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sbm

EMPLOYMENT ▪ HEALTH ▪ EDUCATION ▪ SPORTS

Welcome to another edition of our client newsletter.

Some great things have been happening lately at SBM. We have joined L&E Global, an international alliance of premier employment law firms from around the world.

Membership is by invitation only, with only one firm being selected from each country. It was therefore a real honour to be selected as New Zealand's representative. Being part of L& E Global ensures that we can stay on top of labour law developments from around the globe. It also means that if any of our clients expand their global reach, we can put them in contact with the very best employment lawyers from around the world.

We've also picked up a number of new clients including one of the world's biggest brands and were delighted to recently be named "Labour and Employment Law Firm of the Year – New Zealand" by respected international publication LAWYER MONTHLY.

And we have employed an outstanding new Associate, Aimee Credin. You can read more about Aimee later in this newsletter.

We also set out some important information on when and how to use restraints of trade, we cover off the perils of dealing with long term employee absence, and summarise an important redundancy case that affects all employers.

IN THIS ISSUE:

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Less is more

MANY PEOPLE SEEM TO BELIEVE RESTRAINTS OF TRADE AREN'T "WORTH THE PAPER THEY ARE WRITTEN ON." HOWEVER, THAT ASSUMPTION IS OFTEN COMPLETELY WRONG.

A restraint of trade can offer vital protection to an employer if used correctly and more and more frequently, the Employment Relations Authority and the Employment Court are upholding restraints and injuncting those who breach them.

The key is always in the drafting. That is because restraints are treated at law as void and unenforceable **unless** the restrictions are reasonable and protect a genuine proprietary interest. That means an employer has to carefully consider what protection is actually required and tailor the clause to meet that need and no more.

The most common mistake employers make is to make the restrictions too harsh. This just invites an employee to treat the restraint as unenforceable, and it opens the door for our courts to strike out the restraint as unlawful.

Restraint of trade clauses typically fall into the following categories:

- Restraints against competition
- Restraints against soliciting clients or suppliers
- Restraints against soliciting other employees or contractors

Restraints that prevent an employee from working for a competitor, or in an industry are the hardest to enforce – and should be used sparingly. Restraints that prevent employees from soliciting clients or staff are generally easier to uphold, as they are less intrusive and more likely to be "reasonable."

The starting point however, will always be, is this restraint necessary? The employer needs to be able to show that, if not restrained, the departing employee could unfairly compete with it and that the restrictions simply give the employer time to prepare for this level of competition.

The court will look at a range of factors in testing whether the restraint is genuinely needed. These include the nature of the employer's business; the position and seniority of the employee; the degree of customer contact and opportunity for developing personal influence over customers; and the type of information the employee had access to.

Then, if it accepts that some restrictions are needed, it has to assess if the restrictions are reasonable. Typically that means examining the reasonableness of the time period and geographic area, as well as the impact of the restrictions on the individual.

A restraint will only be reasonable where the employee has received something for it whether it is the offer of employment itself (if it is in the initial employment agreement) or a salary increase or separate payment.

So, when thinking about the content of these clauses, consider **who**, **what**, **where** and **when**:

WHO »

Which of your employees should be restrained? Who has close relationships with key customers or suppliers? Do they have influence over them? Could they unfairly compete if they left? Remember, you should not attempt to restrain everyone indiscriminately.

WHAT »

What are you seeking to protect? Relationships, information, products or pricing? Or is it the poaching of key staff? Remember, only protect what you need to and what is legitimately yours to protect.

WHERE »

How far should the restraint extend? Auckland, North Island, New Zealand, Australasia, the World or a two kilometre radius? What is the reality of your operation? Where did this person work? Remember, the restrictions must be reasonable.

WHEN »

How long should the restraint last? Three months, six months, two years? How long do you need to effectively communicate a change in personnel and build or rebuild relationships? This very much depends on all the other factors set out above. Often the broader the restraints, the shorter the timeframe should be for enforceability.

The key though, is to tailor the restraint to the individual, and never to go for too much – less is often more.

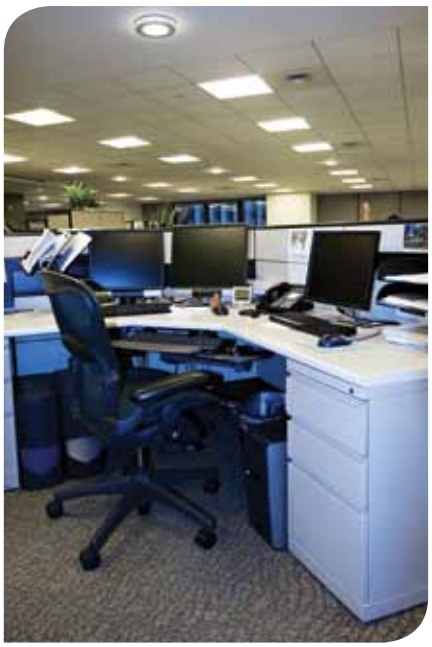
Dealing with long term employee absences ~

Coping with absent employees due to the winter chills and ills is a necessary evil, particularly at this time of the year. Fortunately, for most businesses, this is only a short term inconvenience. However, dealing with long term employee absenteeism, particularly when an employee has been off work for a lengthy period can be tricky.

when is enough, enough?

Every employer has an obligation to be fair and reasonable when dealing with all employees but what does this mean when dealing with long term absences? Here are some key rules:

- The employee first has to receive his or her paid sick leave entitlement under the employment agreement, which can't be less than the minimum entitlements set out in the Holidays Act. If the employee has been sick for a prolonged period, the employer can usually require that the employee provides medical certificates for this absence, at their own cost. However some employment agreements contain benefits that are more generous to employees than the Holidays Act, so always check the employment agreement first.
- The employer needs to try to open up a good line of communication with the employee. The employee should be asked to keep the business regularly up to date, and to provide enough details of their sickness/injury so the employer can understand the situation and likely return date.



- If the employee is on ACC, the employer will also need to liaise with the ACC case manager allocated the matter.
- If the sick leave is exhausted and the absence is putting a strain on the business, then the employer must still try to cope and adjust its operations to the extent reasonably possible.
- Eventually though, an employer may come to the point where it considers it cannot keep the job open any longer. When that point is reached will vary from case to case and depends on a whole range of factors. There is no "one size fits all" here. However before dismissal for medical incapacity will be lawful, the employer should have considered factors such as the length of the absence; the effect it has been having on the business; the importance of the role; the ability to find temporary coverage; the employee's prospects for recovery and whether the injury or illness was work related. Once all of these issues have been considered and discussed with the employee, the employer may be in a position to issue a deadline that if the employee does not return by a set date, then the employment will need to be terminated. At that point, you can say **"enough is enough."**

The key is to keep the lines of communication with your employee open, so that all decisions are made after consultation and with all information available.

Employee requests for information in a restructure

Last year, the Employment Court issued an important decision about the disclosure of information in a restructure (Vice-Chancellor of Massey v Wrigley & Kelly).

Since then, it seems just about every lawyer or advocate who is acting for an employee in a redundancy, is relying on the Wrigley decision, to demand the employer provides more information about its proposal.

So what was this case really about?

Wrigley and Kelly had both been subject to a restructuring process and had applied for new positions at Massey. They were unsuccessful and sought access to documentation created during the selection process including, amongst other things, the selection panel's notes (including scoring sheets) and information relating to other candidates.

There were two fundamental problems for Massey University with this request. The first was that the University had told the selection panel (who in some instances were colleagues of Wrigley and Kelly) that it considered the process confidential so that they would be "open" with their opinions. The second was that a portion of the information requested had not been recorded in writing. The University therefore refused to provide the information on the basis that it simply did not exist, and/or that it was confidential.

The case focussed on an employer's duty of good faith which includes providing access to information relevant to the continuation of an employee's employment. The exception to this obligation is where the information is genuinely "confidential" and where there is "good reason" to maintain that confidentiality.

The Court found that the information requested should have been provided to Wrigley and Kelly, and rejected the argument that the Privacy Act limited the duty to disclose. Although the Court appeared to appreciate that some of the information was confidential, it found that it should be disclosed as there was no "good reason" to uphold that confidentiality.

Significantly, the Court also decided that relevant information is not limited to that information which is written down but may in fact include that information "in the minds of people". That meant the employer also had to document and disclose that information if it was relevant.

The upshot is that employers need to be very careful about promising that selection decisions are confidential, as the duty to disclose this information to the employee may override that obligation. Employers also need to understand that ideas, thoughts and plans around the restructure and selection of staff may need to be disclosed, even if it doesn't yet exist in writing. If that information isn't written down, an employee can still request that the information be documented and provided.

AIMEE CREDIN
ASSOCIATE

AIMEE IS AN ASSOCIATE AT SWARBRICK BECK MACKINNON.

She completed a Bachelor of Laws and Bachelor of Arts and was admitted as a Barrister and Solicitor in 2005. Prior to joining SBM Aimee worked as a Junior Barrister for a Queen's Counsel where her work encompassed all aspects of civil litigation primarily in medico-legal litigation. She has over seven years of litigation experience appearing as counsel in all levels of the courts as well as numerous appearances before specialist Tribunals including the Employment Relations Authority.

Aimee also worked on instruction from a substantial international indemnity organisation where she gained wide-ranging experience in the areas of employment, human rights, privacy, Accident Compensation, defamation and commercial law.

Aimee has a real passion for employment law and her extensive litigation experience makes her a great asset for the firm and resource for our clients.