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HUMAN RESOURCES BRIEF

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# Court Varies Unfair Contract

The *Independent Contractors Act* 2006 (Cth) ("the ICA") which commenced on 11 June 2007 introduced a new federal unfair contracts jurisdiction.

The ICA gives independent contractors access to a federal unfair contracts jurisdiction by allowing the Federal Magistrates Court, as well as the Federal Court of Australia, to hear applications to review alleged unfair or harsh independent contracting arrangements. Applications can be made even if the contract was entered into before the commencement date of the ICA. Previously, independent contractors could apply pursuant to section 106 of the *Industrial Relations Act* 1996 (NSW) to the Industrial Relations Court of New South Wales for orders declaring void or amending unfair contracts.

In the first judgement by the Federal Magistrates Court under the ICA, Federal Magistrate Robert Cameron found that it was unfair for a principal to require three independent contractor truck drivers to upgrade the trucks that they were obliged to provide pursuant to the contract between the principal and contractors.

In early 2007, Riteway Transport Pty Limited ("Riteway") directed the three owner-drivers engaged on the Sydney – Melbourne delivery run to replace their single trailer trucks with new and more expensive B-Double trailers under a term of the contract which enabled Riteway to require the contractors to replace their vehicles. Riteway indicated to the three owner drivers that if they failed to comply with its direction, the contracts between the owner drivers and Riteway would be terminated immediately.

Riteway offered the drivers an amount of $200.00 extra per Sydney - Melbourne run in consideration for the additional costs associated with acquiring the new trailers. The drivers considered that this amount was significantly less than the increased costs which would be incurred in the course of upgrading their vehicles. On this basis the drivers – who had a combined 24 years of service as contractors to Riteway – attempted to negotiate with Riteway concerning the direction, however were unsuccessful in doing so.

The ICA permits the Court to review a contract at the time it was made and to decide whether the contract is unfair, harsh or unjust. The drivers elected to initiate proceedings under the ICA, alleging that, pursuant to section 12 of the ICA, the contracts between them and Riteway were harsh and unfair.

The Court accepted the proposition that it had the power to deal with the applications notwithstanding that the contracts between the drivers and Riteway were no longer "on foot".

Cameron FM found that Riteway was uncompromising on price and that this was evidence that the contracts between Riteway and the drivers permitted Riteway to act unilaterally. This was held to be unfair pursuant to the ICA in that it failed to provide a proper balance of "advantage and disadvantage" between Riteway and the drivers. The terms of the contract effectively permitted Riteway to "manipulate" the drivers into severing their relationship with Riteway.

In his judgement, Cameron FM stated that:

"*It [Riteway] could require the acquisition of expensive vehicles reasonably required for its business, but fail to raise contract rates commensurately and thereby put the applicants in a position where they had no alternative but to find other work.*"

It was concluded that the contracts were unfair:

"*because they permitted Riteway to require the applicants to renew their vehicles with replacements which were materially different from the vehicles which had previously been acceptable, and did not require Riteway to make a commensurate increase in payments to the applicants such that the necessary*

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*additional expenses would be offset by such increased payments*."

Interestingly, in reaching to its decision the Court applied reasoning from various unfair contracts decisions of the Industrial Relations Court of New South Wales.

The Court ordered that the contract between Riteway and the drivers be amended to limit the principal's power to require the drivers to provide new vehicles. Pursuant to the amended contract, Riteway could only require new vehicles "having specifications reasonably equivalent to the vehicle to be replaced". The claims for damages and injunctions were stood over.

Evidently the jurisdiction will have substantial implications in respect of contract review on unfairness grounds. Arrangements with independent contractors should be reviewed to ensure fairness as far as possible as unfairness may arise because of the terms of the contract or circumstances of the negotiation. Caution should be exercised in terminating contractors who have the benefit of the new unfair contracts provisions regardless of the contractual terms, as such terms may be held to be unfair.

# ATO Draft Ruling - Redundancy Payments

On 27 August 2008, the ATO issued Draft Ruling TR 2008/D6 ("Draft Ruling") which impacts on the taxation of genuine redundancy payments. The Draft Ruling, which is detailed and complex, replaces an earlier Ruling (TR 94/12) and restricts the circumstances when a payment made in consequence of the termination of employment will be considered to be attributable to a genuine redundancy by the ATO.

The Draft Ruling provides that in order to qualify as a genuine redundancy payment the following components must be satisfied:

1. The payment being tested must be received in consequence of a termination of employment;
2. The termination must involve the employee being dismissed from employment;
3. The termination must be caused by the redundancy of the employee's position; and
4. The payment must be made genuinely because of a redundancy.

The Draft Ruling introduces a new definition of what constitutes a bona fide redundancy. A genuine redundancy will only occur when the employer determines that the employee's position is "*superfluous to the employer's needs and the employer does not want the position to be occupied by anyone*". Further, the Draft Ruling contains an additional element in that the redundancy of the position must be the "*prevailing or most influential reason for the dismissal*". For example, if an employer reallocates the duties and functions attaching to a particular position to another position within the business, the former *position* will be redundant however, the *employee* will not be redundant, as the employment will continue if the employee is transferred or offered employment in the alternative position.

The Draft Ruling emphasises that in assessing whether a genuine redundancy exists, it is necessary to consider all of the circumstances of the termination of the employment including any performance related issues. Moreover, the fact that the employer and the employee consider a termination payment is attributable to a redundancy does not of itself establish a genuine redundancy. Most employers would be aware that genuine redundancy payments qualify for concessional tax treatment calculated on the following formula (for the 2008/2009 year) – a base amount $7,020 and $3,511 for each year of service). The issue is of importance to employers because of the potential tax liability and additional penalties that can be (and usually are) imposed by the ATO if a termination payment has been incorrectly characterised as a bona fide redundancy payment.

Subject to limited exceptions, the Draft Ruling provides that employees who are engaged for a fixed term, as a casual or on a project based contract will not qualify for redundancy payments as they cannot genuinely be made redundant. Further, the ruling states that in order to qualify as a genuine redundancy payment, the recipient of the payment must be under the age of 65 at the time of the dismissal. The Draft Ruling also has implications for "dual capacity employees" being persons who are both an employee and a director of the employing entity. For the termination to be effected as a redundancy, it must be shown that the dual capacity employee did not consent to the termination of his or her employment. This requirement could present practical difficulties given the fact that directors very often determine the viability of a company and make decisions affecting employees in relation to the termination of employment.

As previously noted, the Draft Ruling introduces an additional level of complexity to the assessment of bona fide redundancy payments. Employers will need to ensure they are familiar with the operation of the Draft Ruling and that considerable caution is exercised when categorising termination payments.

# Sonny Bill's Star Attraction

The recent and highly publicised decision of Austin J of the New South Wales Supreme Court in *Bulldogs Rugby League Club Limited & Anor v Williams & Ors* [2008] NSWSC 822 reaffirms the right of employers to enforce employee restraints.

Sonny Bill Williams ("Williams") and the Bulldogs Rugby League Club Ltd ("the Bulldogs") entered into a 5 year contract in early 2007. It was a provision of the contract between the parties that Williams agreed to "not, without the prior written consent of the Club… participate in any football match of any code" other than certain matches as specified in the contract, without the prior consent of the Bulldogs.

In July 2008 media reports indicated that Williams had left the country, and the Bulldogs became aware that the Toulon Rugby Club, a rugby union club based in France, had commenced negotiations with Williams from about June 2008 onwards. It became known to the Bulldogs that the negotiations related to Williams entering into a contract whereby Williams would represent the Toulon Rugby Club in the French domestic rugby union competition 2008/09 season. Various media reports speculated that Williams had in fact signed a contract with Toulon Rugby Club and that he was due to represent Toulon Rugby Club in a trial game on 8 August 2008.

The Bulldogs commenced proceedings in the New South Wales Supreme Court and sought, among other things, an injunction to prevent Williams from representing Toulon Rugby Club.

In order to obtain injunctive relief against Williams, the Court stated that the Bulldogs were required to demonstrate three things; namely that there was a serious question to be tried, that the Bulldogs would suffer irreparable harm for which damages would not be adequate compensation, and that the balance of convenience weighed in favour of the granting of injunctive relief.

Austin J was of the view that there was at least a serious question to be tried based on the proposition that the restraint clause contained in the contract between Williams and the Bulldogs was valid and enforceable in its terms. He further noted that there was no room for argument as to whether the alleged breach of the restraint clause by Williams would infringe the terms of the restraint as properly construed. The central question that was required to be addressed was whether the restraint went any further than reasonably necessary to protect the interests of the person in whose favour the restraint operated.

The following considerations were noted by the Court as supporting the reasonableness of the restraint and therefore its enforceability:

- Clause 18.2(c) of the contract contained an acknowledgement that Williams was given the opportunity to seek independent legal and also financial advice before signing the contract. Allied to that was the consideration that both Williams and the Bulldogs had bargained, as far as the Court could tell, at arms length and on an equal footing (see for example *Idameneo (No 123) Pty Limited v Angel-Honnibal* [2002] NSWSC 1214 at [51] per Palmer J).
- The simple idea of sanctity of contract. In the absence of any fraudulent, misleading or deceptive conduct or circumstances, a considered obligation undertaken by contract should be enforced against the person who undertakes it (*Doherty v Allman* (1878) 3 App Cas 709 at 720).
- The distinction between restrictive covenants that operate only during the course of a period of employment and those restrictive covenants that extend beyond the termination of the period of employment, ie. post employment restraints. In this case, importantly, the restrictive covenant in question sought to operate only during the course of the contract and, unlike many standard employment contracts, contained no post employment restraint. In a similar case some years earlier involving Australian Rules football player Gary Buckenara and his employer the Hawthorn Football Club Ltd, Crockett J of the Victorian Supreme Court observed that only in "very unusual" circumstances would a restraint that operates exclusively during the term of employment be found to be unreasonable. (*Buckenara v Hawthorn Football Club Ltd* [1988] VR 39).

Based upon these considerations the Court held that the restraint of trade clause, although expressed without geographical limitation, did not extend further than reasonably necessary to protect the legitimate interests of the Bulldogs. In forming this opinion, the Court acknowledged the validity of a number of stated reasons for the restraint being:

- To seek to prevent injury to Williams;
- The recruitment strategy of the Bulldogs, which was based centrally around Williams being available to play for it in the National Rugby League competition; and
- The "star attraction" of Williams and the capacity of such an attraction to contribute to the goodwill, patronage, membership subscriptions, pride, prestige and standing of the Bulldogs.

In considering whether the Bulldogs would suffer irreparable harm for which damages would not be adequate compensation, the Court held that it was appropriate to refer to special circumstances relating to the loss to a rugby club of a star attraction. Austin J referred to the similar circumstances in the case of *St George District Rugby League Football Club Ltd v Tallis*, Santow J, 28 June 1996, unreported, BC9602844. In that case Santow J said:

# Sonny Bill's Star Attraction (cont.)

"*The loss to a football club of a potential star attraction is inherently likely to result in pecuniary loss in terms of patronage, membership subscriptions and innumerable other incidental matters. Such pecuniary loss, at least in some of its aspects to do with winning and pride, prestige and standing of the club, is necessarily incapable of even approximate quantification.*"

The Court, in this case, agreed with and applied the observation of Santow J.

The exercise of determining whether the balance of convenience requires the Court to intervene by injunction, or to abstain from doing so, is essentially an exercise in weighing the risk of loss and damage to the Bulldogs if relief was not granted, against hardship and other loss that may have been occasioned to Williams as a result of the Court granting an injunction. In considering this question, the Court recognised the distinctive approach that has been adopted by Courts of equity to an application to enforce, by injunction or specific performance, a contract of personal service. The fundamental rule in such a situation is that a decree of specific performance is not available to enforce a contract of personal service. The principle extends to a case where an applicant seeks an injunction rather than specific performance, if it is the case that the injunction would have the same effect as a decree of specific performance, or at the very least the effect of leaving the defendant with the choice of either continuing to work for the plaintiff or being idle. (*Warner Brothers Pictures Incorporated v Nelson* [1937] 1 KB 209).

There is however an exception to this approach which was enunciated in the famous decision of *Lumley v Wagner* (1852) 1 De GM&G 604; 42 ER 687. In that case the defendant had agreed to sing at the plaintiff's theatre for a period of 3 months, and had promised not to perform during that period for any other theatre without the plaintiff's authorisation. The Court granted an injunction enforcing this promise and it was held that, while the Court could not order the singer specifically to perform her contractual obligations, it did have the power to "compel her to abstain from the commission of an act which she has bound herself not to do and thus possibly cause her to fulfil her engagement."

This principle has since being applied in Australian case law in other cases relating to football players, such as Gary Buckenara and Gordon Tallis. In the Williams case the Court was satisfied that injunctive relief was available pursuant to the *Lumley v Wagner* principle.

In terms of the balance of convenience, the Court determined that there were three important factors to consider. Firstly, the Bulldogs offered an undertaking to the Court that it would continue paying Williams the payments it was obliged to make pursuant to the contract pending the final determination of the proceedings before the Court. Austin J considered this as significant because, it tended to confirm the "special services" reasoning together with the proposition that even if Williams was forced to be idle he would nevertheless be paid his salary pursuant to the contract.

In weighing up the balance of convenience, the Court also addressed the possibility of hardship to Wiliams in the event that an injunction was granted. It was submitted by the Bulldogs that no hardship would be suffered by Williams should the Court make the orders sought. Further, and importantly, the Bulldogs also submitted that if there were any hardship suffered by Williams, it would be hardship that was brought about by his own conduct.

There exists a strong line of authority for the proposition that a court will place little or no weight on hardship suffered by a defendant where they are the authors of their own misfortune (*John Fairfax Publications Pty Limited v Birt* [2006] NSWSC 995). In the present case the Court considered that Williams' possible hardship would be that he would have to forego his playing opportunities in France and end whatever work arrangements he had entered into with Toulon Rugby Club. Whilst any injunction was in operation the Bulldogs intended to continue to provide Williams with the remuneration as agreed in the contract. The Bulldogs also indicated that if Williams subsequently made himself available for selection to resume playing football with the Bulldogs, then he would in all likelihood have been selected. Taking these matters into account the Court found that any residual hardship would be hardship of which Williams had been the author.

Finally, the Court gave consideration to the fact that Williams was abroad, and the anticipated conduct of Williams representing the Toulon Rugby Club that would have constituted a breach of the contract, would have occurred in France.

The Court concluded that making the interlocutory injunction sought by the Bulldogs would not be futile essentially for three reasons. Firstly it has been established that the courts have jurisdiction to order injunctions in respect of a defendant's conduct abroad and, in restraint of trade cases, it is not uncommon for courts to grant orders restraining a defendant from engaging in activities within a geographical scope that may include an area outside Australia. (H*umane Society International Inc v Kyodo Senpaku Kaisha Limited* (2005) 232 ALR 478 at [16]).

Secondly, the Court agreed with the plaintiff's submissions that the Court should not contemplate that its orders would be disobeyed or that they were likely to be disobeyed. Again, reliance was placed upon an observation made in the Humane Society International case, where it was held that "when asked to grant an injunction, the Court should not necessarily contemplate that it would be disobeyed", citing copious authority for that proposition.

Finally, the Court affirmed that the granting of an injunction to restrain a defendant's conduct abroad would not be futile if the defendant has (i) submitted to the jurisdiction and (ii) has assets in the jurisdiction. This was considered to be a centrally important point

## *Sonny Bill's Star Attraction (cont.)*

in the present case in the sense that it was required to be established that any injunction granted would be a useful remedy. The Bulldogs adduced evidence to show that Williams was the registered proprietor of land in suburban Sydney. By proving the existence of Williams' assets within the jurisdiction and with reference to the contract between Williams and the Bulldogs, which was clear evidence that Williams had submitted to the jurisdiction of the Courts of New South Wales, the Court considered the making of an interlocutory order against Williams not to be futile.

As has been widely reported, this case was subsequently resolved by means of a reputed $750,000.00 cash settlement between Williams and the Bulldogs.

The decision of Austin J affirms the proposition that an employer is entitled to obtain injunctive relief against an employee if it reasonably apprehends that an employee intends to breach their contact of employment. In addition, if the contract is a contract for the provision of "special services", the promise not to work for a competitor is more likely to be enforced by a Court.

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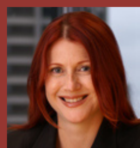

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