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Workplace View

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Money Talks – Former Employee All Tied Up In Post-Employment Restraint

A former employee has been ordered to pay his previous employer, a major accounting firm, more than AU$188,000 in damages after breaching a post-employment restraint and poaching one of the firm's top clients.

Background to the Case

Mr Money joined the firm as a trainee accountant in 2003, and although he did not have any formal accounting qualifications, was eventually promoted to the position of supervising accountant.

Mr Money's contract prohibited him, for a three year period after his employment, from providing 'services' to clients he had worked with while employed by the firm. The contract also required Mr Money to pay the firm liquidated damages in the event of a breach.

After Mr Money resigned from the firm in 2009, he commenced part-time employment with a rival accounting practice, as well as part time employment with a major client of his former employer, with whom he had established a close relationship. The rival practice soon began aggressively competing for the client's business, with one quotation shaving a cool AU$70,000 off the old employer's rate. As a result, the client terminated its retainer with Mr Money's former practice and engaged the rival firm.

The ex-employer brought proceedings against the accountant for liquidated damages for breach of the post-employment restraint.

At first instance, the court found the broad nature of the word 'services' meant the restraint could be enlivened by an unreasonably wide range of circumstances and was therefore void. The employer appealed, arguing the word 'services' was limited to the provision of recurring accountancy services and advice. Mr Money submitted the provision should only apply to senior employees.

On Appeal

Overturning the decision at first instance, the Victorian Court of Appeal found the restraint was 'relatively narrow' and the liquidated damages clause was enforceable. Mr Money was ordered to pay his former employer AU$188,495.65 plus interest and legal costs.

The court confirmed settled legal principles that a restraint of trade clause in an employment agreement is prima facie void, and will only be enforceable if the restrictions imposed are reasonable having regard to the legitimate business interests of the employer, as well as to the public interest.

The court found the firm had a legitimate interest in protecting the goodwill which developed with its clients as a result of its employees performing accounting services. Due to the nature of their work, accountants regularly develop relationships of trust and confidence with their clients, the court reasoned.

As to the reasonableness of the post-employment restraint, the court noted that three aspects should be taken into account:

- the nature of the restraint;

- the imposition imposed on the employee; and
- the duration of the restraint.

The court held this particular clause, which lasted for a period of three years, was 'relatively narrow' because it did not prevent Mr Money from practising as an accountant or even providing accounting services to the firm's client base. Rather, the clause was designed to prevent Mr Money from exploiting, after his employment with the firm, the relationships that he had established with its clients. The court rejected Mr Money's argument that the restraint only applied to services supplied by a qualified accountant, and not to trainees or other unqualified persons, such as he was.

Further, the court accepted the liquidated damages clause was a genuine pre-estimate of the damage likely to be suffered by the firm if Mr Money breached the restraint.

How Does It Affect You?

Post-employment restraints, when properly drafted, are a useful means of protecting an employer's client relationships and trade secrets. As this case demonstrates the use of post-employment restraints is not restricted to senior and executive employees but may also be used in contracts with unqualified employees where such an employee will have close contact with clients and develop relationships of trust and confidence with those clients.

The inclusion of a liquidated damages clause may also be useful when drafting an employment agreement because it dispenses with the difficulties associated with proving actual loss suffered.

Urine or Saliva? What Should Be Tested?

The struggle between employers and unions over the best way to test workers for drugs continues, with an energy company set to appeal a recent Fair Work Australia (FWA) decision which ruled in favour of saliva over urine when testing for drugs.

The company wants to introduce a new drugs policy which will allow it to test the urine of workers. Such a policy is in line with the long running argument of employers that urine testing is a more accurate measure to determine if a worker is under the influence of drugs, has a lower incidence of false positive readings and is therefore more reliable than saliva swabs.

The objection to urine testing by workers is on the basis that it is intrusive – not only the testing process itself but by the fact the test picks up drugs lingering in the body which may have been taken days before when the worker was off duty.

FWA ruled that while both methods were susceptible to cheating, saliva swabs were better at detecting an immediate impairment. This decision contradicted a FWA ruling last year which upheld a mining company's bid to continue to test workers' urine for drugs on the basis that on-site saliva testing was more flawed than on-site urine testing.

While the best method for drug testing may still be in dispute, the importance of a clear policy is not. There is no doubt that where plant and equipment are being used, impairment caused by drugs is a significant risk for employers to mitigate. In these circumstances, and considering the duty of an employer to provide a safe workplace, employers require a clear and relevant drugs and alcohol policy in place – both for employees and contractors.

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Did You Know?

Workers Injured In 'Private Bedroom Activities' May Be Entitled To Workers' Compensation

The boundary between work life and private life is becoming less clear. In last month's *Workplace View*, we reported on a FIFO worker who successfully claimed workers' compensation for an injury he sustained while sleeping in employer-provided accommodation. This month, the Federal Court has upheld a workers' compensation claim by a Commonwealth worker whose 'private activities' with a 'male friend' in a motel room caused a glass light fitting above the bed to fall and strike her on the nose and mouth leaving her with physical and psychological injuries.

The Federal Court's decision turned on the meaning of 'private'. At first instance, Comcare and the Administrative Appeals Tribunal found that the act in question was a 'private activity' which interrupted the overall period or episode of work that would otherwise be compensable. The Federal Court disagreed and set aside the AAT decision, finding that the worker had been injured in the course of her employment.

Justice Nicholas said that many activities (such as showering) that an employee might be expected to engage in during a stay in a motel room are private and – provided there was no misconduct or an intentionally self-inflicted injury – what counted was whether there was a 'relevant connection or nexus' between the worker's injury and her employment.

In this case there was such a nexus – the motel room was one in which the employer had induced or encouraged the worker to stay. In that event, there was therefore no reason for the employer to distinguish between an injury sustained while engaging in sexual activity and one that was caused by, say, a game of cards played in the motel room.

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