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Workplace View

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Don't Get Caught in the Crossfire! The Dangers of Concurrent Workplace and Criminal Investigations

By Jillian Howard, Senior Associate

In cases of serious misconduct involving theft or some other criminal act, it is not uncommon for a criminal investigation to run concurrently with an internal investigation. Any direction or request by the police that an employer deviate from its normal employment practices to allow that criminal investigation to take place can, however, cause difficulty for employers and will not provide a "get out of jail free card" for any procedural failings by the employer in dealing with the employment issues.

This issue was put into sharp focus in the recent decision of the Fair Work Commission (**FWC**) in *Wong v Taitung Australia Pty Ltd* [2016] FWC 7982 when a failure to suspend an employee suspected of serious misconduct following a police request was fatal to an employer's defence to an unfair dismissal claim.

In *Wong*, the applicant was identified by a colleague as a participant in a joint criminal enterprise with other employees involving the theft and resale of goods produced by the employer. The matter was reported to the police and the employer was asked not to take any action against the employees identified to enable the police to obtain further evidence of participation in the criminal enterprise.

Some three months later, the applicant complained to his employer that the truck he was driving was faulty and not roadworthy. The employer tested the truck but identified no concerns, concluding that the applicant was being unnecessarily difficult. The applicant was then suspended. After leaving work, the applicant contacted WorkSafe and the Fair Work Ombudsman to complain about a number of issues, including the safety of the truck.

Four days later, the applicant was provided with a letter setting out allegations in respect of his participation in the criminal enterprise and inviting him to a disciplinary meeting the following day. At the disciplinary meeting, he denied any involvement in the criminal enterprise. His denials were rejected by the employer and he was summarily dismissed.

The applicant complained that his dismissal was unfair and asserted that the real reason for his dismissal was the complaints he had made about unsafe working practices. The FWC disagreed.

Although it was apparent that the applicant's complaints had prompted the timing of the dismissal, they were insignificant when compared to the seriousness of the misconduct which was found to have had occurred. There was, therefore, a valid reason for the dismissal.

However, the FWC went on to find that the employer had made one "unfortunate and important error" which "turned an entirely fair dismissal into an unjust summary dismissal". The decision of the employer to allow the applicant to continue working after discovering his involvement in the criminal enterprise reduced the apparent severity of the misconduct, meaning that the employer could not subsequently summarily dismiss the applicant. This was despite an acknowledgement of the desirability on behalf of the police to gather further evidence to assist the potential criminal prosecution.

What should an employer do in cases of serious misconduct when a concurrent criminal investigation is taking place?

It is important to recognise that the conduct of a criminal investigation into workplace conduct does not obviate the requirement to deal with the issues fairly and promptly.

Although it is important to cooperate with the police, employers should try to avoid prejudicing their position by delaying their own investigation and disciplinary process until the criminal investigation has been completed. Otherwise, there is a risk that evidence may be lost or the delay may be taken as an indication that the conduct is not as serious, or is condoned by the employer.

This risk can be avoided by suspending the employee while the police investigation takes place. However, given criminal investigations can take a long time to complete (and may not ultimately result in proceedings being commenced), employers should be aware of the danger a lengthy suspension may have on making a dismissal unfair due to the stress placed upon the employee.

If, as in the *Wong* case, it is not possible to suspend the employee without prejudicing a related criminal investigation, employers should ensure that employees are dismissed with notice rather than summarily to avoid rendering an otherwise fair dismissal unfair.

Employer Reminder

By Jessica Geelan, Associate

The recent case of *Just Group Ltd v Peck* [2016] VSC 614 serves as a timely reminder to employers to review the post-employment restraints in their employees' employment contracts to ensure the terms are carefully drafted and reasonable. Post-employment restraints are presumed to be unenforceable unless the employer can establish there is a legitimate business interest in imposing the restraint and that it is no wider than is reasonably necessary to protect that interest.

In the *Just Group* case, the Victorian Supreme Court found that a restraint of trade clause preventing a CFO from working for a rival fashion retailer was broader than what was reasonably necessary to protect Just Group's legitimate interests, and was therefore unenforceable. As a result, the court rejected the company's claims for relief and the CFO was allowed to continue working for Cotton On, a major rival of Just Group's Just Jeans, Peter Alexander and Portmans.

Just Group argued that the "fierce competition" between it and Cotton On reasonably prevented the CFO from working with the rival retailer for up to two years. It also sought to ban her from using any of Just Group's confidential information in her new employment.

Seems fair enough? Well, the contract precluded the CFO from engaging in "any activity" which was the same or similar to "any part" of Just Group Ltd both during and after her employment. It also restricted her from acting for or on behalf of up to 50 other entities and brands listed in her contract (including related entities) anywhere in Australia and New Zealand for a maximum period of 24 months.

Even though Just Group sought to have the restraint read down to apply only to the CFO's employment with Cotton On, the court found that Just Group was unable to establish a legitimate business interest as the restraints prevented the CFO from working with competitors in positions where confidential information acquired during her time with Just Group was irrelevant to the new employer.

A reasonable restraint can often be achieved through a "cascading" clause that contains a series of overlapping restraints, which may read down to what a court considers reasonably protects the employer's legitimate business interests. However, a court cannot rewrite the terms of a restraint and, in this case, had the restraint operated only by reference to Cotton On, it may have been enforceable.

Landmark Uber UK Decision

By Felicity Clarke, Of Counsel

Much like in Australia, employees in the UK are afforded rights beyond those available to independent contractors and self-employed workers. These rights include minimum wage thresholds, leave entitlements and unfair dismissal and redundancy protections. It is, therefore, of great significance that the London Central Employment Tribunal recently handed down a landmark decision in finding that Uber drivers – and there are more than 40,000 of them across the UK – are employees and not contractors in the Uber business.

The two test claimants (one a current Uber driver and the other a former driver) claimed to be "workers" for the purposes of the *Employment Rights Act* 1996 and *Working Time Regulations* 1998 and were thereby entitled to be paid the minimum wage and provided with paid leave. They argued that Uber's practice of presenting them with "recommendations" and "tips" in order to improve "rider experience" in fact amounted to instruction, management and control over the way in which they provided their driving services.

Uber argued that the drivers were self-employed operators who were solely responsible for providing driving services to passengers and that Uber's role was to provide an online platform to connect drivers to passengers. In its contract documentation with drivers, Uber described itself as a "technology services provider that does not provide transportation services, function as a transportation carrier or agent for the transportation of passengers".

The Employment Tribunal was sceptical of the "twisted language" and "fictions" in Uber's contract documentation, noting the "remarkable lengths" Uber went to in describing itself and its legal relationship with drivers. The tribunal looked behind the contract documentation in upholding the claimants' "simple case" that Uber ran a transportation business and employed drivers to that end.

In making its decision, the tribunal considered the control with which Uber recruited and monitored drivers, finding that Uber exerted sufficient control over its drivers and had integrated them into the business model as demonstrated by Uber's payment and review system.

As yet, no similar case involving Uber has been heard in Australia. Nevertheless, the UK decision has the potential to upset the business model of the sharing economy, which is premised on the assumption that the workers engaged to provide the services are independent contractors rather than employees.

Did You Know?

By Emily Tan, Associate

Did you know that you could get stung with an underpayment claim if the annualised salary provisions in your employment contracts are not specific enough?

For administrative ease, many employers choose to pay employees an "annualised salary" or an "all-inclusive rate". This is an arrangement in which an employee is paid a fixed salary in satisfaction of all entitlements they may be entitled to under a modern award. Examples of common entitlements that may be satisfied by an annualised salary include allowances, overtime rates, penalties and annual leave loading.

The recent decision in the case of *Simone Jade Stewart v Next Residential Pty Ltd* [2016] WAIRC 00756 makes it clear that an employment contract **must** clearly identify the applicable award and set out exactly which provisions are to be satisfied by the payment of the annualised salary. In that case, the employee was given the green light by the court to pursue a claim for AU$29,000 in unpaid overtime and meal breaks despite being paid an annualised salary

This is because the annualised salary clause in the employee's contract attempted to include "any" award entitlements that may be payable under "an" award, which created uncertainty as to which award covered the employee and which award provisions were satisfied by her annualised salary.

The court held that the award in question, namely the Clerks Private Sector Award 2010, only permits certain entitlements to be included as part of an annualised salary. The broadly drafted clause in the employment contract therefore attempted to include award entitlements which were incapable of inclusion such as meal breaks.

The requirement for specificity is to remove any doubt about what the annualised payment is for. Employees should be able to compare their annual salary to award entitlements so that a no-disadvantage test can be properly considered and applied. To minimise exposure to potential claims, employers should ensure that annualised salary provisions in employment contracts are clearly drafted and contain the specificity required to withstand scrutiny.

Meet the Team

Jessica Geelan, Associate, Sydney

My first ever job was – Flipping burgers at my local takeaway shop.

What I like about my current job is – It's not flipping burgers in a takeaway shop. On a serious note, I like that I'm constantly challenged and learning new things. My team is also really supportive and the best at what they do.

A random fact about me is – I sang in a choir at the opening ceremony of the Sydney 2000 Olympics.

My dream concert anytime, anywhere is – I have a newfound appreciation for Michael Jackson. If I could go back in time and see his Bad tour live at Wembley (coincidentally in the year I was born) that would be amazing.

My last supper would be – All the Italian food I could eat.

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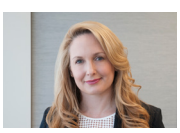

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