the legislative test for unfair dismissal to ensure that procedural errors alone are not enough to lead to awards of compensation or reinstatement in what would otherwise have been a fair dismissal;
- Discourage disingenuous claims by charging a non-refundable lodgement fee plus an additional fee if the matter proceeds to arbitration;
- Give the Fair Work Commission clearer powers to deal with unfair dismissal applications "on the papers"; and
- Remove the emphasis on reinstatement as the primary goal of unfair dismissal provisions.

General Protections (Adverse Action) Claims

Recommendations for improvements to the general protections provisions included:

- A clearer definition of what constitutes a "workplace right";
- Better management of discovery processes by the Fair Work Commission and courts; and
- Greater powers to award costs against applicants in certain cases.

Transfer of Business

This recommendation is for the Fair Work Commission to be able to make an order stopping the transfer of an employment arrangement (such as an enterprise agreement) from of an old employer to a new employer where such an order would improve the prospects of employees gaining employment with the new employer. An automatic 12 month expiry period was also recommended for transferrable employment agreements, except for transfers between associated entities.

Enterprise Bargaining

The recommendations included:

- Returning to the "no disadvantage test" in place of the "BOOT" (better off overall test), which the Productivity Commission considers to be more costly and less efficient;
- Allowing parties to negotiate enterprise agreements with longer durations (up to five years) to reduce costs associated with bargaining;

- Granting the Fair Work Commission greater discretion to overlook inconsequential procedural or technical errors during bargaining; and
- Limiting the content of enterprise agreements to concern only employee/employer issues and excluding terms that pertain to the employee/union relationship.

Industrial Disputes

The Productivity Commission recommended:

- Simplifying the process for authorising protected industrial action, including removing the requirement that protected action must be taken within a defined time period;
- Modifying the threshold for intervention by the Fair Work Commission in some disputes;
- Deterring the tactical use of notifying industrial action only to withdraw it after the employer has spent time and money planning to manage the action (deterrence would include allowing employers to stand down employees without pay if they do not go ahead with notified industrial action);
- Providing employers with more graduated options for response action to protected industrial action such as instituting limits or bans on overtime and reducing hours of work; and
- Increasing the maximum penalty for unlawful action to three times the current penalty.

Let's Get Quizzical

The first correct answer to all questions emailed to **Isla.Rollason@squirepb.com** will win a AU$50 David Jones voucher (Australia only).

1. Under the *Fair Work Act* 2009 (Cth), how frequently must the Fair Work Commission complete a review of both modern award wages and the national minimum wage?

a) Every year;

b) Every two years; or

c) Every five years.

2. How many days does the Fair Work Commission have to respond to a stop bullying claim?

a) Seven days;

b) 14 days; or

c) 21 days.

3. How many members constitute a full bench of the Fair Work Commission?

a) Three;

b) Five; or

c) Seven.

4. In its recommendations published in December 2015, the Productivity Commission recommended that the nominal expiry date for Enterprise Agreements can be:

a) Up to two years following the date of FWC approval;

b) Up to three years following the date of FWC approval; or

c) Up to five years following the date of FWC approval.

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