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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies
Labour & Employment Law

A LOOK INSIDE:

Message

from Founder and Managing Principal

The last few months have seen PCS extremely busy on a range of fronts. In addition to launching the second edition of our Guide to Services, continuing to run our extensive thought leadership program and, most importantly, servicing our clients across their needs in the legal and strategic space of people management we have consolidated our philanthropic journey.

We announced earlier in the year that the firm had entered into a sponsorship arrangement with Packemin Productions and we were delighted with our inaugural show, Miss Saigon which was held at Riverside Theatres in Parramatta. My heartiest congratulations to Neil Gooding and his team for putting on such a tremendous production and we look forward to the February 2018 production of Shrek The Musical.

On the rugby front, our Manly Marlins showed a remarkable turnaround to secure the minor premiership in the Shute Shield having missed out on the semi-finals last year. While ultimately unable to secure a spot in the Grand Final we commend Brian "Billy" Melrose for his coaching efforts and congratulate Anthony Bergelin on a highly successful first year as Club President.

As we go to print the National Rugby Championship is in full swing and the PCS Greater Sydney Rams have already demonstrated that they will be a competitive outfit. This is the fourth year of our firm being the principal sponsor of the Rams and we wish the team well in 2017.

And in the education sector the Firm continues to sponsor Srey Oun as she progresses through high school in Cambodia. This, coupled with our support of the Year 9 Latin Reading Competition and the prizes we will be sponsoring in the University of Sydney's Classics Department reflect the passion of the Firm in investing in education.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL

Think Before You Act:

Enforcing Restraints Strategically

Michael Starkey, Associate

It is a common misapprehension, particularly among employees, that post-employment restraints are rarely enforceable. In fact, provided they go no further than is reasonable and necessary to protect an employer's "legitimate business interests", courts are willing to uphold such restraints, which can prevent former employees from taking up work with a competitor, or soliciting or accepting work from the employer's clients. However, post-employment restraints remain tricky for reasons broadly associated with two "stages".

1. **Documentation and drafting**: post-employment restraints must be properly documented and drafted so that they only impose obligations which are reasonable and necessary; and
2. **Circumstances of enforcement**: when an employee's employment comes to an end, a business needs to make a decision about whether or not it is worthwhile to seek to enforce the restraint.

This article looks at a number of considerations employers may wish to take into account when making decisions associated with these "stages", in order to ensure that their use of post-employment restraints is practical, strategic and helps to protect their business interests.

Up-to-date Documentation

The surest way of protecting an employer's legitimate business interests is including a properly drafted post-employment restraint in an up-to-date contract of employment that is applicable to an employee's current position. While all employees have ongoing obligations in respect of an employer's confidential information, attempting to enforce restraint obligations which are not documented, or which are only documented in an employment contract that is no longer relevant to the employee's role, is a difficult task.

Employers who are concerned about an employee's post-employment activities that may not be captured by a documented post-employment restraint should, nonetheless, seek legal advice in respect of their position. In some cases, it may be possible for an employer to obtain injunctive relief to prevent a former employee from wrongfully diverting or exploiting a business opportunity that arose as a consequence of the employee's employment.[1]

Finally, employers should also ensure that any post-employment restraints contained in an employee's contract are incorporated (or otherwise, not displaced) by any documentation entered into regarding an employee's separation from the business (such as a deed of release).

Be Specific

One of the best ways of ensuring that a post-employment restraint is drafted so as to be enforceable is to be as specific as possible with respect to the activities the employee is restrained from undertaking. This is particularly so in the case of broad non-compete clauses which seek to prevent an employee from working with a competitor of the employer. As well as being reasonable in terms of geographical scope and duration, these clauses should take into account the nature of the employer's business and the employee's position within it.

In an illustrative case from 2016, an employer was unable to enforce a non-compete clause against its CFO because the way in which the clause was drafted would have prevented her from working for a competitor in any capacity (examples raised during proceedings included "check out operator" or "shelf stacker"). The court refused to enforce the clause because, if it did so, the CFO would be prevented from working in positions in which she could pose no "threat" to her former employer's legitimate business interests if the clause was enforced.[2]

This is particularly important for employers outside of New South Wales. While courts in New South Wales are permitted by legislation to "read down" a restraint which would otherwise be too broad so as to make it enforceable, courts outside New South Wales do not have this ability.

Upholding Your End of the Bargain

An employer that wishes to enforce a post-employment restraint should be careful to "uphold its end of the bargain" during an employee's employment. In one recent case,[3] a leading accountancy firm was unable to prevent a senior accountant setting up in competition because it was found to have "repudiated" his employment contract. This "repudiation" came about because of certain changes the employer made to the employee's role and bonus structure. These changes were said by the court to be so fundamental that they indicated that the employer no longer intended to be bound by the employment contract. In these circumstances, the employer was unable to rely on the post-employment restraints contained in it.

In any event, parties should always aim to ensure that they adhere to the terms of a contract. However, employers may take some reassurance from the fact that they may be able to enforce post-employment restraints, even if they have breached an employee's contract, if their breach is not so fundamental as to constitute a repudiation of the contract. For example, in a 2015 case,[4] another leading accountancy firm was able to enforce a post-employment restraint against a key executive whose business it had purchased despite not paying certain instalments of the purchase price for the business on time. This was (in part) because the late payment, while a breach of the contract, was not found to amount to a repudiation.

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1 *Climate Change Technologies P/L v Glynn & Ors* [2017] SASC 60.

2 *Just Group Ltd v Peck* [2016] *VSC 614.*

3 *Crowe Horwath (Aust) Pty Ltd v Loone* [2017] VSCA 181.

4 *Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASCFC 147.

Considering the Reason for Termination

When considering whether, or to what extent, to enforce a post-employment restraint, employers should give consideration to the reason and circumstances in which an employee's employment has come to an end. This may be relevant to both the potential risk a former employee poses to an employer's business, and whether a court would be likely to hold that it is reasonable to restrain the employee from certain activities. For example, a court will be more likely to enforce a broad non-compete clause in circumstances in which an employee has suddenly resigned and is found to have taken copies of the employer's confidential information upon doing so, than in circumstances in which an employee has been made involuntarily redundant.

This is because a court may conclude that it is "excessive" to prevent an employee from earning a living in their chosen field when the employee's employment has come to an end at the employer's initiative and through no fault of the employee. However, the reason an employee's employment has come to an end is less likely to be a factor in whether an employer is able to enforce more "particularised" restraint provisions, for example, relating to the non-solicitation of clients, or an employer's confidential information. This is because such provisions are likely to do no more than is necessary to protect an employer's existing interests, without affecting an employee's ability to earn a living.[5]

Finally, employers should bear in mind that the enforcement of post-employment restraints is not an "all or nothing" process. Often, employers and former employees are able to negotiate an agreed position without the need to resort to legal proceedings. Employers should consider the most appropriate strategy for enforcing restraints on a case-by-case basis, in consultation with their legal advisers.

Key takeaways

1. While post-employment restraints should be used diligently and strategically, Courts have displayed a consistent willingness to enforce post-employment restraints which are well-documented and properly drafted, taking into account the nature of an employee's role.
2. Employers are far more likely to be able to rely on contractual post-employment restraints if they "uphold their end of the bargain" during an employee's employment.
3. When considering whether to invest in enforcing a post-employment restraint, employers should have regard to the circumstances of the termination of the employment in question. This may assist in an evaluation of what "threat" a former employee might pose, as well as the employer's prospects of success.

[5] *Ecolab Pty Ltd v Garland* [2011] NSWSC 1095.

My house, my rules:

The "pros and cons" of workplace policies

Sam Cahill, Associate

It is common for employers in Australia to have a suite of workplace policies. Indeed, in recent years, it has become an unquestioned assumption that employers should have written policies concerning a range of workplace issues, including bullying and social media. In this article, we look at the advantages and disadvantages associated with workplace policies, and how an employer can maximise the effectiveness of its policy arrangements.

Benefits of Workplace Policies

Managing legal risks

An employer has various legal obligations with respect to work health and safety and the prevention of certain types of behaviour in the workplace, including discrimination, harassment and workplace bullying. An employer, and its senior officers, may face severe penalties for failing to comply with work health and safety duties. Similarly, an employer can be held vicariously liable for a failure to take appropriate steps to prevent, or respond to, unacceptable behaviour at work.

Importantly, an employer can use workplace policies to:

- provide staff with information concerning work health and safety;
- explain the types of behaviour that are prohibited at work;
- outline the disciplinary consequences for engaging in prohibited behaviour; and
- establish processes for reporting behavioural or safety issues to management.

These policies can assist in managing the employer's legal risks. By way of example, an employer may be able to rely on its policies to assist in demonstrating that:

- it complied with its work health and safety obligations;
- it took reasonable steps to prevent sexual harassment in the workplace, and is therefore not vicariously liable for such behaviour; and/or
- it had grounds to dismiss an employee who had engaged in unacceptable behaviour in breach of a policy.

However, the mere existence of policies covering these issues will not be sufficient. An employer will need to demonstrate that the relevant policy had been actively promulgated and enforced. This was highlighted in a recent case involving racial vilification in the workplace, in which the Federal Circuit Court made the following assessment of the employer's policies:

> *"The official position taken by [the employer] is wholly exemplary. The code of conduct and other documents exhibited to the Court show that, on its face, [the employer] is wholly opposed to any form of racial or other unlawful harassment in employment. The difficulty, however, is that it is one thing to have these policies, no doubt sincerely embraced by the management of [the employer], but it is another to enforce them."*[1]

The employer in that case had failed to respond adequately to complaints of racist behaviour in the workplace, and thereby failed to enforce its policies regarding racial vilification. As a result, the Court found that the employer was vicariously liable for the unlawful conduct of its employees.

Clarifying expectations and ensuring consistency

Policies can be used to provide employees with clarification regarding the employer's expectations. By way of example, an employer may have policies regarding appropriate workplace attire and attendance at work. Used in this way, workplace policies can be an effective method of delivering instructions to an employer's entire workforce. They can also provide a basis for disciplinary action against employees who fail to comply with these instructions.

Policies can also be used to provide guidance to managers, and thereby ensure consistency of decision-making across the organisation. By way of example, a policy may provide guidance on:

- how and when an employee can be required to provide medical evidence in respect of a period of personal leave;
- how and when an employee may be issued with a formal warning for misconduct or unsatisfactory performance; and
- when the employer will provide support to an employee undertaking further study.

Policies of this kind may be especially helpful in organisations where managers are required to make decisions regarding employment issues without assistance from human resources practitioners.

Detriments of Workplace Policies

Limiting employer's discretion

An employer will often have a significant amount of discretion when issuing instructions to employees and managing issues in the workplace (provided the employer complies with the relevant laws).

For example, an employer may adopt one of a number of approaches when responding to complaints made by an employee, or raising concerns regarding an employee's performance. However, an employer may have a policy that restricts this discretion by prescribing certain requirements, such as a requirement to:

- provide an employee with a certain amount of notice of a disciplinary meeting;
- provide an employee with written information regarding an allegation or investigation;
- complete a workplace investigation within a prescribed period of time; or
- provide an employee with a certain number of warnings before terminating his or her employment.

Given the importance of maintaining an employer's flexibility when dealing with employment issues, we generally recommend that employers refrain from introducing policies of this kind or that policies which do cover these issues retain a level of flexibility within which discretion can be exercised and the consequences for an employer of non-compliance are less onerous.

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[1] *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852.

Legal risk associated with failure to comply

An employer may face legal action from employees if it fails to comply with its own policies. The main avenue of legal redress is for an employee to allege that the policy in question was incorporated into his or her contract of employment, meaning that a breach of the policy amounts to a breach of contract for which (unlimited) damages may be awarded.

Australian courts have recently considered this issue in the following scenarios:

- An employee's contract of employment contained a promise to *"abide by all Company Policies and Practices currently in place, any alterations made to them, and any new ones introduced"*.[2] The employer in question had a policy setting out generous redundancy entitlements, but refused to follow this policy in respect of the employee.
- An employee's letter of engagement provided that the employer's policies *"are to be observed at all times."* [3] The employer in question had a "Workplace Harassment and Discrimination Policy", which stated that the company would *"handle complaints promptly, with confidentiality, impartiality and with sensitivity to the complainant's needs"*. The company failed to do so in respect of a complaint made by the employee.
- An employee was required to sign a policy document titled "Working with Us", which provided that the company would *"take every practicable step to provide and maintain a safe and healthy work environment for all people"*. [4] The employee argued that the employer breached this policy by allowing him to be bullied at work.

In each of these scenarios, the court found that the promises contained in the employer's policy were incorporated into the employee's contract of employment, and were therefore enforceable against the employer under contract law.

Conversely, in a recent High Court decision, the Commonwealth Bank avoided being held liable for failing to follow its redundancy policy as the documentation made it clear that processes outlined in the policy, such as those dealing with redeployment, did not give rise to a contractual entitlement.[5]

Key takeaways

- Regularly evaluate whether your organisation's current policies are necessary and appropriate. In doing so, it is important to distinguish between policies that are designed to protect the organisation (eg, anti-discrimination, work health and safety, sexual harassment, confidential information) and other policies that relate to operational matters (eg, performance management, dress code, study leave). It may be that policies falling into the second category are unnecessary or inappropriate.
- Ensure that your organisation's employment contracts expressly state that its policies do not form part of the employee's contract of employment (and that this wording is also reflected in the policies) and do not use language that conveys a promise to employees or imposes an obligation on the organisation.
- Ensure that all staff in your organisation, and especially managers, understand and follow your organisation's policies. This can be done by encouraging staff engagement and providing regular updates and training. Your organisation should strive to create a compelling narrative as to why its policies exist and why they must be followed.

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2 *Riverwood International Australia Pty Ltd v McCormick* (2000) 177 ALR 193.

3 *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177.

4 *Goldman Sachs JBWere Services Pty Ltd v Nikolich* [2007] FCAFC 120.

5 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

Just the facts:

Mistakes to avoid when conducting an investigation

Kathryn Dent, DIRECTOR

In our June webinar, cognisant of the fact that many HR Practitioners are increasingly involved with or conducting investigations, I highlighted the mistakes to avoid when conducting an investigation to ensure that the process and the outcomes are fair, transparent, legally compliant and defensible.

It is difficult to recommend a model investigation process because the process of an investigation will necessarily depend on the allegations, the participants and the workplace. However, avoiding the mistakes set out below should steer organisations in the right direction to ensuring that their findings and action taken in response to the findings, are solid and defensible.

My "top 10" mistakes, and how to avoid them, are reproduced here.

1. Not following the process

Fortunately, it is rare to find an organisation that doesn't have a grievance or complaint policy (and those that do not have one should consider drafting and implementing one as a priority).

Policies vary from organisation to organisation so it is important to be familiar with what is required once the complaint or grievance is received. Whilst a policy may not be contractual in nature (the best policies aren't), they are there to provide consistency of approach and security to employees and to that extent compliance with them is highly advisable.

Generally, policies have a multi-step approach, starting with internal resolution before the matter is escalated. The best policies avoid mandating that each step must be followed (sometimes this is not appropriate given the identity of the parties involved), reserve discretion and afford flexibility to cater for different circumstances. Importantly, the policies should not commit the organisation to commencing and concluding an investigation within a set timeframe. Instead, a general commitment to expediency should suffice, as a means of reassuring the parties.

If you need to deviate from the process set out in the policy, make sure you have sound reasons for doing so and that you consult with those involved in the investigation about this to obtain their consent. This minimises the risk of technical objections and challenges on this point at a later date.

2. *When failing to plan is planning to fail*

Once you have decided to investigate, which can sometimes be a challenging step in itself (think about the "off the record" or "confidential chats" employees want to have, usually for fear of retribution), the next phase is planning it. Failing to plan an investigation can affect the outcome and defensibility of findings. For example, it could lead to witnesses and evidence being overlooked, policies not being complied with, insufficient support, an exacerbation of health issues caused by the behaviour the subject of the investigation, an aggravation or repetition of behaviour and further damage to working relationships.

Planning will help to mitigate these risks. Planning involves:

- Identifying witnesses, additional to the complainant and respondent
    - This may or may not be capable of being done early depending on how comprehensive the initial complaint or grievance is.
    - Only interview those who are likely to have knowledge of the matters or who have been identified as potential witnesses by the complainant or the respondent.
- Working out the order of interviews
    - Generally, interview the complainant first and then the respondent, with any witnesses last. Remember that any new material from witnesses that could affect the findings may necessitate a further interview to put that material to the person (at least of the respondent).
    - Whether respondent or witnesses follow the complainant may depend on:
        - The extent of confidentiality that is required to preserve the integrity of evidence including the respondent's answers; and
        - How likely it is that the respondent will admit to the allegations and obviate the need for interviewing the witnesses.
- Working out the mechanics of the interviews
    - Where will they be held? Away from the workplace to protect confidentiality?
    - How will they be recorded? Audio recording requires consent of the party being interviewed. If you are transcribing by hand or recording digitally on an electronic device, best practice dictates that the written statement should be signed.
    - When will they be conducted?
    - How long is each interview likely to take?
- Status quo
    - Whether or not the parties should remain in the workplace is an important consideration to minimise further damage to workplace relationships or potential health-related issues.
    - There is also the question of whether to suspend the alleged wrongdoer, to avoid a continuation of the behaviour in question and/or victimisation. Suspension on full pay is often sanctioned for cases of serious misconduct and is made easier if there is a clause in the employment contract permitting such an action.
- Selecting the investigator is also part of the process and leads into a discussion of the next mistake.

3. *Not choosing the right investigator*

Remember there are a variety of types of investigators whose job it is to hear the alleged facts and complaint, obtain responses, marshall evidence, assess it on the balance of probabilities and make findings.

The selection of an investigator will depend on the issues at stake (for example, are they potentially press-worthy and reputation-damaging if made public? Could they result in litigation? Would a lawyer be a better choice in order to potentially attract legal professional privilege and preserve confidentiality?)

The selection will also depend on resources (Can the organisation spare an internal resource being devoted to hours of interviews? Does the internal investigator have sufficient experience? Could the internal investigator be accused of bias if they have had dealings with the participants in the investigation?).

4. *Investigator as decision maker*

While the investigator's primary responsibility is to determine the truth of the allegations as far as he or she can, the investigator should also be conscious to avoid acting in a way which may lead to challenges to his or her findings.

On this basis, it would be a mistake to have an investigator as decision-maker on anything other than very minor matters. If the findings could lead to a termination of employment, then separating the investigation function from the decision-making function is prudent. An "independent" decision maker can review the report and accept or reject the findings and then determine the most appropriate course of action without the added pressure of having to defend the process and course they adopted, which may happen if they were the investigator.

5. *Relying on "untested" information*

Information should be tested as far as possible. If untested information is going to be relied on, the investigator should be able to justify why that reliance was reasonable in the circumstances.

For example, it would be a mistake to accept as fact information presented by the complainant or witness if there was a means to test it (for example if a document existed which would verify the information presented or event or if a third party witnessed it).

6. *Not knowing the role of a support person*

Within the unfair dismissal regime industrial tribunals may find a termination to be harsh, unjust or unreasonable if the unfair dismissal applicant was unreasonably refused the opportunity of having a support person present during any discussions relating to dismissal.

The case law which has developed in this area has clarified that a support person's role is not that of an advocate or representative, but is limited to assisting the relevant employee.

On this basis an investigator has the right to caution or silence a vocal or obstructive support person or, in extreme cases, suspend or terminate the interview.

7. *No logical order*

The order of interviews will help ensure the investigation runs smoothly and expeditiously, the latter being important to preservation of confidentiality, protection of participants, potential restoration of the relationship or timely disciplinary action at worst.

Whilst it is not fatal to have to reinterview witnesses, having an order to the process will minimise this potential. A logical order means that all allegations or accounts can be put to a person in the one interview, and this is usually best achieved if the order of interviewees starts with those who know the most. This can also flush out additional interviewees or other evidence.

8. *Blurring the investigation and the disciplinary response*

If you have followed the recommendation to separate the roles of investigator and decision-maker, then this potential blurring is less likely to occur.

The disciplinary process should be separate and distinct from the investigation. The disciplinary process is about identifying what action is appropriate based on the findings and other relevant material (such as an employee's personal circumstances and other extenuating factors). At its most simple, the disciplinary process starts when the investigation findings are accepted and should be embarked on in a manner that is procedurally fair. Procedural fairness can be dictated by applicable contractual obligations, policies or procedures. It also arises from the general proposition that any proposed disciplinary action should be put to the employee, a response obtained and consideration given to that response (relevant to defending an unfair dismissal).

It is appropriate to warn the employee prior to the meeting of the potential for dismissal, indicate that all circumstances will be taken into account, and allow a support person to be present.

9. *Not dealing with the findings and implementing recommendations (if there are any)*

There are several reasons why it is a mistake to not deal with findings and/or not to implement recommendations.

Inaction may:

- be seen as excusing unacceptable workplace behaviour, thereby prejudicing the ability to discipline other employees for similar behaviour in the future;
- adversely impact staff morale and productivity, and at worst may lead to staff turnover or inability to attract new staff;
- undermine the integrity of the complaint or grievance procedure and as a consequence, employees' confidence in invoking it;
- have health and safety implications if a person continues to engage in bullying or harassing behaviour;
- restrict an employer's ability to mount a defence, ie making it difficult to demonstrate it took all reasonable steps to prevent any unlawful conduct.

10. *Not learning from mistakes*

The final takeaway is to review the investigation once it is completed. Were there lessons to be learned? What were they? For example:

- Was the relevant process easy to follow?
- Were employees able to access and rely on the policy, or were there impediments? Can those impediments be eradicated and how?
- Were there any additional matters raised during the investigation that require attention by way of unaddressed behaviours, non-compliance with policies, flaws in processes, gaps in policies, other breaches?
- Was confidentiality and non-victimisation maintained or should any potential breaches be separately investigated and disciplined?
- Has a systemic issue been identified that requires broader investigation or rectification?

How long is too long?

When the job can no longer be done by an injured worker

Therese MacDermott, consultant

A common response to a situation when a worker is injured is to assign the worker to a different role for a designated period, often referred to as "light" or "suitable" duties, while he or she is recovering from an injury. This response is generally dictated by the requirements of workers' compensation legislation and may also be undertaken to fulfil an employer's obligations under anti-discrimination legislation. However, employers can feel pressured to retain an injured worker in an alternative role long after it becomes clear that the worker cannot return to his or her pre-existing duties, and after the requirements of workers' compensation laws are satisfied.

In this article, we consider what obligations an employer must satisfy under disability discrimination legislation, in order to terminate an injured worker's employment safely on the basis that he or she is unable to perform the inherent requirements of the particular work, as they cannot return to their pre-injury duties, even with reasonable adjustments. While an injured worker may seek to be retained permanently in a re-assigned role, this is not what the legislative framework requires. What is important is the capacity to fulfil the duties for which the injured work was employed, albeit with reasonable adjustments, rather than characterising the alternative role itself as a reasonable adjustment.

Assisting a worker to return to their original role

Courts have found the requirements of the *Disability Discrimination Act 1992* (Cth) ("**DDA**") to make reasonable adjustments are directed towards alterations to the job or other modifications for the person, which are designed to facilitate the person being able to do the work that he or she was employed to do.

An illustration of this point is a recent case[1] where a worker injured his hand at work and

[1] *Hilditch v AHG Services (NSW) trading as Lansvale Holden* [2017] FCCA 1086

subsequently undertook suitable duties on a part-time basis, but was ultimately found to be unfit to perform his pre-injury duties as a "fitter". The medical evidence in this case was to the effect that the injured worker could no longer perform the "fitter" duties and could only return to work for permanently modified duties, such as office work. The court found that the employer's obligations arising from the DDA in this context were to make reasonable adjustments to the injured worker's situation so that he could continue to work in the position for which he was employed, that is the "fitter" position. It was not to find him other employment in an alternative role.

One qualification to this point is that if an employer has a history of allowing injured workers to remain long term in alternative roles, the application of the strict letter of the law may raise questions about the reasonableness of this response. If the injured worker remains in the alternative role long-term, this could give rise to a situation where it is taken to be the substantive role going forward against which capacity is assessed. In such circumstances, it is generally advisable not to leave the matter unresolved indefinitely, but to make a clear decision regarding any incapacity to perform the pre-injury role. A new contract to employ the person in the alternative role can then be entered into if that is negotiated between the parties. Employers also need to be mindful of any significant differences in salary and entitlements between the two roles, and negotiate contractual terms to reflect this.

Making appropriate enquiries

If an employer is contemplating terminating an injured worker's employment based on his or her inability to perform the inherent requirements of the job, it is incumbent on the employer to make enquiries about a worker's capacity at that point in time. Generally, this requires a consideration of the feasibility of a return to work (including the possibility of a return to work in a reduced form in the short term), with a view to the worker returning to the pre-injury position in the foreseeable future.

The type of information relevant to these inquiries includes medical reports provided by the worker and any other reports that may have been obtained by the employer from an insurer or rehabilitation provider. Where this information is insufficient to enable the employer to make a fully informed decision, it may be appropriate, for example, to obtain the consent of the worker to release medical information from their treating doctor or specialist. An alternative approach is to request the worker to attend a medical assessment arranged and paid for by the employer. An injured worker is required to co-operate with such a request.

Consultation

A failure to give the injured worker an opportunity to consider or propose any adjustments prior to a termination of employment can impact on how an assessment of the capacity of the individual is viewed by a court or tribunal, particularly in unfair dismissal cases. The importance of consultation with an injured worker is highlighted in a recent Fair Work Commission decision,[2] where it was found that a nurse had been unfairly dismissed following a non-work related injury. The Commissioner stated:

"...I am satisfied that the decision to terminate Ms Maharaj's employment was unreasonable. Northern Health may well have been able to satisfy itself as to the correctness or otherwise of its position had it undertaken even the most basic of investigation with Ms Maharaj. It did not do so and there is nothing before the Commission that suggests that Ms Maharaj could not have returned to work, to her pre-injury duties on a graduated return to work plan."

Timing

The appropriate time to consider a worker's ability to perform the pre-injury role is at the time that termination is being considered. Workers' compensation legislation in each state and territory also set timeframes for various matters, such as how long alternative duties need to be provided, and need to be factored into managing a return to work.

[2] *Dorris Maharaj v Norther Health* [2017] FWC 2997, at [114]

Another important timing factor is in relation to timeframes for a return to full capacity. If a medical report indicates that an injured worker is likely to return to full capacity to enable him or her to undertake their pre-existing duties within a nominated timeframe, then an employer will need to work with that assessment, including in some cases allowing access to different forms of leave, such as unpaid leave if necessary. This is different to a situation where the prognosis of a return to full capacity in the foreseeable future is poor. In this case, the argument that a person is not able to perform the inherent requirements of the job is strengthened.

Key takeaways

- The duties undertaken in the pre-injury role are crucial to the assessment of incapacity.
- Act on medical information and obtain further reports to enable informed decision-making.
- Employing a worker permanently in an alternative role is not required, but may be an option that an employer is prepared to consider.
- Develop a comprehensive strategy as legal challenges may arise through a number of different avenues, including compliance with workers' compensation obligations, disability discrimination and unfair dismissal.

Fair Work Act:

Amendments enhance penalty provisions & impose new franchising obligations

The Federal Parliament has recently passed amendments to the *Fair Work Act 2009* (Cth) (the "Act") which aim to protect "vulnerable workers" from exploitation by employers. The amendments follow a period of intense media scrutiny in relation to such workers, particularly migrant workers employed by franchise companies.

Serious contraventions

The amendments impose penalties of up to $540,000 for a corporation and $108,000 for an individual in respect of a new category of "serious contraventions" of the Act. A contravention of a civil penalty provision of the Act (for example, underpayment of wages) will be considered a "serious contravention" if:

- the person knowingly contravened the provision; and
- the person's conduct constituting the contravention was part of a systemic pattern of conduct relating to one or more other persons.

These new penalty provisions also capture persons who are knowingly involved in a serious contravention.

Employers should bear in mind that the category of "serious contraventions" **applies to all employers**, not just franchisors.

Franchising obligations

The amendments create a new offence to capture franchisors and parent companies in the event that they fail to take reasonable steps to prevent contraventions within the franchise group. This means that franchisors will be directly exposed to liability for contraventions such as underpayments, even if they do not employ the workers in question themselves.

Other changes

Other changes introduced by the amendments include:

- new powers for the Fair Work Ombudsman to require the production of evidence in relation to investigations; and
- new prohibitions preventing employers from implementing cashback arrangements that require employees to spend their money in connection with their employment or prospective employment, where the requirement is unreasonable and the payment is directly or indirectly of benefit to the employer or prospective employer.

Given the nature of these amendments, we encourage all our clients to undertake workplace audits in relation to payment of wages, award compliance, and leave entitlements to identify any systemic issues (within their own organisations and any franchising group) and rectify them. Please contact your PCS Team Member for further information and assistance.

Events

Miss Saigon

As sponsor of Packemin Productions, the PCS team were joined by clients for a spectacular production of Miss Saigon, which was held at Riverside Theatres in Parramatta.

PCS Greater Sydney Rams

In the fourth year of PCS being the principal sponsor of the PCS Greater Sydney Rams, we have been out supporting the Rams who have already demonstrated that they will be a competitive outfit.

Events

Latin Reading

In August, the PCS team continued its support of the Year 9 NSW Latin Reading Competition.

Bledisloe Cup

The PCS team once again hosted a table at the Bledisloe Cup. Despite the result, it was a wonderful night.

HR Awards

For the 2017 HR Awards, PCS proudly sponsored the award for Australian HR Team of the Year (≤ 1000 employees).

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