# The Advisor

## December Christmas 2023 Edition

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As we approach the close of another eventful year, we can reflect on the myriad developments in employment law that have unfolded in the past twelve months. It has been a year of significant changes, marked by pivotal decisions and the implementation of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**Secure Jobs**) reforms.

Our October edition of the Advisor included in depth examination of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. In breaking news, the Senate has passed a substantial part of the Bill after the Government reached a deal with crossbenchers David Pocock and Jacqui Lambie. Under the deal, the Closing Loopholes amendments have been divided into two Bills, with the first passed on 7 December 2023 and the second to be delayed in the Senate until February 2024.

The legislation that passed in the first Bill includes the less contentious reforms, but notably
:

- the protection of family and domestic violence victims from adverse action by their employers;
- protecting redundancy payments for employees working for a business that has only become a small business due to insolvency;
- the criminalisation of intentional wage theft, including superannuation; and
- a new criminal offence of industrial manslaughter.
- If passed, the key areas of the second Bill would be some of the most significant changes made to Australia's employment laws. They would transform the definition of a contractor versus an employee, the definition of a casual employee, and labour hire entitlements and arrangements. We will provide updates as they unfold in the new year.

# Secure Jobs - Final Reforms

The final Secure Jobs amendments will take effect by the end of the year.

On 6 December 2023, significant amendments came into effect to limit the use of fixed term contracts.

The Fair Work Act 2009 (**FW Act**) now prohibits the use of fixed term contracts for the same role beyond a two year period (including renewals) or two consecutive contracts, whichever is the shorter.

Where a fixed term contract is made in breach of the new provisions, the employee will be considered a permanent employee. The term of the contract that provides for its expiry on a set date will be of no effect, but the remaining terms of the contract would remain valid. In effect, the fixed term contract will become a contract of employment and the employee will be entitled to notice of termination and redundancy benefits under the FW Act.

There are some exceptions that allow fixed term contracts to continue to be used beyond these limits, namely where:

- the employee has specialised skills that the employer does not have, but needs, to complete a specific task;
- the employee is engaged as part of a training arrangement, such as an apprentice or trainee;
- the employer needs additional workers to do essential work during a peak period, such as for fruit picking or other seasonal work;
- the employer needs additional staff members during an emergency, or needs to replace a permanent employee who is absent for personal or other reasons, for example parental leave, sabbatical, or long service leave, or absence relating to workers' compensation;
- the employee earns above the high-income threshold;
- the employer is reliant on government funding or funding specified in the FW Regulations;
- the employee is appointed to a position within a corporation or association where its rules stipulate the length of time the appointment can remain in place;
- the employer is permitted to enter into the fixed term contract by a term specified in a modern award that covers the employee;
- the contract is a type of contract, prescribed in the FW Regulations, for which an exception applies.
- Employers are required to provide a Fixed Term Contract Information Statement to all employees entering a fixed term contract.

The Fair Work Commission has also been given new powers in relation to disputes that arise concerning fixed term contracts. If a dispute cannot be resolved at the workplace, the Fair Work Commission has the power to resolve it through conciliation, mediation or consent arbitration. In addition, the Federal Circuit and Family Court of Australia or State Magistrate Courts can now deal with such disputes under the small claims jurisdiction. From 30 December 2023, employees will be able to authorise salary deductions made by their employer that are recurring, or for amounts that vary from time to time.

## Secure Jobs - Final Reforms - Continued

Under current laws, a new written authorisation between an employee and employer must be made if a deduction amount changes, but from the end of this year an employee will be able to make a single written authorisation that allows their employer to deduct amounts from their pay even where the deduction amount may vary from year to year.

Other deductions can continue to be allowed by an employee for specific amounts only. Such deductions must be authorised in writing, and principally for the employee's benefit.

# When can out of hours conduct lead to a dismissal?d

*Ventia Australia Pty Ltd v Pelly [2023] FWCFB 201* (1 November 2023)

A recent appeal before a Full Bench of the Fair Work Commission has considered what constitutes 'work-related conduct' and upheld the reinstatement of a firefighter who was dismissed for sharing an OnlyFans video and a pornographic meme to a Facebook group of current and former colleagues.

The firefighter, working on the HMAS Albatross, had posted several times to the Facebook group "Sickos Video Sharing Group". Outside of work hours he had posted pornographic content, and during work hours he had made two other posts. One was a photo of a colleague returning from sick leave in the work car park. The other was a photo of an old bicycle with a fire extinguisher placed on each side of the rack behind the seat, referring to a new firefighting truck that management had acquired.

The photo of the colleague returning from sick leave was found to violate a policy against posting photos taken on base - but having resulted in no real damage or embarrassment for the company did not, alone, warrant dismissal. The photo of the bicycle was found to be plausibly considered to violate bullying or harassment policies but did not appear to have caused any offence to other members of staff. On these findings the posts were found to be misdemeanors.

Considering that the posts had only come to light when a female worker shared the posts in defense of her own conduct related issues, the FWCFB pointed to the 'abject stupidity' of sharing pornographic material in private groups of work colleagues but found "no complaint to anchor the out of hours conduct to employment" such that dismissal was fair and reasonable. The FWCFB also noted the shortcomings in Ventia's social media policy training which failed to adequately communicate the company's expectations of employee's private social media usage.

### Conduct must 'touch' employment

Central to the findings of the FWCFB were considerations of what kinds of out of work conduct could warrant summary dismissal.

The FWCFB focused on the required nexus between the alleged conduct and the workplace duties of the employee, stating:

> *"To constitute a valid reason for dismissal, the out of hours conduct must touch the employment, or touch the duties or the abilities of the employee in relation to the duties."*

Whilst an employee's employment may be validly terminated because of out of hours conduct, the circumstances are limited to cases where:

# When can out of hours conduct lead to a dismissal? - Continued

*Ventia Australia Pty Ltd v Pelly [2023] FWCFB 201* (1 November 2023)

- the conduct is such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee.

To determine whether conduct engaged in privately, out of hours or outside work has a relevant connection with employment to constitute a valid reason for dismissal, it is necessary to consider the entire factual matrix including:

- the nature of the out of hours conduct and what it involved;
- where the out of hours conduct occurred;
- the circumstances in which the out of hours conduct occurred;
- the nature of the employment;
- the role and duties of the employee concerned;
- the principal purpose of the employee's employment;
- the nature of the employer's business; express and implied terms of the contract of employment; and
- the effect of the conduct on the employer's business; and
- the effect of the conduct on other employees of the employer.

Whilst the Full Bench found that there was not a sufficient connection between the out of hours conduct and the employee's workplace duties, it stressed that "material of the kind shared by members of the Sickos Video Sharing Group has no place at or in any workplace, regardless of the nature of the work or the constitution of the workforce", and found it "surprising that firefighters who provide a vital service to members of the public … would risk careers they are rightly proud of, by sharing objectively offensive material that could be (and in the present case was) viewed by persons outside the consenting group and risk the possibility of that material impacting others in the workplace, or the reputation and business of their employer".

## What does this mean for employers?

Ventia highlights that where an employer wishes to use out of work conduct as grounds for dismissal there must be a connection between that conduct and the duties of the employee. Policies, employment contracts and training are vital proactive measures for setting expectations and avoiding unacceptable conduct.

# Union Official Access to Workplaces

*Communications Electrical Electronic Energy Information Postal Plumbing and Allie Services Union of Australia v Austral Ships Pty Ltd [2023] FCAFC 180* (14 November 2023)

The Full Court of the Federal Court has overturned a case which ruled that union officials cannot use their right of entry to hold discussions with members to gather signatures on petitions or "secure a commitment to a particular course of action in the future".

## The Original Decision

The original determination made by Justice Craig Colvin in December 2022 was made in favour of Austal Ships Pty Ltd, a military ship builder. Austal had blocked the access of a union organiser who sought worker's backing for a majority support determination.

Under s 484 of the *Fair Work Act 2009* (Cth), union officials may access workplaces for the purpose of holding discussions. Under s 501 and s 502 employers must not obstruct, hinder, or delay the entry of a union official seeking to hold such discussions.

In the initial decision Colvin J found that under s484 the organiser's access was limited to discussion and "does not extend to them securing some form of commitment that has a future significance beyond the conclusion of the discussion". As such the s501 requirement not to refuse entry of a permit holder and the s502 requirement not to hinder or obstruct a permit holder were not engaged as "entry for the purposes of obtaining signatures was not entry for the purposes of holding discussions."

## The Case on Appeal

The single ground of appeal was that the primary Judge had erred in his finding that entry for the purposes of obtaining signatures on a petition in support of a majority support determination was not authorised under s 484.

The Full Court reviewed ss 484, 501 and 502 in light of the s480 right of entry objects provision, which includes the object of creating a framework which balances the interests of union officials to access the workplace to investigate suspected contraventions of the Fair Work Act, the interests of workers to receive information from these officials, and the right of employers to go about their business without undue inconvenience.

The Full Court found that the ruling at first instance misunderstood the nature and purpose of the permitted discussions:

"Discussion is a means to an end. It is not a course in which one partakes solely for its own sake; rather, it is a medium that is engaged in order to achieve some other objective…

When considering the purpose for which entry on to premises is sought under s 484 of the FW Act, it is artificial to separate the holding of discussions from the realisation of the broader purpose or objective to which those discussions are directed. Entry that is sought so that discussion may be held necessarily entails entry for the purpose of achieving whatever is hoped to be achieved by holding them."

The court allowed the appeal and remitted the decision to the primary judge for further hearing.

## What does this mean for employers?

This decision indicates a willingness of the Court to take a broad approach to what constitutes 'discussions' under the legislation, and that union organisers may use their s 484 right to secure further commitments from union members.

# Secure Jobs Flexible Working Arrangement Rulings

In two recent decisions the Fair Work Commission has provided guidance on the interpretation and application of the new Secure Jobs Flexible Working arrangement provisions introduced in June 2023.

The first case *Jordan Quirke v BSR Australia Ltd [2003] FWCFB 209* (10 November 2023) was primarily concerned with jurisdiction issues and whether a request was valid. The second case, *Charles Gregory Gregory v Maxxia Pty Ltd [2023] FWC 2768* (16 November 2023) was a more substantive decision as to the meaning of 'disability' and what is reasonable for an employer to require from an employee.

## *Jordan Quirke v BSR Australia Ltd [2023] FWCFB 209* (10 November 2023)

*Quirke* was the first decision of the Fair Work Commission Full Bench to use the Secure Jobs flexible work dispute provisions. The decision confirmed the "five discernible requirements" any claim must meet to be resolved by the Commission. It was determined the worker's claim failed at the first hurdle for failing to provide adequate evidence relating to an alleged disability.

### The legislation

For context, the new s65A and s65B provisions outline, respectively, how employers must respond to flexible work arrangement requests and how disputes are to be resolved.

Section 65A outlines the requirement that an employer provide a written response to the request within 21 days of the request being made, and what must be included within the response. It further outlines circumstances in which an employer may refuse a request and the steps an employer must take before making such a refusal, including consultation with the employee.

Section 65B(2) provides that the parties must attempt to resolve the dispute at the workplace level before a referral to the FWC can be made.

The 'five discernible requirements' under s65 that must be satisfied for a s 65(1) request to be valid are:

1. One of the enumerated circumstances under s65(1A) must apply to the employee. The present tense 'apply' connoting that the circumstance must be current as opposed to anticipated.

2. The requested change must be 'because of' the relevant circumstance.

3. A non-casual employee must have a minimum service period of 12 months prior to making the request.

4. The request must be in writing.

5. The request must set out the details of the change sought and the reasons for the change.

In keeping with the effective applicable date of the provisions, the FWCFB identified the incidental requirement that a request must have been made after 6 June 2023.

### The decision

A part time customer experience coordinator for furniture and electrical products retailer BSR Australia Ltd requested a change to her roster after her GP had recommended changes to help resolve her insomnia and anxiety.

In early 2023 the employee informally advised her team leader of these recommendations. She followed up with an email in April suggesting an 'ideal' roster, before sending a Microsoft Teams message in August requesting further conversations.

BSR refused the request on August 30.

The FWCFB found that because the worker's request made in April was not in writing, " it does not meet the jurisdictional requirements for a request under s65(1) which can be the subject of arbitration under s 65B(4)(b)." The employee's email was a request prior to the effective date of the provisions, and the Microsoft Teams message was found to be merely a request for discussion. The court also found the written communications insufficient as neither referred to the circumstantial requirements under s 65(1A).

Finally, the FWCFB indicated that there was difficulty substantiating a disability claim. Despite the GP's suggestion that the employee's roster was contributing to insomnia and anxiety, there had been no formal diagnosis of any anxiety related disorder which limited her "movements, activities or senses."

## *Charles Gregory Gregory v Maxxia Pty Ltd [2023] FWC* (16 November 2023)

This subsequent case has provided further substantive guidance on what constitutes a reasonable response to a request for flexible working arrangements and what may constitute a disability. A worker with irritable bowel syndrome sought to use the Secure Jobs flexible working provisions to resist a return to the office 40% of the time. The FWC rejected his claims.

# Secure Jobs Flexible Working Arrangement Rulings - Continued

## Facts

Mr Gregory is an advisor at salary packaging company Maxxia Pty Ltd. During his employment he has predominantly worked form home due to the Covid-19 Pandemic. Maxxia recently introduced hybrid working guidelines which require employees to work at least 40% of their hours from the office.

Mr Gregory submitted a request to remain working exclusively from home. In support of this request, he advised that he was seeking a custody arrangement in which he would care for his school-aged child for a week, every second week. He also submitted documentation from an online medical provider claiming he was suffering from 'a situational crisis' and 'inflammatory bowel disease'.

Maxxia responded to this request a day later proposing a graded return to the office.

In rejecting the advisor's request, Maxxia considered the following factors:

- The low 'daily productivity' level of the employee
- An apparent failure of current support measures to increase productivity.
- The high expectations of clients and the financial implications for Maxxia where contractual obligations are not met.
- A need for the advisor to contribute to workplace culture.
- A belief that the advisor was 'struggling mentally', and that adequate support could not be given should the employee continue to work from home.

## Decision

Commissioner Platt found no jurisdictional issues arising in the circumstances, and that the request was validly made in line with s65.

In relation to Mr Gregory's disability claim Commissioner Platt found that:

> *"Whilst I accept that Mr Gregory's condition would be an inconvenience, I am not persuaded that it is capable of being described as a disability in the normal context of that word. The medical evidence provided is insufficient to persuade me that Mr Gregory has a disability for the purposes of s65(1A)(c)."*

Whilst there was no dispute that Mr Gregory was a parent, a valid consideration under s65(1), the nexus would only be triggered once the custody arrangement was agreed and active.
In conclusion Commissioner Platt found that it was reasonable for the business to require Mr. Gregory to work from the office 40% of the time:

"I accept that it is desirable for there to be face to face contact within workforce teams. I accept that a face-to-face presence would allow for observation, interaction and (if necessary) coaching to improve Mr. Gregory's productivity and provide him with greater support. I accept that Mr. Gregory's knowledge and experience could be more easily accessed by less experienced team members on a face-to-face basis."

## What does this mean for employers?

Quirke indicates that the FWC will only intervene to settle disputes resulting from requests to change working conditions if the request is valid under s 65 and there has been a genuine attempt to resolve the dispute at workplace level. It is important for employers to be aware of what is a valid request and their obligations in responding to requests for changed working conditions to ensure that they make genuine attempts to resolve issues at the workplace level.

Gregory demonstrates that it may be reasonable in certain circumstances to refuse or adjust a request for flexible work. It is important that employers communicate the reasons for the refusal and continue discussions with employees.

# Enterprise Agreement 'coverage' and 'application'

*Murtagh v Corporation of the Roman Catholic Diocese of Toowoomba [2023] FCAFC 172*

## Facts

Mr Michael Murtagh and Mr Francis O'Mara were employed by Toowoomba Catholic Education. Mr Murtagh resigned effective 6 December 2019; Mr O'Mara resigned effective 31 December 2019.

Mr Murtagh and Mr O'Mara's jobs came within the coverage clauses of *The Catholic Employing Authorities Single Enterprise Collective Agreement – Diocesan Schools of Queensland 2019-2023* and *The Catholic Employing Authorities Single Enterprise Collective Agreement – Religious Institutes Schools of Queensland 2019-2023* respectively:

"Any employee of the employers identified in clause 1.4.1 who is covered by the Educational Servies (Teachers) Award 2010 and the Educational Services (Schools) General Staff Award 2010 and who is employed in a school accredited by the Non-State School Accreditation Board (NSSAB) of Queensland or its successor."

Both agreements came into operation on 2 December 2020.

The previous applicable EAs had a nominal expiry date of 30 June 2019.

Whilst both new EAs stated that they would come into operation seven (7) days after approval by the FWC, each contained the following clause:

Cl 1.2.3 Where this Collective Enterprise Agreement specifies an earlier operative date in relation to a particular provision, then that provision shall operate form that date for ***all applicable employees*** at that earlier date. (emphasis added)

One such clause was the salary increase clauses:

Cl 4.2.1(a)(i) 2.5% of the applicable salary rate operative as of the first full pay period on or after 1 July 2019.

## Issue

Whether the construction of the commencement clauses, in conjunction with ss 51-54 of the *Fair Work Act 2009* (Cth), means that an entitlement to arrears only applies to employees still employed when the agreement comes into operation.

## Judgment

The Court considered the coverage clauses of both EAs and found it uncontroversial that each applicant fell under the class of employees included.

The court considered ss 51-54 of the FWA and the earlier decision of *Aldi Foods Pty Ltd v Shop, Distributive & Allied Employees Association (2017) 262 CLR 593*, and found that in certain circumstances an EA may 'cover' an employee prior to it 'applying' to an employee.

However, at [33] the court was not satisfied that statements made in *ALDI Foods*:

> *"made reference to the effect, if any, of the FWA provisions mentioned in respect of a clause in an enterprise agreement which even purported to have backdated operation to "applicable employees" in relation to pay rates for particular employees."*

To satisfy this question the court considered s 58(2) of the Fair Work Act:

(2) if:

(a) an enterprise agreement (***the earlier agreement***) applies to an employee in relation to particular employment; and

(b) another enterprise agreement (***the later agreement***) that covers the employee in relation to the same employment comes into operation;

…

(e) if the earlier agreement has passed its nominal expiry date – the earlier agreement ceases to apply to the employee when the later agreement comes into operation, and can never so apply again.

Accordingly, at [44]:

> *"In my view, it is not inconsistent with s 58(2)(e) of the FWA to construe that provision as giving force and effect to those commencement date clauses as soon as each enterprise agreement came into operation."*

# Enterprise Agreement 'coverage' and 'application' - Continued

*Murtagh v Corporation of the Roman Catholic Diocese of Toowoomba [2023] FCAFC 172*

As to the dichotomy of covers versus applies at [45]:

> *"What s 54 brought into operation on 2 December 2020 were enterprise agreements which provided, materially, for staged pay rate increase for work performed by employees in particular teacher employments covered by those agreements commencing on 1 July 2019 … only on and from 2 December 2020 were obligations to pay and entitlements to receive those pay increases created in respect of work performed in particular employment, a particular "job", on and from 1 July 2019."*

Furthermore, such retrospective pay arrangements were considered within the explanatory memorandum of the Fair Work Act (Para 196):

> *The terms of an agreement can only have any effect when an agreement commences operation. However, this does not preclude an agreement from including a term that has retrospective effect (eg a backdated wage increase).*

In conclusion the court found at [48]:

> *"In neither agreement is there an overt intention to discriminate in terms of coverage as between teachers who were employed as at 1 July 2019 but who cease employment before each agreement comes into operation and those who remain employed when the agreement comes into operation. And it would be a distinctly anomalous construction both of the coverage clause and especially the plain text of the operative date clause to construe each as so discriminating."*

## Commentary

The court recognised the larger industrial relations issue at play at [18]:

> *"Behind these relatively modest amounts of alleged arears lurks an industrial law issue concerning entitlements, if any, to back pay after enterprise agreements come into operation of considerable systemic importance and related difficulty. The observation (at [58]) of the learned primary judge that the provision in each commencement clause for earlier operation "could have been more clearly expressed" is, with respect accurate and a model of understatement."*

The reference to "applicable employees" in cl 1.2 of the EA provided a broad scope for interpretation such that, in retrospect, drafters would have been astute to define such "applicable employees". However, given the court's consideration such provisions should be interpreted with a consideration of "fairness".

As Court noted that the coverage clause could have been expressed in a clearer manner, in this case it is possible that a different conclusion may have been reached if the clause was so expressed. The case does highlight, however, that careful drafting will always be crucial to ensure that an enterprise agreement is not ambiguous, and reflects the intentions of the parties.

# ‘Objective’ Reasons Incorrectly Applied to Adverse Action

*Monash Health v Singh [2023] FCAFC 166*

In an appeal from the Federal Circuit and Family Court, the Full Court of the Federal Court has overturned a decision in which it was held that Mr Singh, a former employee of Monash Health, was terminated because he made numerous complaints in relation to his employment, took extended personal leave, and commenced proceedings in the Fair Work Commission (**FWC**). While it was alleged that termination for these reasons constituted adverse action, and this was originally held, the decision was overturned by the Full Federal Court for numerous reasons, and the court found that the case should be reheard.

## Facts and Background

After being employed as a medical librarian from 1996, Mr Singh’s employment was terminated on 7 January 2020 by Monash Health stating that his position had become redundant due to a restructure.

Mr Singh commenced proceedings against Monash Health, alleging that both the restructure and the redundancy were ‘shams’, and that they were instead made up to terminate his employment. Mr Singh alleged that Monash Health terminated his employment for the reasons that he made 16 complaints about his employment, and took two periods of personal leave. This was in addition to Mr Singh commencing proceedings in the FWC in 2018. These proceedings were later resolved by reclassifying him from a Grade 1 medical librarian to a Grade 2 medical librarian.

In the initial decision, the reasons for termination that were alleged by Mr Singh were identified in his application, and the primary judge took these reasons to be sufficiently precise ‘for Monash Health to know the case that was being put against it.’ Based on this, the primary judge held that this was sufficient for the onus of proof to be placed on Monash Health to prove that they did not terminate Mr Singh due to a reason that constituted adverse action.

Monash Health claimed in its appeal that the reasons in Mr Singh’s application were not identified to a sufficiently precise extent, such that the onus of proof could not be placed on Monash Health.

Following this, it was then up to the primary judge to determine whether the presumption that the action was taken for a reason that constituted adverse action was rebutted successfully.

However, it was submitted by Monash Health in their appeal that this was not considered by the primary judge, and instead the primary judge considered Mr Singh’s arguments as to why it should not accept Monash Health’s evidence.

Further, by applying an ‘objective test’ to determine the reasons for the dismissal, rather than Monash Health’s subjective reasons as supported by their witnesses and evidence, Monash Health claimed that the primary judge fell into error.

On those bases, Monash Health argued it was then not open to the primary judge to conclude that the alleged reasons that constituted adverse action were the reasons for termination.

## Decision

The decision on appeal involved the application of s361 of the FW Act, which involves the onus of proof with respect to whether reasons for particular action constitute adverse action.

S361 states that if ‘it is alleged that a person took … action for a particular reason, or with a particular intent,’ and ‘taking that action for that reason would constitute [adverse action],’ then ‘it is presumed that the action was … taken for that reason or with that intent, unless the person proves otherwise.’

However, prior to the consideration of whether this presumption was successfully rebutted or not, it was first considered whether the reasons alleged by Mr Singh were sufficiently precise in his application. It was held in a prior Full Court decision that two pre-conditions must be met before the presumption under s361 arises, which are that firstly, ‘the particular reason … for the contravening action must be alleged in the application,’ and secondly, that ‘taking that action for that reason … would constitute a contravention’.

As such, when considering Mr Singh’s originating application, the First Employment Complaint was claimed to comprise numerous complaints to a number of staff. This was in addition to 13 other complaints, and other forms of ‘unfavourable treatment’ which also amounted to adverse action.

However, as the First Employment Complaint was the only action that pre-dated the initial restructure proposal,

# ‘Objective’ Reasons Incorrectly Applied to Adverse Action - Continued

*Monash Health v Singh [2023] FCAFC 166*

none of the other alleged action was found to be able to constitute adverse action, as it occurred after the restructure proposal.

Additionally, while the First Employment Complaint comprised three emails that were sent between June 2016 and July 2017, ‘it was only during Mr Singh’s closing argument … that [Mr Singh] identified [these] three emails said to comprise the First Employment Complaint.’ Therefore, it was held by the Full Bench that Monash Health’s onus of proof was not enlivened due to Mr Singh’s complaints not being sufficiently precise.

Following this, regarding whether the primary judge failed to assess whether Monash Health’s onus of proof was successfully rebutted, it was held that ‘there was no independent determination … of whether, by reference to each [reason], the statutory presumption was rebutted.’ Rather, it was found that the primary judge dealt with Mr Singh’s arguments that the Court should not accept Monash Health’s denials that it terminated his employment because of his complaints, the FWC proceedings, and his taking of leave.

Further, the primary judge determined that Monash Health could ‘at least theoretically have been motivated by [Mr Singh’s] complaints to engineer a termination’ of Mr Singh. Although, in the conclusions, this theoretical possibility led to an finding that Monash Health actually was motivated by Mr Singh’s complaints, although with no further discussion or consideration of this matter. Therefore, the Full Court held that this later finding could not have ‘easily [been] reconciled with her Honour’s earlier tentative observations.’ Furthermore, the Full Court found that the primary judge regrettably failed to ‘evaluate the credibility of [Monash Health’s] denials against each of [Mr Singh’s] asserted reasons by reference to all of the … evidence’.

Lastly, on the third basis of appeal, this involved whether the primary judge applied an ‘objective’ test to assess the merit, validity, and fairness of Monash Health’s reasons for termination. This was argued to be contrary to the test set out by the High Court in Barclay, which requires assessing whether the relevant Monash Health employees who made the restructure decision had subjectively acted for the reasons they each gave.

Whilst the primary judge referred to the legal principles from the case of Barclay, it was held to be ‘clear from her reasons that she did not in fact apply this approach.’ This was due to the primary judge ‘applying an erroneous “objective” test as to “whether it was necessary to dismiss” Mr Singh’.

Further, while it was necessary for the primary judge to make an assessment as to the reliability of the evidence, in particular the evidence of Monash Health’s witnesses, ‘here, the primary judge gave primacy to her own view … about whether or not Mr Singh’s dismissal was necessary.’

Overall, the findings of the Full Court in relation to the 3 grounds of appeal discussed were that Mr Singh’s submissions were not sufficiently precise to place the onus of proof on Monash Health to disprove that their reasons for dismissing Mr Singh did not constitute adverse action; that the primary judge did not separately assess whether Monash Health discharged the onus of proof in respect of each alleged reason; and finally that the primary judge applied an ‘objective’ test to determine the reasons for Mr Singh’s dismissal, rather than making a finding as to Monash Health’s actual reasons.

This led to the decision of the Full Court that the matter be remitted to the Federal Circuit and Family Court of Australia for a rehearing.

## What does this mean for employers?

This case provides a good clarification of the relevant legal principles involved in assessing whether an employer took adverse action against an employee. These involved the relevant onuses of proof established by s361, and the test to be applied in assessing the evidence and making a finding in relation to the reason for taking alleged adverse action.

Therefore, the appeal confirms that it is not an ‘objective’ test that is applied in determining the reason, but rather a ‘subjective’ test to analyse the actual reasons for taking the action.

# Application for Injunction to Restrain Former Employees

*2nd Chapter Pty Ltd & Ors v Sealey & Ors [2023] VSC 599*

This case, heard in the Victorian Supreme Court, involved an application for an interlocutory injunction by a financial advisory firm, Escala Pty Ltd (**Escala**), its wealth management services provider, 2nd Chapter Pty Ltd (**2nd Chapter**), and the parent company of Escala, Focus Financial Partners LLC (**Focus**). The injunction was only sought against two of Escala's former financial advisors, Mr Sealey, and Mr Vickers-Willis.

This case focused solely on the interlocutory injunction application, which came before the Court as an urgent application.

## Facts and Background

Mr Sealey and Mr Vickers-Willis were initially financial advisors and shareholders in Escala, although in February 2019, both Mr Sealey and Mr Vickers-Willis agreed to be bought out by Focus. As part of this purchase, Mr Sealey and Mr Vickers-Willis entered into both a Share Purchase Agreement and a Shareholders Agreement, which involved the acquisition of shares in 2nd Chapter. 2nd Chapter, with shareholders Mr Sealey and Mr Vickers-Willis, then subsequently entered into a Management Deed with Focus, where 2nd Chapter was to provide wealth management services to Escala.

In addition to alleging that, but for the granting of the interlocutory injunction, both Mr Sealey and Mr Vickers-Willis intended to breach restraint of trade clauses of these 3 agreements, the plaintiffs also allege that Mr Sealey and Mr Vickers-Willis intended to breach a restraint of trade clause in their Employment Agreements.

Each of these clauses involved restraining the defendants in relation to negatively affecting Escala's business, such as by soliciting, canvassing, approaching, encouraging, enticing any person or entity who was or is a client of Escala, to cease doing business with them.

6 months prior to both Mr Sealey and Mr Vickers-Willis giving notice of their intention to resign from Escala, and as shareholders of 2nd Chapter, their former colleague, Mr Allen had resigned and commenced employment with LGT Crestone Wealth Management Ltd (**LGT Crestone**), a competitor of Escala.

It was then published in a news article that these three former Escala employees had moved to LGT Crestone. Mr Vickers-Willis subsequently confirmed, through his solicitors, that he intended to commence work at LGT Crestone, although Mr Sealey did not specifically state whether or not he intended to commerce work at LGT Crestone.

Proceedings were commenced against Mr Vickers-Willis and Mr Sealey to restrain them from breaching the restraint covenants in each of the relevant agreements.

## Decision

In relation to granting an interlocutory injunction, the principles were set out as follows:

- Firstly, it must be considered whether the plaintiffs have made out a prima facie case that there is a probability that the plaintiffs will be entitled to relief at trial.
- Secondly, it must be considered whether the inconvenience to the plaintiff of not granting the injunction would outweigh the inconvenience which the defendant would suffer if an injunction was granted.
- Further, the plaintiffs must show that damages would be inadequate as a remedy, were the injunction not granted.

The court also noted that, for the purposes of considering whether there was a prima facie case, it must take into account the principles regarding enforcement of covenants in restraint of trade. These are firstly, that the party who would receive the benefit of the covenant carries the onus of proof in justifying the restraint, and secondly, that 'the restraint is reasonable …, in the sense that it affords not more than adequate protection of legitimate interests'.

Reasonableness, in regard to protecting legitimate interests, is assessed at the date of entry into the restraint, and it involves doing 'no more than is reasonably necessary to protect the legitimate interest in its duration or extent.'

However, for the purposes of restraint clauses imposed on employees, it is well established that employers have legitimate interests in protecting confidential information, such as trade secrets, and customer connections.

Waller J first considered whether, with respect to the enforceability of the restraint covenant, there was a serious question to be tried, in the sense of the plaintiffs having a prima facie case. In relation to this matter, it was found that there was not a serious question to be tried for enforceability of the restraint covenants in any of the 4 agreements. This was reinforced by the fact that each restraint operated under 'different circumstances, for different periods of time, and not in a consistent and coherent manner'.

# Application for Injunction to Restrain Former Employees - Continued

*2nd Chapter Pty Ltd & Ors v Sealey & Ors [2023] VSC 599*

For all of the 4 agreements, it was firstly stated the restraints are presumed to be void and unenforceable unless they are reasonable in the interests of the parties, and the public. Further, it was found that the restraints are unreasonable in the public interest, as they would have the effect of preventing clients or former clients of Escala from taking their business to LGT Crestone for any reason.

Although, for various reasons adapted to each specific agreement, it was also held that the restraints were not reasonable between the parties to the agreements, and would not be so even if a less restrictive geographical area was adopted to apply, such as Sydney and Melbourne only. For example, in the employment contracts, the reasons that it was held to be unreasonable were because there was 'no nominated commencement date for the restraint period', the restraint applied to all of Escala's current clients, regardless of whether they had dealings with Mr Sealey or Mr Vickers-Willis, and the 'restraint applies to any former client of Escala,' and would operate to prevent the two advisors from approaching one of these clients who had left Escala long ago, of its own accord.

Beyond this, in relation to the balance of convenience of granting an injunction versus not granting the injunction, it was held that damages were likely to be adequate as a remedy if the injunction were not granted, as it would be readily ascertainable as to the amounts that Escala would have received from clients that it may lose. However, if the injunction was granted, then both Mr Sealey and Mr Vickers-Willis would be unable to work in their profession, and their families would be without an income to support their monthly expenses of at least $30,000 and $24,000, respectively. Given this, and the fact that any continuing restraint would be uncompensated, Waller J found that refusing to give the interlocutory injunction carries 'the lower risk of injustice'.

As such, the court refused to grant an interlocutory injunction.

## What does this mean for employers?

This decision highlights that even where a restraint clause may exist in an employment contract, unless very specific in its operation, it is likely to be unenforceable and void. As such, in applying restraint of trade clauses to employees, it should be precisely considered as to why it is necessary to protect the employer's legitimate interests, and in its duration and extent, do no more than is reasonably necessary to do so.

As the festive season approaches, we extend warm wishes to you and your loved ones. May this holiday season bring you joy, peace, and the opportunity to rejuvenate for the challenges and triumphs that the coming year holds.

Brian Cook
and the team at SIAG