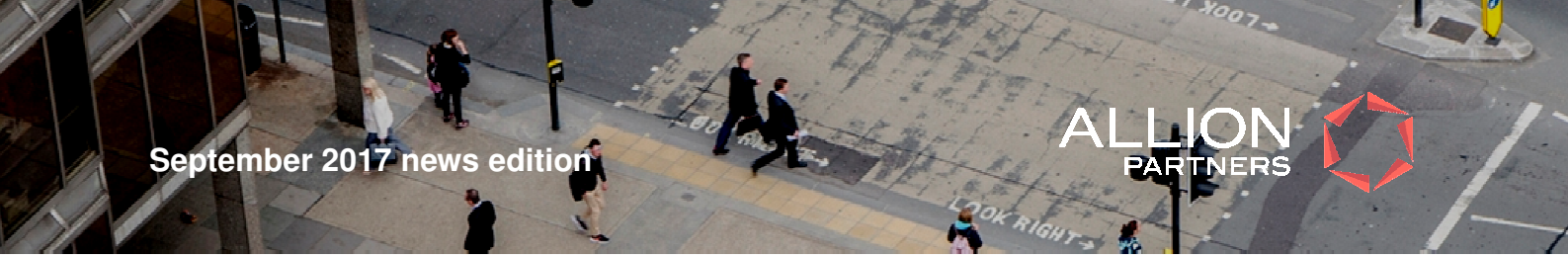


EMPLOYMENT, WORKPLACE, HEALTH & SAFETY LAW

In our September update we look at:

- **RESTRAINT OF TRADE**: Is a four year restraint period reasonable?
- **ENTERPRISE AGREEMENT COVERAGE:** Do Enterprise Agreements cover prospective employees?
- **UNFAIR DISMISSAL:** Does a reduction in roster shifts amount to dismissal?

UPCOMING EVENT 13 SEPTEMBER – *WORKPLACE INVESTIGATIONS*

FOUR YEAR RESTRAINT OF TRADE CLAUSE CONSIDERED APPROPRIATE

The Victorian Supreme Court has confirmed a four year restraint period is reasonable after taking into account the sale of the employee's company stake and his continued employment at the company.

Case Brief: ***Southern Cross Computer Systems Pty Ltd v Palmer (No 2) [2017] VSC 460***

The IT Specialist (the **employee**) sold his 40% share in Southern Cross Computer Systems Pty Ltd (the **Company**) for $3.5 million to Ingenio Group Pty Ltd (**Ingenio**) in June 2016 as part of a Share Sale Agreement between the parties. The employee continued as a key employee of the Company, and despite a 4 year restraint period, worked one day a week with Blue Connections Pty Ltd (**Blue Connections**), a Company competitor.

The Company sought an injunction to prevent the employee from providing services to Blue Connections, soliciting other employees and retaining clients of the Company. The Victorian Supreme Court (the **Court**) upheld the four year restraint period contained in the Share Sale Agreement (the **Agreement**) and granted an injunction against the employee.

The employee contested the definition of "restricted business" in the Agreement stating Blue Connections did not constitute a restricted business. However, Justice McDonald stated the plain meaning of the phrase was confined to businesses in the IT procurement and management services. He therefore found that Blue Connections was a "restricted business" for the purposes of the Agreement.

The employee also contested the validity of the four year restraint period in the Agreement. However, Justice McDonald considered the maximum restraint period appropriate in the circumstances because the employee remained employed by the Company. Further, the four year term was approved by both parties when entering into the Agreement and Ingenio had paid substantial consideration in the Agreement including the right to restrain.

What does this mean for employers?

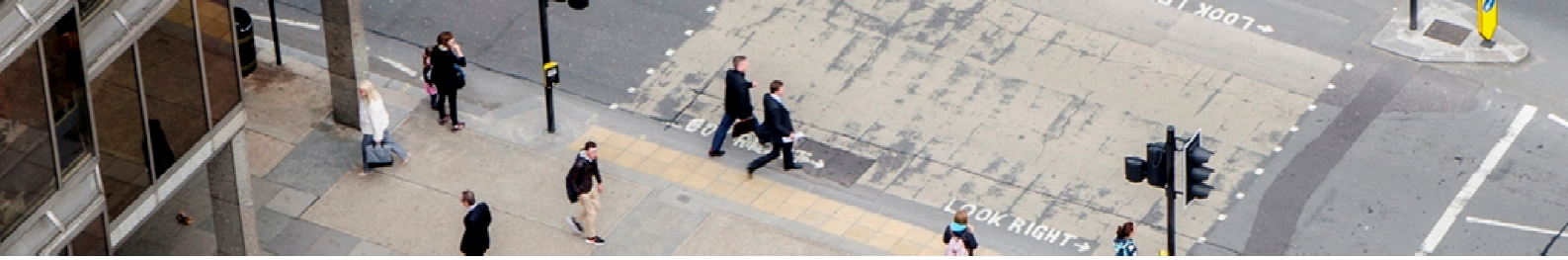
- Factors such as monetary consideration, prior agreements and the existing relationship between an employer and an employee may be considered by a court in construing an employment contract.
- The maximum restraint period may be imposed if the court considers it reasonable to do so.

HIGH COURT ALDI COVERAGE CASE

The High Court of Australia has reserved its decision regarding the Aldi Enterprise Agreement, holding the company failed to show that it was genuinely agreed by employees covered by it.

Case Brief: ***Aldi Foods Pty Limited v. Shop, Distributive & Allied Employees Association & Anor M33/2017*.**

Aldi Foods Pty Ltd (**Aldi**) sought to establish an enterprise agreement (**EA**) for 17 staff members that were to be transferred to the new



South Australian distribution centre. Aldi had requested the staff members to vote on the EA and applied to the Fair Work Commission (**FWC**) for approval.

The FWC approved the EA. The Shop, Distributive & Allied Employees Association (**SDA**) unsuccessfully sought leave to appeal the approval of the FWC. Consequently, the SDA bought an application to the Federal Court on jurisdictional review grounds.

The Federal Court overturned the EA stating the 17 managers were not 'covered' by the EA as required. The Federal Court found in favour of the SDA concluding that the EA should have been classified as a Greenfields (new EA) which required a different procedure to be followed by Aldi and the FWC. The EA was consequently overturned

In January, Aldi was granted leave to appeal to the High Court.

Aldi contended the agreement was not a Greenfields EA because it contemplated employees that would be covered in the future rather than just employers currently working. Aldi relied on the *John Holland* case. The case confirmed that reference to 'covered' in an EA covered 'employees whose employment would come to be regulated by the agreement.'

The High Court has reserved its decision.

What does this mean for employers?

- Employers need to be aware of who the agreement or award is intended to cover when drafting an Enterprise Award or Agreement.

SIGNIFICANT REDUCTION IN SHIFTS AMOUNTS TO REPUDIATION OF EMPLOYMENT CONTRACT

The FWC in NSW found that an employer constructively dismissed an employee when the HR manager informed the employee her shifts would be reduced until she completed further training.

Case Brief: ***Roxana Balgowan v City of Sydney RSL & Community Club Ltd*** **[2017] FWC 3798 (27 July 2017)**

In April, the HR manager of the employer informed the pregnant employee that her 'change box shifts' would be reduced because of nearly $300 in shortfall, poor performance and cash-handling anomalies. She was advised that she would have to undergo training prior to any more shifts and was consequently only rostered for one shift in April resulting in 75% pay reduction.

The employer argued that the employee had stated she would 'go' in the disciplinary meeting. The HR manager consequently sent a letter confirming her resignation.

The employee denied that she had resigned and said the company had constructively dismissed her when they failed to provide her with her regular shifts.

The Commissioner found that the shift reduction amounted to a significant pay cut for 3 months while she retrained. The FWC found the significant change amounted to repudiation of the employment agreement and ordered the employer to pay $13,566 in compensation to the employee.

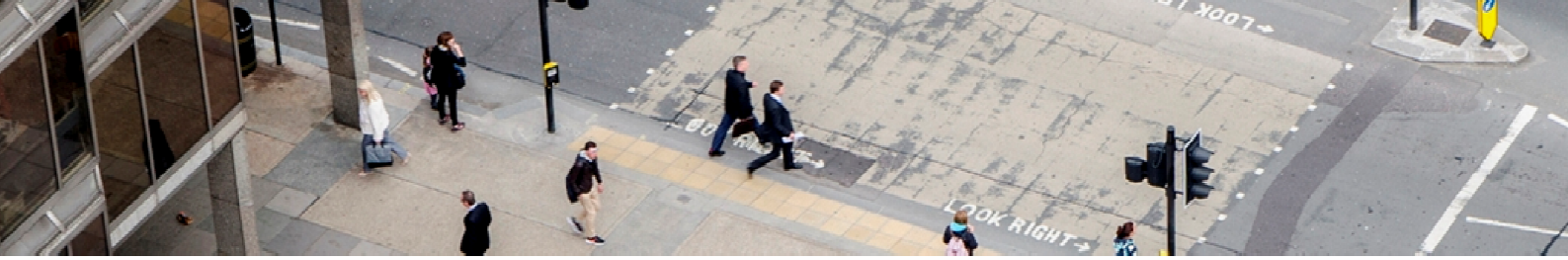
What does this mean for employers?

- Employers should be mindful about reducing hours or shifts of employees until the correct notice and resignation is formalised to avoid inadvertently repudiating the employment contract.

OTHER NOTEWORTHY CASES

- **Worker clears high hurdle for late dismissal**: The FWC has allowed an employee to bring an unfair dismissal claim lodged 164 days late. The FWC recognised that the longer the delay in making an application the higher the hurdle will be for extending the deadline. The FWC commission found in favour of allowing an extension after considering the accumulation of the employees mental illness, initial lack of knowledge about her rights, misapprehension about the FWC investigatory powers and her relatively basic English: ***Yu Duo (Lynda) Lin v Woolworths Limited*** **[2017] FWC 4019 (2 August 2017)**

- **Bullying colleague for union membership valid reason for dismissal:** The FWC has upheld an employer's decision to terminate



an employee after external investigations found the actions amounted to workplace bullying. The employee had encouraged his colleagues to join the AMWU before a union meeting to elect a site delegate. Other employees reported the incident including an allegation that the employee threatened to get another employee sacked and isolate them if they did not join the AMWU. The employer contracted an external legal counsel to conduct an investigation into the employee's conduct which resulted in finding workplace bullying had occurred on site. The processes and procedures that the employer had relied upon were considered appropriate and the commission found that the termination was lawful: ***Anthony King v The Trustee for Bartlett Family Trust T/A Concept Wire Industries* [2017] FWC 3867 (24 July 2017)**

- **United Voice and NUW in Union Merger Discussions**: In the wake of Prime Minister Turnbull's pledge to introduce a public interest test for union amalgamations, United Voice and NUW Unions are in discussions to form a new organisation of up to 170,000 members. The merger would see United Voices' hospitality, childcare, health, manufacturing and community health combined with NUW warehousing, distribution, food manufacturing, diary, cold storage and food related industries.

UPCOMING EVENT

Presentation	Event details	Register
Masterclass – Workplace Investigations This session will cover the latest legal developments to assist you in managing the key aspects of workplace investigations	Allion Partners – Level 9, 863 Hay Street, Perth Wednesday, 13 September 2017 12.15pm for a 12.30pm start to 2.00pm	As places are limited, please RSVP: by Monday, 11 September 2017 rsvp@allionpartners.com

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