



Industrial & Employment Relations Newsletter

POST-EMPLOYMENT RESTRAINT OF TRADE: NO ONE SIZE FITS ALL [PART 2]

In Part 1 of this two-part discussion, we outlined the common law presumption that post-employment restraint is void and unenforceable on public policy ground; it is up to the former employer to prove the restraint goes no further than is reasonable to protect its legitimate interests. The balance is to be struck between the need of the employer to protect legitimate business interests as against the right of the employee to earn a living.

Drafting Post-employment Restraint of Trade

By default, a generic post-employment restraint of trade clause is present in the employment contract template. However, the fundamental issue with such generic restraint is that it is not always tailored to fit the circumstances and needs of the employer.

In *Aussie Home Loans & Anor v X Inc Services & Ors* [2005] NSWSC 285, Mr Kolenda (“K”) was employed as the Victorian State Manager between 2001 and 2004 for Aussie Home Loans (“Aussie”). It was part of K’s job to be in contact with loan writers and banks. The Restraint clause in K’s employment contract stated that he would not, for 12 months after termination, solicit, interfere with or endeavour to entice away any employee or contractor of Aussie. When K’s employment contract was terminated in October 2004, he established “X Inc Services” in competition with Aussie. Within a period of 6 months thereafter, four employees from an Aussie-related entity and a loan writer were enticed to join X Inc Services. Aussie

sought to enforce the restraint in the aforesaid clause against K together with a declaration that the four employees who resigned were restrained for 12 months from responding to an approach from X Inc Services.

Two main errors were made when Aussie prepared these employment contracts: unreasonable restraint and the use of non-cascading clause.

Justice White of the NSW Supreme Court considered that the restraint was too wide because the restraint clause applied to all Aussie employees and any of its contractors, whether they were contracted to Aussie before or after K was employed by Aussie; it applied not only to contractors in Victoria but all other States and Territories in which K did not have dealings.

His Honour further held that the 12-month restraint duration was unreasonable considering loan writers contracted by Aussie could be terminated on one-weeks notice, the market for loan writers was competitive and K’s own employment contract was terminable on one months notice.

The second drafting error here was the restraint clause was not in the form of a “cascading” clause to allow the Court, if it considers necessary, to read “down” unreasonably wide restraints to allow a former employer to protect its legitimate interests. This was of particular importance considering that in NSW, the *Restraints of Trade Act 1976 (NSW)* allows the NSW Courts to “read down” a restraint. No counterpart exists in Victoria. Justice White noted that because the contract was entered in Victoria, the restraint clause was not enforceable.



Implementing Post-employment Restraints

When a position is being offered, employers should ensure that, in addition to the essential terms, post-employment restraints, confidentiality, intellectual property and conflict issues are addressed in the proposed employment contract.

During the term of the employment, the employment contract should be reviewed to reflect any change to the employee's position.

It is recommended that the employer conduct an exit interview upon termination or resignation to reinforce those continuing obligations under the employment contract with a Deed of Release, such as restraint of trade and confidentiality that survive the termination of the employment relationship.

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YOUR QUESTION ANSWERED: NOTICE PERIOD BY EMPLOYEES

One common Inquiry from both employees and employers is what the reasonable notice period should be given by an employee. More importantly, what will the impact be on final termination payment?

Most Awards and some common law contracts provide for Notice of Termination for both the employer and the employee. For example, clause 13.2 in the *Insurance Industry Award 1998* states as follows:-

“13.2.1 The notice of termination required to be given by an employee is the same as that required of an employer, save and except that there is no requirement on the employee to give additional notice based on the age of the employee concerned.

13.2.2 If an employee fails to give the notice specified in 13.2.1 [Notice of termination by the employer], the employer has the right to withhold monies due to the employee to a maximum amount equal to the amount the employee would have received under 13.1.4.”

Whether “monies” include statutory accrued entitlements is a contentious issue. In any event, unless the employee is informed of and authorises the proposed deduction, statutory accrued entitlements should not be withheld as failure to obtain proper authorisation or consent from the employee may warrant a complaint for failure to pay the correct termination payment.

Employees should avoid giving notice while on, e.g., annual leave; such action may amount to a repudiation of employment contract by the employee.

THE NEW COMMONWEALTH OH&S LEGISLATIVE FRAMEWORK

After reviewing all 27 codes of practice previously approved by Comcare in 2005 and 2006, the



Occupational Health and Safety Code of Practice 2008 (“Code”) came into effect on 12 June 2008 to replace all previously approved codes.¹

The Code is a “source of practical guidance on safe work practices and risk management in relation to specific hazards and/or hazardous activities. This Code provides guidance to duty holders on standards of health and safety that must be achieved in the workplace in relation to those matters, hazards or hazardous activities”: Introduction, Occupational Health and Safety Code of Practice 2008.

The 25-part Code introduced five new topics: Risk Management (Part 1); Occupational Diving (Part 20); Spray Painting (Part 21); Abrasive Blasting (Part 22); and Cash in Transit (Part 25). The Code also reserved certain topics, such as Manual Tasks (Part 4), Asbestos in Situ (Part 10), Construction Induction Training (Part 23) and Falls in Construction (Part 24) for future development.

As a result, the Commonwealth occupational health and safety legislative framework consists of:-

- Occupational Health and Safety Act 1991 (Cth);
- Occupational Health and Safety (Safety Arrangements) Regulations 1991;
- Occupational Health and Safety (Safety Standards) Regulations 1994 (Safety Standards Regulations); and
- The Code.

In an OH&S related proceeding, the Code provides the relevant standards of health and safety required of a duty holder. If a duty holder has not followed the Code, it must prove to a Court that “the related provisions of the Act or regulations were complied with by other equivalent or better means. If the duty holder fails to do so, the breach is proven”: Legal

Status and Application of this Code of Practice, Occupational Health and Safety Code of Practice 2008.

WORKERS’ COMPENSATION ORDERED TO LIVE-IN EMPLOYEE FELL AT NIGHT: LAUNER V EML [2008] SAWCT 28

In November 2006, the live-in manager of Roseworthy Roadhouse in South Australia (“worker”) fell down the stairs and injured herself during a night-time trip to the toilet. The worker was living onsite rent-free with no reduction in her entitlements.

The worker’s application for compensation was rejected on the ground that it had not arisen from her employment.

On appeal, Deputy President, Stephen Lieschke of the SA Workers Compensation Tribunal observed that:

- the employer benefited from the live-in arrangement due to there being less break-ins and greater efficiencies in managing the roadhouse;
- the worker was living and working on the premises in her capacity as an employed manager. The fact the worker was a director did not detract from her legal status as being an employee engaged by the employer under a contract of service.

Mr Lieschke concluded that “there is nothing about [the worker’s] status that detracts from the obvious conclusion that [the employer] impliedly induced or encouraged her to live free of charge on its premises in order to reduce break-ins and to gain greater

¹ See, www.comcare.gov.au/safety/codes_of_practice.



management efficiencies in the running of the roadhouse.”

PRE-EMPLOYMENT SCREENING

Under the Australian Standard 4811-2006, employment screening is defined as “the process of verifying, with the consent of the individual, the identity, integrity and credentials of an entrusted person and should apply to any individual that is, or will be, entrusted with resources and/or assets.”

Failure to conduct due diligence at the pre-employment stage could be costly to employers later. In *Chalker v Brisbane City Council* (2002) 52 AILR ¶9-212, the employee resigned and alleged constructive dismissal after the employer discovered that the employee had provided fraudulent references to hide past criminal offences in their employment history. In the judgement in favour of the employer, the Queensland Industrial Relations Commission was critical of the failure by the employer’s selection panel to undertake the relevant pre-employment checks and the unsatisfactory process of referee-checking only on mobile telephone numbers provided by candidates which made the falsification far too easy.

A Few Suggestions

It is crucial to obtain written consent from candidates for reference or qualification check. Such consent could form part of the application form or as a separate document handed out at the interview after the candidates have been shortlisted.

The method used to check can also vary. Commonsense dictates that for senior positions and in highly specialist fields, written references (e.g., in letter form or by email) from referees should be obtained. As commented in the *Chalker’s* case above, the first step is to ascertain the identity of the referee.

Locating referees through the Whitepages could be a handy starting point.

The Australian Qualifications Framework (<http://www.aqf.edu.au>) and Australian Education International (<http://aei.gov.au/AEI/default.htm>) may be able to assist with clarifying overseas academic or trade qualifications. The website for the Department of Immigration and Citizenship may also be helpful (www.diac.gov.au).

Discovery subsequent to the Commencement of Employment

If an employment relationship commences on the basis of deceptive information provided by a candidate, the position of the employer is dependant on whether the discovery goes “directly to the nature of the job and the employee has deliberately or recklessly misled a prospective employer... [only] then [may] the employer be justified in dismissing an employee once the truth is known”: *FEDFA v Shell* 1989 AILR 430.

SEASONS GREETINGS

**This office closes at 5.15 pm, Tuesday 23
December 2008 and re-opens on Monday 12
January 2009.**

Best wishes for Christmas and the New Year.

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