JONES DAY

OCTOBER 2017

MONTHLY UPDATE—AUSTRALIAN LABOUR & EMPLOYMENT

IN THIS ISSUE

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MESSAGE FROM THE EDITOR

In this edition of the *Update*, we comment upon the exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017, which proposes to extend whistleblower protection to cover the Australian private sector. We then discuss three recent Australian cases. First, we discuss the Federal Court of Australia's decision to penalise an employer for failing to offer a longstanding casual employee employment in a permanent position "on a like for like basis". Second, we review a decision of the Fair Work Commission to compensate an employee of a labour hire company for her unfair dismissal. Lastly, we consider the Supreme Court of New South Wales' decision to reduce a general manager's contractual post-employment restraint clause from 12 months to six months.

IN THE PIPELINE—HIGHLIGHTING CHANGES OF INTEREST TO EMPLOYERS IN AUSTRALIA

DRAFT OF PRIVATE SECTOR WHISTLEBLOWER PROTECTION LAW RELEASED

On 23 October 2017, the Australian Government released an exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017. The Bill proposes to amend the *Corporations Act 2009* (Cth) to create a whistleblower protection regime that covers Australian companies, banks, insurers and superannuation funds. The Bill has a similar structure to the whistleblower protection regime in the *Public Interest Disclosure Act 2013* (Cth), which covers only the Australian public sector.

Currently the Corporations Act protects officers, employees and independent contractors. The Bill expands the definition of an "eligible whistleblower" to include employees of companies who provide goods or services to an organisation, and a spouse, child or dependent of an eligible whistleblower. If implemented, Australian companies should anticipate unknown third parties making protected disclosures.

Whistleblowers will be protected where they have reasonable grounds to suspect that an organisation:

- Is involved in misconduct or "an improper state of affairs or circumstances";
- Has breached the law regulating companies and the banking, insurance and financial services industries;
- Has breached Commonwealth criminal law; or
- Is involved in conduct that represents a danger to the public or financial system.

Whistleblowers are protected against civil and criminal liability, victimisation and adverse action in employment where they make disclosures to public regulators (such as the Australian Securities and Investments Commission and the Australian Prudential Regulation Authority), the Australian Federal Police or auditors, actuaries, directors or persons responsible for the receipt of disclosures.

Whistleblowers are entitled to commence claims for compensation where they can prove that they have suffered actual loss or damage. Where a whistleblower litigates a vexatious or unreasonable claim for compensation, a court may make an order that the whistleblower pay the defendant's legal costs. We expect that the Bill will result in an increase in litigation for many large employers, including litigation commenced under the Corporations Act and the *Fair Work Act 2009* (Cth), where employees allege that they have been treated adversely because of complaints made in relation to their employment.

The Bill obliges all Australian public companies and large private companies to publish a whistleblower policy by 1 January 2019. This policy should provide information about the protections available to whistleblowers, and how the company will ensure fair treatment of employees mentioned in disclosures or to whom such disclosures relate.

HOT OFF THE BENCH—DECISIONS OF INTEREST FROM THE AUSTRALIAN COURTS

EMPLOYER PENALISED $42,000 FOR FAILING TO CONVERT CASUAL EMPLOYEE TO PERMANENT POSITION

Tomvald v Toll Transport Pty Ltd [2017] FCA 1208

Factual Background. Toll Transport Pty Ltd employed Mr Tomvald as a casual freight handler for almost a decade. He worked weekdays and generally 34 hours per week. In 2016, Mr Tomvald approached Toll seeking to convert his casual position to a permanent position, working 38 hours per week. Toll offered Mr Tomvald a permanent part-time position working only 30 hours per week. Mr Tomvald rejected Toll's offer and commenced proceedings in the Federal Court of Australia.

An enterprise agreement ("EA") and the Road Transport and Distribution Award 2010 covered Mr Tomvald's employment. Both the EA and the Award provided that a casual employee who worked on a regular and systematic basis had a "right to elect" to become a permanent employee "on a like for like basis". Mr Tomvald argued that Toll contravened the EA and the Award by refusing to convert his employment to permanent employment working similar hours as those he had previously worked. He sought a declaration that Toll be obliged to convert his employment to permanent employment, payment of compensation to him by Toll and an order for the imposition of penalties.

Legal Background. A person must not contravene a term of an EA under the Fair Work Act. The Federal Court can order a person to pay a penalty if satisfied that a person has contravened the Act.

Decision. The Federal Court held that Toll had contravened the EA by not offering Mr Tomvald employment "on a like for like basis". Mr Tomvald was entitled to a permanent full-time position because he regularly worked a little less than eight hours per shift and about 34 hours per week. The Federal Court ordered that Mr Tomvald be compensated for the loss he suffered because of Toll's failure to convert his position as a casual employee to a permanent position "on a like for like basis".

In addition, the Federal Court held that Toll had contravened both the *Fair Work Regulations 2009* (Cth) and the EA by failing to produce Mr Tomvald's employment records upon request, failing to consult Mr Tomvald in relation to an alteration to his hours of work and misrepresenting his workplace rights under the EA. The Federal Court imposed a $42,000 penalty on Toll.

Lessons for Employers. In the July 2017 *Update*, we outlined the decision of the Fair Work Commission that all modern awards contain a clause by which casual employees may elect to convert to full-time or part-time employment. The Commission developed a draft model conversion clause for the 85 awards that did not already contain this clause. This case is an example of the penalties that may be imposed on employers for failing to comply with a "casual conversion clause" in a Modern Award or EA.

LABOUR HIRE EMPLOYEE UNFAIRLY DISMISSED

Kumar v Australia Personnel Global Pty Ltd [2017] FWC 5661

Factual Background. Ms Kumar sought a remedy for an alleged unfair dismissal by Australian Personnel Global Pty Ltd ("APG"), a labour hire company, pursuant to the Fair Work Act. APG employed Ms Kumar to work as a casual employee for a host employer in January 2013. APG terminated Ms Kumar's employment in June 2017 due to the host employer's reports of "ongoing issues with punctuality and attendance".

Legal Background. The Commission recognises that employees employed by labour hire companies face difficulties seeking an unfair dismissal remedy where they are not an employee of the host employer. Accordingly, the contract between a labour hire company and a host employer must not prevent an employee from seeking an unfair dismissal remedy, or be used to abrogate their responsibility to treat employees fairly. Where a dismissal is unfair, a labour hire company cannot rely on the defence that it was merely complying with the decision of the host employer. Labour hire employers cannot contract out of unfair dismissal law.

The Fair Work Act lists factors that the Commission must take into account when determining whether it is satisfied that a dismissal was harsh, unjust or unreasonable. These factors include whether there was a valid reason for the dismissal relating to the employee's capacity or conduct, and whether the employee was given an opportunity to respond to the employer's allegations.

Decision. The Commission held that Ms Kumar's dismissal was unfair and awarded her $8,597.31 in compensation. Ms Kumar was not given an opportunity to respond to the host employer's allegations, and she was not subject to any warnings in respect of her alleged unsatisfactory performance. APG's failure to investigate properly the work performance allegations made against Ms Kumar by the host employer were relevant to the Commission's determination.

APG had investigated only "in the minimalist way detailed" in an email trail between the host employer's Industrial Relations Coordinator and APG's managers. APG had acquiesced to the removal of Ms Kumar without having an independent view as to her capacity or conduct.

Lesson for Employers. Regular and systematic casual employees employed by labour hire companies at the time of their dismissal have a right to lodge a remedy for unfair dismissal even where the host employer has directed the removal of this right. Labour hire companies may be required to investigate properly the reasons why a host employer has made a decision to terminate a labourer's employment contract.

NEW SOUTH WALES COURT READS DOWN POST-EMPLOYMENT RESTRAINT CLAUSE

Grace Worldwide (Australia) Pty Limited v Alves [2017] NSWSC 1296

Factual Background. Grace Worldwide (Australia) Pty Limited employed Mr Alves as a general manager. In July 2017, Mr Alves gave notice that he was leaving Grace to work as the CEO of a competitor. Grace commenced proceedings in the Supreme Court of New South Wales seeking, among other things, an injunction restraining Mr Alves from working for the competitor for 12 months, based on a 12-month post-employment restraint clause in Mr Alves's employment contract. Mr Alves alleged that the restraint clause was unreasonable and that the 12-month period could not be justified to protect Grace's legitimate interests.

Legal Background. Australian courts have said that a restraint of trade clause is contrary to public policy and void unless

the party seeking to support the restraint can show that the restraint is, in the circumstances of the case, reasonable. A restraint must go no further than is reasonably necessary to protect the interests of the party in whose favour the restraint operates.

In New South Wales, the *Restraints of Trade Act 1976* (NSW) provides that if a restraint is contrary to public policy, it is either altogether invalid or valid only to the extent that the Court thinks fit. This means that the Court can "read down" or reduce the duration of a post-employment restraint clause.

Decision. The Court concluded that the restraint period in Mr Alves's employment contract was more than reasonably necessary to protect Grace's legitimate business interests. Mr Alves's restraint period was reduced from 12 months to six months. The Court relied upon, among other things, Mr Alves being the public face of Grace and the significance of his knowledge of Grace's business abating after around six months.

Lessons for Employers. Employers should be aware that New South Wales courts will read down post-employment restraint clauses that are considered more than what is reasonably necessary to protect an employer's business interest. We note that in all States and Territories other than New South Wales, courts will read down post-employment restraint clauses only where there are cascading options for duration and geography.

We thank associate Katharine Booth and paralegal Beverly Parungao for their assistance in the preparation of this Update.

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QUESTIONS

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JONES DAY GLOBAL LOCATIONS

ALKHOBAR	CLEVELAND	HOUSTON	MILAN	RIYADH	TAIPEI
AMSTERDAM	COLUMBUS	IRVINE	MINNEAPOLIS	SAN DIEGO	TOKYO
ATLANTA	DALLAS	JEDDAH	MOSCOW	SAN FRANCISCO	WASHINGTON
BEIJING	DETROIT	LONDON	MUNICH	SÃO PAULO	
BOSTON	DUBAI	LOS ANGELES	NEW YORK	SHANGHAI	
BRISBANE	DÜSSELDORF	MADRID	PARIS	SILICON VALLEY	
BRUSSELS	FRANKFURT	MEXICO CITY	PERTH	SINGAPORE	
CHICAGO	HONG KONG	MIAMI	PITTSBURGH	SYDNEY	