NEWSLETTER

cornwallstodart
ENHANCING SUCCESS

JUNE 2012

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

Welcome to the second edition of the E&IR newsletter for 2012.

In this edition, we highlight recent case law on harassment in the workplace and restraints of trade, and detail recent changes to road safety remuneration laws.

On the team front, we are delighted to announce that Lorraine Zaffiris is expecting her first baby with husband Anthony in November. Please join us in congratulating Lorraine.

We also congratulate Lachlan Currie, who completed his traineeship with us in April and was admitted to the Supreme Court recently. Lachlan has accepted a role in our Commercial Litigation team and we wish him all the very best.

This month, we also welcomed a new trainee into the E&IR team: Tamsyn Hutchinson. Tamsyn's name may be familiar to you; she was a clerk in our Corporate & Commercial group while completing her Master of Laws (Juris Doctor). Tamsyn has previously worked in publishing as an editor and production manager. Her interest in law was sparked while working in a community legal centre between 2008 and 2010.

Louise Houlihan
Partner and Head of E&IR
Phone (direct) **+61 3 9608 2273**
Mobile **+61 409 835 809**
Email **l.houlihan@cornwalls.com.au**

*Click on image to view profile

Road Safety Remuneration Act 2012 (Cth)

From 1 July 2012, the new *Road Safety Remuneration Act 2012* (Cth) (**Act**) will commence operation. The Act has the potential to significantly affect all participants in the road transport supply chain, including retailers, operators, employers and drivers.

The Act establishes a new Road Safety Remuneration Tribunal (**Tribunal**), which will have the power to determine minimum rates of pay and related conditions for both employed and self-employed drivers, including conditions for loading and unloading vehicles, waiting times, working hours, load limits, payment methods and payment periods.

The Tribunal has the power to require road transport operators to pay drivers higher rates, allow longer delivery times, alter their driver remuneration structure and pay drivers for waiting and loading times.

The Tribunal's powers extend to the regulation of road transport operators' contracts with independent contractors (ie owner-drivers) and employee-drivers, as well as road transport operators' agreements with its logistics service providers.

Accordingly, road transport operators will need to:

- review their current operations to identify areas of risk;
- take a proactive approach to minimise the likelihood of an adverse ruling by the Tribunal; and
- prepare contingencies to deal with the event of an unfavourable ruling by the Tribunal.

Road Safety Remuneration Tribunal

The Act establishes and empowers the Tribunal to carry out a range of functions, including:

1. making Road Safety Remuneration Orders (**RSROs**);
2. approving Road Transport Collective Agreements (**RTCAs**);

3. dealing with disputes about remuneration and related conditions between drivers, employers, hirers and other participants in the supply chain; and
4. conducting research into remuneration related matters that may affect safety in the road transport industry.

The powers of the Tribunal are broad and have the potential to significantly affect the operations of each participant in the road transport supply chain.

Road safety remuneration orders

What are RSROs?

The most important function of the Tribunal is the making of RSROs. RSROs are enforceable instruments that determine mandatory minimum rates of pay and related conditions for employed and self-employed drivers. Importantly, RSROs apply in addition to any existing rights employed drivers have under industrial instruments/contracts of employment and that self-employed (independent contractor) drivers have under their contracts for services.

Scope of RSROs

The Tribunal has the power to make RSROs in respect of each participant and intermediary in the road transport supply chain. RSROs can cover most aspects of the supply chain, including:

- conditions about minimum remuneration and other entitlements for road transport drivers who are employees, additional to those set out in any modern award relevant to the road transport industry;
- conditions about minimum rates of remuneration and conditions of engagement for contractor-drivers;
- conditions for loading and unloading vehicles, waiting times, working hours, load limits, payment methods and payment periods; and
- ways of reducing or removing remuneration-related incentives, pressures and practices that contribute to unsafe work practices.

The Tribunal can make orders that directly regulate road transport operators' contracts with owner-drivers and employees, as well as orders that regulate road transport operators' agreements with logistics services providers.

How are RSROs made?

Applications for RSROs can be made by any participant in the road transport supply chain, including drivers, employers or hirers of drivers, representative organisations and industrial associations (ie unions).

Road Transport Collective Agreements

The other important function of the Tribunal is to approve RTCAs. RTCAs are collective agreements that set remuneration and related conditions that participating hirers are required to provide to all owner drivers performing services for the hirer.

To approve a RTCA, the Tribunal must be satisfied that:

- a RSRO is in effect in respect of the participating drivers;
- the majority of participating drivers would be better off overall if the RTCA applied (instead of the RSRO);
- the majority of participating drivers have approved the agreement; and where the term of the RTCA is longer than twelve months, provision is made to enable remuneration to be adjusted.

RTCAs can operate for a maximum of four years, during which time the RSRO will have no effect.

Compliance and contravention

The compliance framework under the Act is similar to the structure under the *Fair Work Act 2009* (Cth) (**FWA**). Contravention of RSROs and RTCAs carry civil penalties of up to $6,600 for an individual and $33,000 for a corporation.

Compliance with the Act and the enforceable instruments will be monitored and enforced by the Fair Work Ombudsman. Importantly, the Act falls within the definition of a 'workplace law' for the purposes of the 'general protections' under the FWA. Employers who take 'adverse action' against employees because of their participation in an application to the Tribunal may face penalties under the FWA.

Disputes

The Tribunal has the authority to deal with disputes about remuneration or related conditions, if these conditions have the potential to affect whether a driver works in an unsafe manner.

The Tribunal can also deal with disputes arising from the termination of an employee driver's employment or an owner-driver's engagement, if the driver contends that the termination was mainly because the driver refused to work in an unsafe manner.

Drivers may implicate road transport operators in disputes both directly (owner-driver brings a complaint against road-transport operators) or indirectly (employee-driver brings a complaint against a logistics service provider; logistics service provider brings a complaint against road transport operators).

The Tribunal can deal with disputes in a range of manners, including mediation or conciliation, making a recommendation or expressing an opinion and (if the parties agree) arbitration.

Impacts of the Act on road transport operators

Road transport operators should review their operations and remuneration structures to identify any areas that have the potential to create or contribute to unsafe work practices. Areas of concern include:

- delivery schedules;
- incentive payments;
- loading practices; and
- remuneration structures.

From 1 July 2012 road transport operators will need to monitor any applications made to the Tribunal to ensure that their interests are adequately represented and, if an order is made, they comply.

Conclusion

Given the potential of the Act to affect significantly the operation of road transport operators' businesses, we recommend that road transport operators give some thought to how the Act could affect their operations and take a proactive approach to minimise any adverse effects.

Cooper v Western Area Local Health Network [2010] NSWADT 39 (9 March 2012) – the importance of workplace sexual harassment policies

The recent case of *Cooper v Western Area Local Health Network* highlights the importance of, and benefits to, employers of putting in place and enforcing appropriate sexual harassment policies.

The NSW Administrative Decisions Tribunal fined a male employee $10,000 for the sexual harassment of a co-worker but the employer escaped liability because it had taken the appropriate 'reasonable steps' to educate its employees about sexual harassment issues and, when necessary, had taken disciplinary action for breaches of its policy.

The facts

The sexual harassment involved two colleagues who had worked together since 2005 and who socialised outside of work (including telephoning each other at home, sharing meals and exchanging Christmas gifts). At a staff training day the male employee gave the female employee a folded note and told her to read it later. The female employee returned to her hotel room and read the note, which she said made her feel physically sick. The exact contents of the note were not recorded by the Tribunal in its decision; however it was described as 'a series of actions of a sexual nature proposed to be done by a male to a female'. Shortly after, the female reported the incident to the police.

Two days later, the female reported the incident to her supervisor, Mr Clarke, who conducted an interview and said 'I'll act on it straight away'. The following day Mr Clarke wrote a letter to his superior, which was signed by the female as an accurate record of events. The employer investigated the complaint and gave the male employee a 'first and final' warning letter as well as instructions not to approach the female employee. It emerged in evidence that all employees had attended mandatory training in relation to sexual harassment and had received the employer's workplace Code of Conduct.

The decision

The Tribunal held that the conduct of the male employee constituted sexual harassment within the meaning of s 22B(2) of the *Anti-Discrimination Act 1977* (NSW) and the test set out in *Sharma v QS Pty Ltd t/as KFC Punchbowl* (EOD) [2010] NSWADTAP 22, because the conduct was:

1. a sexual advance, a request for sexual favours or conduct of a sexual nature;
2. in relation the applicant; and
3. not welcomed by the applicant,

and a reasonable person, having regard to all the circumstances, would have anticipated that the applicant would be offended, humiliated or intimidated by that conduct.

The Tribunal fined the male employee $10,000 but held that the employer was not vicariously liable for the employee's conduct. The Tribunal took into account the fact that the employer had required the offending employee to re-commit to the workplace Code of Conduct at each re-employment and promotion, and regularly attend training on bullying and harassment prevention.

The Tribunal also noted that 'it is not enough for the employer [to] merely…institute policies; the policies need to be implemented and brought to the attention of employees in a meaningful way'. In this case, the Tribunal accepted the evidence of the employer that it enforced its Code of Conduct and, when necessary, took disciplinary action against offending employees. The Tribunal stated that 'the steps taken by the employer were sufficient, in the sense that all steps that could have been taken were in fact taken to fulfil the employer's responsibility, that is [the] employees [were] aware of the various policies affecting their conduct at work and the necessity to abide by them, including penalties if they do not.'

Lessons to be learnt

This case highlights the importance of implementing and enforcing appropriate sexual harassment and bullying policies. Employers must take reasonable steps to make employees aware of their workplace policies and ensure that appropriate disciplinary action is taken when a breach is found to be substantiated.

Birdanco Nominees Pty Ltd v Money [2012] VSCA 64 (4 April 2012): three-year restraint clause – enforceable? You better believe it.

The Victorian Court of Appeal has enforced a three-year restraint clause against a junior employee of accounting firm Bird Cameron. The case is of particular interest to employers because it demonstrates that there may be circumstances in which restraints will be enforceable against junior employees who have developed continuing client connections in the course of their employment.

The facts

Mr Liam Paul Money (**Money**) commenced employment with Bird Cameron as a trainee accountant in early 2003, when he was 19 years old. Money had commenced an accounting course at university but had withdrawn from the course after a few months.

Money signed a written contract of employment with Bird Cameron that contained a restraint of trade clause that governed Money's conduct for a period of three years after the cessation of his employment with Bird Cameron. The contract made it a breach for Money to provide accounting services to a person who had been a client of Bird Cameron and to whom Money had provided accounting services during the three years before his employment ceased. In the event of such a breach, the contract provided that Money was to pay as liquidated damages, 'a sum equal to 75% of the fees incurred by the client…in the last full financial year in which the client…' had remained a client of Bird Cameron.

Money was employed by Bird Cameron for over six years. In that time, he was promoted to the position of supervising accountant, although he did not complete the study required to obtain formal accounting qualifications.

Money's responsibilities while at Bird Cameron included preparing income tax worksheets and other material for the Szencorp Group of companies, a major client of Bird Cameron. While performing these duties, Money developed a close relationship with the financial controller of the Szencorp Group.

In April 2009, Money tendered his resignation to Bird Cameron in order to take up employment three days a week with the Szencorp Group and two days a week with accounting practice Benjamin King Money (of which his father was a partner).

In August 2009, the Szencorp Group sought a quotation from Bird Cameron for the continued performance of accounting services for the following twelve months. It also sought a similar quotation from Benjamin King Money. Benjamin King Money's quotation was considerably less than that of Bird Cameron and the Szencorp Group subsequently terminated its retainer with Bird Cameron and engaged Benjamin King Money to perform the necessary accounting services for the following financial year.

Bird Cameron brought proceedings in the County Court to enforce the restraint, claiming a sum of $188,495.65, which is equivalent to 75% of the fees for the Szencorp Group for the year to 30 June 2009.

The decision

At first instance, the County Court dismissed Bird Cameron's claim on the basis that the restraint was unreasonable and that the damages claimed were a penalty and not a genuine pre-estimate

of Bird Cameron's loss. However, this decision was overturned on appeal.

The Court of Appeal upheld the restraint and ordered that Money pay Bird Cameron $188,495.65, plus interest and Bird Cameron's costs of both the appeal and the original proceeding.

In determining that the restraint was reasonable, the Court of Appeal assessed three aspects of the restraint:

1. the nature of the restraint;
2. the consequences of a breach of the restraint; and
3. the duration of the restraint period.

The court considered the restraint to be quite narrow in the sense that it did not prevent Money from going into practice as an accountant, nor did it apply to the entire client database of Bird Cameron. Rather, the restraint was limited to the provision of particular services to particular clients of Bird Cameron with whom Money had, in the course of his employment, established a continuing relationship. The court noted that the practical effect of the restraint was that Money was not prevented from acting for a former client at all; rather, he could provide accounting services to them so long as he paid an agreed sum to Bird Cameron.

In relation to the consequences for a breach of the restraint, the court was satisfied that the amount of damages was not unreasonable in the circumstances. It did not regard the amount to be a penalty and, rather, considered it to be a genuine pre-estimate of the damages likely to be suffered by Bird Cameron.

The court considered the duration of the restraint (three years) acceptable, because it was likely that Money would retain a relationship with his clients for some time after the cessation of his employment with Bird Cameron.

Lessons to be learnt

The case demonstrates that, if carefully drafted, quite extensive restraint of trade clauses in employment contracts are enforceable, despite the common belief that these clauses are ineffective.

Restraints should also be amended as necessary to reflect changes in the employment relationship (for example, a promotion).

Workplace Relations Highlights (Watch this Space)

Fair Work Australia is in the process of conducting a review of modern awards (including their transitional provisions), other than modern enterprise awards and state reference public sector modern awards. Submissions have been received regarding most of the modern awards and changes are expected to be made in due course.

The federal government is considering developing national legislation, similar to Victoria's Brodie's Law, following a parliamentary inquiry into the 'scourge' of bullying in Australian workplaces. This could effectively impose jail sentences on workplace bullies. Last year, Victoria amended provisions of the *Crimes Act 1958* (Vic) on stalking to cover forms of 'serious' bullying such as threats and abusive words or acts and to broaden the definition of 'harm' to include self-harm and suicidal thoughts. Prime Minister Gillard said that, while this type of bullying will also be addressed in a proposed harmonised Code of Practice, the problem costs the country up to $36 billion a year, and more is needed to be done such as legislating at a national level.

The Victorian government continues to debate the adoption of the model *Work, Health and Safety Act* (**WHS Act**). The Victorian government is concerned about the costs that would result in transitioning to the new national legislation. The Victorian government has referred to a report commissioned by PriceWaterhouse Coopers that suggests the laws will cost Victorian businesses $587 million a year to comply with (and Victoria $3.44 billion over five years to adopt). But this data is apparently unaudited. On the other hand, the Productivity Commission's assessments of the WHS Act suggest that, while transitioning to the national system will cost the country's employers about $850 million initially, the costs of complying will fall each year and adoption of the WHS Act could ultimately save businesses $370 million net a year.