Welcome to the latest edition of Piper Alderman’s Employment Matters. Read the latest news on key employment and industrial issues from our Employment Relations team.

**December 2011**

**Workplace Festive Season Celebrations - Avoiding the Legal Hangover**
Partner, Sharlene Wellard, gives some tips to help employers avoid legal issues arising from the festive season.

**High income threshold increase**
We report on what the increase to the High Income Threshold means for employers and employees.

**Employee’s redundancy imposes barrier to enforcement of non-competition restraint**
Senior Associate, Ben Motro, reports on a recent case that highlights the difficulties in upholding post-employment restraints following a redundancy.

**Injured worker wins reinstatement in General Protections claim**
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**The redundancy that wasn’t**
Partner, David Ey, looks at a case about the issue of the favourable taxation of genuine redundancy payments.

**This month Piper Alderman is very pleased to launch a new book by our own Erin McCarthy, Elise Jenkin and Professor Andrew Stewart: Parental Leave: A User-Friendly Guide, published by Thomson Reuters.**
We all look forward to relaxing and celebrating the festive season with colleagues and clients at end of year functions.

Employers need to be mindful that inappropriate behaviour at work functions can impact on the organisation’s reputation and leave them open to serious legal claims, including sexual harassment, workplace health and safety, and workers compensation.

Here are some tips for avoiding the legal hangover:

- Remind staff that relevant organisation policies (such as workplace health and safety, bullying harassment and discrimination) and codes of conduct apply at the event, that they are required to comply with them and that there are disciplinary consequences if required standards of behaviour are not met.
- Ensure appropriate people are appointed and are able to intervene if they spot bad behaviour.
- If alcohol is available at the event, ensure it is served responsibly and that food and non-alcoholic drinks are readily available. Remind staff that they are expected to consume alcohol responsibly.
- Tell staff when the function will end and make sure it ends at that time.
- Consider how staff will travel home safely. If the event is held off site, let them know where to access public transport, consider issuing vouchers to pay for taxis or arranging a car pool with designated drivers.

Workplace Festive Season Celebrations - Avoiding the Legal Hangover

Partner, Sharlene Wellard, gives some tips to help employers avoid legal issues arising from end of year festivities.

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High income threshold increase

In addition to Fair Work Australia’s decision to increase minimum wages from 1 July 2011, the ‘High Income Threshold’ has also increased from $113,800 to $118,100.

The change in the High Income Threshold affects various provisions of the Fair Work Act, including:

- Employees who are not covered by an award or an enterprise agreement who earn above the Threshold are ineligible to commence unfair dismissal proceedings.

- For those employees who are eligible to commence unfair dismissal proceedings, the maximum compensation available is a maximum of either 26 weeks’ pay, or half the amount of the Threshold ($59,050), whichever works out to be lower.

- The Threshold determines which employees may be offered a “guarantee of annual earnings”. For employees who earn above the Threshold, employers may offer those employees a guarantee that their earnings will exceed the Threshold for a particular period of time, with the result that no modern award will apply to them during that time.
Injured worker wins reinstatement in General Protections claim

Associate, Sam Condon, reports on the case of Stephens v Australian Postal Corporation, which is an important ruling on the application of the General Protections.

In an important ruling on the application of the “General Protections” in the Fair Work Act 2009 (FW Act) the Federal Magistrates Court has ordered that an injured employee be reinstated following a dismissal.

Background

Mr Stephens was employed by Australia Post as a driver/sorter, under a fixed-term contract.

On 3 December 2009, Stephens suffered an injury after losing his footing when alighting an Australia Post van. He completed a workers compensation claim form on 8 December, and resumed duties on 14 December.

Stephens’ claim form did not reach Australia Post’s workers compensation section until 6 January.

On 5 January, Stephens, while on his work run of delivering and picking up mail, spoke at length with a supervisor regarding his workers compensation claim, and expressed his concern that he had not heard anything from the employer about it. The conversation caused him to run late and miss a pick up.

Later in the shift, Stephens tore his work pants. He returned to the hub where mail was sorted, and asked a supervisor if he could go home and change his pants without being “booked off” (not paid for his absence). The supervisor initially denied the request, but after phoning a more senior supervisor he confirmed that Stephens could go home to change without being booked off. The supervisor who initially rejected Stephens’ request explained to the senior supervisor that if Stephens had asked him nicely, he would have let him go home. Stephens overheard this and took offence, saying in response “You’re f…… joking”. According to Stephens, this was said “out loud to himself”, and was not directed at his supervisor.

On 6 January, Stephens was questioned by the Operations Manager as to why he swore at his supervisor. He was also asked why he had missed a pick up. He replied that he was running late from talking to a supervisor about the progress of his workers compensation claim.

On 7 January, Stephens’ employment was summarily terminated for swearing at a supervisor, and missing a pick up.

Issues for consideration and the findings of the Federal Magistrate

Adverse Action

The General Protections provisions make it unlawful for a person to take “adverse action” against another person because the other person has a “workplace right”.

“Workplace right” is defined Act to include circumstances where a person “is entitled to the benefit of, or has a role or responsibility under, a workplace law” or “is able to initiate, or participate in, a process or proceeding under a workplace law or workplace instrument”.

“Adverse action” is defined to include action taken by an employer against an employee where the employer:

- alters the position of the employee to the employee’s prejudice, or
- discriminates between an employee and other employees.

Federal Magistrate Smith held that the Safety, Rehabilitation and Compensation Act (1988) (SRC Act), which entitled Stephens to compensation and rehabilitation relating to his work injury, provided him with a “bundle” of workplace rights for the purpose of the FW Act.

In determining if Australia Post breached the FW Act by dismissing Stephens, the central issue was whether the dismissal was due to: (a) the reasons specified in the termination letter, namely missing a pick up, and using offensive language towards a supervisor; or (b) whether the decision was influenced by Stephens exercising his workplace rights, including his workers compensation claim, and its implications for Australia Post in regard to providing rehabilitation and alternative work for Stephens.

Following the Full Federal Court’s recent decision in Barclay v Bendigo TAFE (which is being appealed to the High Court) Federal Magistrate Smith held that an objective test applied, which required consideration of what actuated the conduct of the decision maker, not what the person thought he or she was actuated by.

Because of the “reverse onus” provision in the Act, once Stephens alleged that his rights under the SRC Act had played a part in his dismissal, the onus was on Australia Post to prove that it had not.
Federal Magistrate Smith was not satisfied that missing a pick up and swearing at his supervisor were the exclusive reasons for Stephens' termination. He was critical of Australia Post's witnesses, who gave “carefully considered and shortly expressed” responses to questions. Moreover, the employer failed to produce contemporaneous records relating to the termination process, and the reasons for it. It had also failed to call its human resources manager to give evidence, whom Federal Magistrate Smith said “must have been influential” in the decision to dismiss Stephens.

For these reasons, Federal Magistrate Smith concluded that Australia Post had failed to prove that the real reasons for the dismissal were “discerned from the circumstances” of Stephens' workplace rights. The dismissal was therefore held to be in breach of the FW Act.

Implications and lessons for employers

Managing and terminating the employment of injured employees continues to be a vexed issue for employers.

The “reverse onus” established by the FW Act, under which the employer bears the onus of establishing that conduct did not occur for a prohibited reason, is likely to result in an increase in claims made by workers under the general protection provisions, rather than utilising anti-discrimination legislation, where a reverse onus does not apply.

The decision in Stephens also demonstrates the courts' willingness to exercise a broad use of the powers to order reinstatement, even where an employee is engaged under a fixed-term contract.

Employers should carefully manage any termination process involving an injured worker, and seek legal advice when necessary.

Stephens v Australian Postal Corporation
[2011] FMCA 448

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Discrimination

Stephens also alleged that Australia Post breached the FW Act by taking adverse action against him because of his physical disability.

Federal Magistrate Smith said that, given the absence of any statutory definition, the words “physical and mental disability” in the FW Act should not be limited in an “overly refined way” to the underlying physiological condition, but should include some of the “inherent consequences” of the condition. There was “ample evidence” to prove the existence of the disability when the decision to terminate Stephens' employment was made.

He held that Australia Post had failed to prove that the real reasons for Stephens' dismissal were “discerned from the circumstances” of the fact that Stephens had a disability. Australia Post was held to have engaged in adverse action against Stephens because of his disability, in breach of the FW Act.

Reinstatement the appropriate remedy

Federal Magistrate Smith was satisfied that reinstatement of Stephens to his position was the appropriate remedy.

He found that it was “probable” that Stephens would have been offered a further fixed term of employment in the same duties when his current fixed term contract expired.

Australia Post subsequently made an application for leave to appeal the reinstatement order, on the ground that the order was inconsistent with the purpose of the Court’s ability to order reinstatement. It argued that it was unable to reinstate Stephens to his existing position, because his fixed-term contract had in fact expired. Australia Post later withdrew that application, but has signalled an intention to appeal the decision of Federal Magistrate Smith, once penalty and cost orders are finalised.
The redundancy that wasn’t

Partner, David Ey, looks at the case of The Taxpayer v Commissioner of Taxation, that examines the issue of the favourable taxation of genuine redundancy payments.

Under Australia’s tax laws, genuine redundancy payments made to employees on termination of employment are taxed more favourably than other payments that might be made on termination.

A recent case, ironically involving an employee of the Australian Taxation Office (ATO), shows that for a payment to qualify for this favourable treatment it is not enough that the payment be called a “redundancy payment”. The circumstances must, as a matter of fact, come within the definition of a “genuine redundancy payment” in section 83.175 of the Income Tax Assessment Act 1997.

The facts

The employee (her name is not given in the case report) held a senior role in the Brisbane office of the ATO and managed employees in both Brisbane and Adelaide. She experienced difficulties in her relationship with both groups of employees, and felt that she “became a target” over what had occurred. She felt under pressure to resign.

However, her Director’s evidence at the hearing was that, despite the employee’s view, he remained well-disposed towards her and saw her as continuing to play a valuable role given her particular skills. He denied that he wanted her to resign, or that he had pressured her to do so.

The employee took long service leave between August and November 2009. The Director allocated her work amongst other staff while she was away.

Before returning to work, the employee wrote to the Director, raising the possibility of a voluntary redundancy. She cited a provision in the ATO’s enterprise agreement which provided for retraining or redeployment for employees “whose services can no longer be effectively used in their current job because of changes in technology or work method or changes in the nature, extent or organisation of the ATO”.

After discussions, the ATO agreed to formally inform the employee that she was “an employee whose services can no longer be effectively utilised” and that her employment was “terminated on the grounds that you are excess to the requirements of the ATO”.

The employee duly accepted the termination and received what was described as a voluntary redundancy payment.

She subsequently sought a private ruling from the ATO that the payment was a genuine redundancy payment for tax purposes. The Commissioner of Taxation ruled that it was not. The employee appealed to the Administrative Appeals Tribunal.

Decision

The AAT upheld the Commissioner’s decision that the payment was not a “genuine redundancy payment”.

It had regard to the Director’s evidence that the employee would have been able to return to work after her leave, and that there was plenty of available work that she was well equipped to do. The Director said that her position had not disappeared or been reorganised out of existence. He said that the employee’s substantive job remained and needed to be filled, and the functions that she had left behind had been absorbed by others on a temporary basis during her leave.

Although in its correspondence with the employee the ATO had expressly referred to her departure as a “voluntary redundancy”, it argued at the hearing that a closer reading of clause 97 of the enterprise agreement and the correspondence told a different story. In particular the ATO relied on clause 97.2 of the enterprise agreement which stated that clause 97 was only applicable “where an individual employee’s job is still required and … Where the job is no longer required, the arrangements under clause 98 must be used”.

The AAT accepted the submission by the ATO that the employee’s job remained and would need to be performed by someone. It drew a distinction between cases covered by clause 97 (where the job still exists but the employer no longer wants it done by the employee in question) from where the job has effectively disappeared and the employer no longer requires it to be done by anyone.

It followed that the employee’s position was not redundant, even though she was no longer able to be utilised in the role.

Consequently the so-called “voluntary redundancy” payment was not a “genuine redundancy payment” for tax purposes.

**Ramifications**

Employees should not simply assume that a payment on termination that is described as a redundancy payment will necessarily qualify as such under the tax laws. Professional advice and even a private ruling should be sought if there is any room for doubt.

Likewise employers should be careful not to mislead employees into believing that a payment will qualify as a genuine redundancy payment when it might not. Employers should emphasise that the tax treatment of any payment is something about which the employee must obtain their own independent advice.

_The Taxpayer v Commissioner of Taxation_ [2011] AATA 499

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Employee’s redundancy imposes barrier to enforcement of non-competition restraint

Senior Associate, Ben Motro, reports on a recent case that highlights the difficulties in upholding post-employment restraints.

In the recent decision of Ecolab Pty Limited v Stephen Garland (2011) NSWSC 1095, Justice Brereton of the NSW Supreme Court has refused to enforce a post-employment restraint, which sought to prevent a former employee from competing with his former employer.

Background facts

Mr Garland, the defendant, was employed by Ecolab Pty Ltd as its national sales and marketing manager (floor care) until 20 May 2011, when his employment was terminated by reason of redundancy. Mr Garland had commenced employment with Campbell Bros Ltd in May 2009, until Ecolab acquired the part of the business in which Mr Garland had worked at Campbell.

On 18 July 2011, Mr Garland commenced employment in a similar role with Karcher Pty Ltd, a competitor of Ecolab.

Mr Garland’s employment contract with Ecolab contained two restraint covenants that prevented him from:

1. being engaged in any business involving the provision of products or services, similar to those provided by Ecolab, to any Ecolab client (the non-compete restraint).

2. soliciting or enticing away any client or supplier from Ecolab (the non-solicitation restraint).

The relevant area and period of the restraints were Australia and 12 months respectively, however both covenants included “cascading” provisions which allowed the Court to reduce the breadth of the covenants by pre-determined areas and periods.

Ecolab sought equitable relief (namely interlocutory injunctions) preventing Mr Garland from breaching the two restraints, pending a final hearing by the Court.

Decision

As in any case where a party seeks interlocutory relief, Justice Brereton was required to firstly determine whether there was a serious question to be tried (which focused on the strength of the employer’s case for final relief, including whether an injunction rather than damages would be an appropriate remedy), and secondly, whether the balance of convenience favoured making the order sought by the employer (namely, an injunction seeking to prevent Mr Garland from breaching the restraints).

Justice Brereton decided that there was a seriously arguable case that Mr Garland was contravening, or would during the restraint period contravene the non-compete covenant and the non-solicitation covenant. His Honour also considered that, given Mr Garland’s established customer connection since May 2009, and the fact that Ecolab as a business had an Australia-wide presence, the duration and area of the restraints were reasonable.

As the Court was asked to grant equitable relief, Justice Brereton was required to exercise his discretion in respect of the relief sought. In doing so, he considered the following:

- Mr Garland’s position was made redundant, and accordingly he was not “the author of his own misfortune”

- Mr Garland’s supervisor at Campbell (and subsequently at Ecolab) suggested to him that his future with the company was “paved with gold”

- When providing Mr Garland with his draft employment contract, Ecolab included a “Question & Answer” document that indicated that it would be unlikely that the restraint of trade clause would apply if he was “made redundant”

- Ecolab made changes to its floor care business in 2011, which reduced the significance of Mr Garland’s customer connections.

Despite finding that there was a seriously arguable case in respect of the non-compete restraint, Justice Brereton did not consider that a Court, on a final hearing of the matter, would grant a final injunction. His Honour also held that when considering the “balance of convenience” test, Mr Garland would likely suffer some hardship if he were to grant an interlocutory injunction. He therefore declined to grant any injunction to enforce the non-compete restraint.
Because the non-solicitation restraint would not affect Mr Garland from earning a living, and would do no more than protect such remaining interest as Ecolab had in the customer connections associated with Mr Garland, His Honour granted an interlocutory injunction until the final hearing date, restraining Mr Garland from breaching the non-solicitation restraint.

Observations

This case illustrates that courts will be less inclined to enforce restraints that prevent employees from competing with their former employers, where the employment is terminated by the employer due to redundancy, and possibly in other situations where the employee is dismissed without any fault on their part.

Employers also need to be cautious about the representations they make in their discussions with employees prior to their commencement of employment, as well as in pre-commencement documentation, if they are to maximise the chance of enforcing restraints of this kind.

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This month Piper Alderman is very pleased to launch a new book by our own Erin McCarthy, Elise Jenkin and Professor Andrew Stewart: *Parental Leave: A User-Friendly Guide*, published by Thomson Reuters.

Aimed at managers and human resource practitioners, the book covers the issues associated with parental leave and follows the chronology of an application for leave. Some of the key issues dealt with include:

- the main sources of entitlements arising from statute, industrial instrument and company policy and how these interact at a practical level
- reconciling the different eligibility requirements for paid and unpaid parental leave and also considering how non-standard parenting arrangements such as surrogacy or parents who are not in a relationship affect eligibility for leave
- obligations to transfer an employee to a safe job if her pregnancy prevents her from performing her usual work
- how paid parental leave payments interact with an employer’s normal payroll processes and how payroll systems may need to be changed to take account of the special requirements of government-funded paid parental leave
- an employer’s continuing obligations while an employee is on parental leave, including the NES consultation requirements and engaging replacement employees in a way that minimises the risk of disputes at the end of the leave period, and
- managing the return to work guarantee at the end of the parental leave period and responding to requests for flexible working arrangements in light of legislative requirements and discrimination case law.

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