

Restraint of trade thwarted by bonus scheme

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Modifications to an employee's incentive scheme and role effectively repudiated his employment contract, leaving his employer powerless to stop him from courting former clients, an appeal court has found.

In mid-2016, accountancy firm Crowe Horwath amended its incentive scheme to defer a portion of its annual bonus payments and distribute them over three years, and introduced a "one best way" policy to standardise management practices in all of its offices.

The managing principal of the firm's Launceston office considered the changes, which included removing the staff management aspect of his role, and their impact on his remuneration and autonomy a breach of his employment contract, and left the company to set up his own advisory firm.

The employer obtained an interlocutory injunction to prevent the employee from breaching a contractual obligation not to service the 89 clients he'd dealt with in the past 12 months, but before Victorian Supreme Court Justice **Michael McDonald**, the employee said the restraint clause should not survive his departure because the employer, in failing to comply with its contractual obligations, had repudiated his employment contract.

In particular, changing its incentive scheme constituted repudiatory conduct, as the firm intended, without any contractual authorisation, to withhold a proportion of his bonus, he claimed.

Justice McDonald accepted the employer breached its employment contract with the employee when it changed the bonus scheme and his role, and said its post-employment restraint of trade clauses were not enforceable because the employer had effectively ended the contract.

The employer appealed, arguing it was the parties' intention that its post-employment restraints "survive the termination of the employment in all circumstances, and for any reason".

But Court of Appeal Justices **David Ashley**, **Phillip Priest** and **David Beach** found a "consistent trend" in case law showing that when an employer repudiates an employment contract, and the repudiation is accepted by the employee, the employer can no longer enforce a restraint of trade.

Further, the bench found no precedent in Australia for enforcing a restraint of trade provision when an employee had ended their contract due to an employer's repudiation.

Restraint itself not unreasonable

The decision, while not entirely surprising, does highlight another layer of restraint-related risk that not all employers are aware of, says [Bespoke](#) special counsel **Ryan Solomons**.

"What's significant about this decision is the Court found the restraint was reasonable – it was a 12-month restraint, and protected a legitimate business interest – [but] because the employer had repudiated the contract, [it] was void," he told HR Daily.

"Employers face huge obstacles ensuring that their restraints are enforceable, and they go to lawyers to help them draft cascading restraints to ensure they can be enforced to protect the employer's business connections... this adds another complexity to the restraint of trade: that an employer has to make sure they are not the one breaching the contract, otherwise it can hold that the restraint is unenforceable."

Solomons notes that parts of the bonus scheme that led to the repudiation were discretionary, and that the employer could change the scheme at any time. But once a bonus had been earned, the employee was entitled to payment.

"What's happened in this instance is the employer changed the rules and postponed payment of that bonus, and the employee then considered the contract having been repudiated."

The repudiation of a contract doesn't render all employee obligations void and unenforceable, Solomons notes. "Certainly things like an employee's fiduciary obligations to keep [employment-related] information confidential... would not be void."

[Crowe Horwath \(Aust\) Pty Ltd v Loone \[2017\] VSCA 181 \(7 July 2017\)](#)

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