

## EMPLOYMENT LAW PERSPECTIVES

The future is looking good

(Oct 05)



To the older among us the prospect of a career in employment law would have seemed bizarre only 15 years ago. Now it is a reality which delivers a steady stream of new work as clients fail to keep up to date with changes in legislation and employment practice. To those who thought the regime here in NZ and Australia was complex, spare a thought for our English and American brethren.

The development of employment law on either side of the Atlantic has been fast and furious over the last 30 years and reflects the different social models; the US version has developed as a natural extension of the ambulance chasing, contingent fee driven tort system exploiting a new marketplace, whereas the Europeans are reflecting a social democratic style of state interventionism. Either way the profession wins! Nowhere is the division clearer than in the way partnership agreements operate in law firms. The recent invasion of the London legal market by adventurous US firms has clearly demonstrated the differences in the two regimes

Most partnership agreements in non US firms contain remarkably similar conditions and covenants in respect of restraint of trade. How these are exercised is, to a great extent, a reflection of national psyche; for example the notion of 'gardening leave' where a partner who announces his/her intention to join a rival and is sent home on full pay for the entire period of notice (6-12 months) is a peculiarly British characteristic. Partnerships want to protect client relationships which may or may not be attached to individuals rather than firms. English courts generally look favourably on a firm's attempts to safeguard client base and goodwill by use of covenants. As a result English partners tend to have much tougher restrictive covenants than staff solicitors, for whom they are generally regarded as unfair (and unenforceable) restraints of trade. Real problems arise where teams of partners and solicitors move together to join another firm. Threatening letters and injunctions are commonly used in attempts to thwart such moves. Costs are enormous and the real possibility of damages arises if injunctive relief is wrongly given. Some desperate firms have gone to ridiculous lengths and sued the new partnership for attempting to induce a partner to breach their contract. There are no winners in these cases as no partner is going to willingly return to work in firm that goes to such lengths.

American firms, who naturally sought to employ 'locals' for their new English offices, were 'gob-smacked' at the turn of events. The American view is quite pragmatic when exposed to the light of day. They see a firm's willingness to sue its former employees and partners as an act of sheer desperation and regard the notion of restrictive covenants in employment contracts as completely immoral and highly unlikely to protect a legitimate business interest. Clients are unlikely to take sides and generally end up at an entirely new firm when a fight breaks out. They tend to not want to get involved in costly litigation about their right of choice in selection of legal adviser.

Turning to another aspect of employment law; compliance. In the NZ and Australian environments, where new regulation is sometimes rejected on moral grounds or as a point of national principle, employment law compliance may well present lawyers with a new profitable service. A recent speaking engagement allowed me to ask the assembled law firms whether their own staff management protocols were fully compliant with new regulation(s). Whilst this is hardly empirical research, fewer than half the firms present were able to confirm that their own compliance met current requirements. If fewer than 50% of law firms are not fully compliant it is a safe bet clients fare much worse. Keeping up to date is a tedious chore and is ongoing. Whether it is the new Holidays

Amendment Act, Parental Leave and Employment Protection Amendment Act, Employment Relations Amendment Act, Smoke-Free Environment Amendments Act, the Criminal Records (Clean Slate) Act, annual updates of contracts and maintaining full compliance in staff relations is beyond the capacity of most clients. However, it is relatively straightforward to set up a standardised amendment package whereby clients who employ staff can 'outsource' the compliance requirements to their law firm. It requires a set of templates, the latest version of a real-time task manager, centralised client records and an online library account. In addition, a keen eye has to be kept on the client's obligations to staff under the terms of the ERA 2000 where corporate restructuring takes place. Tests need to be applied to ensure all 'Vulnerable Workers' (affected by re-structuring or merger/takeover) are identified and notified of their rights. This too can be managed as part of an outsourced service.

For assistance on how to set up/manage an employment law compliance outsourcing service for clients call our office on (09) 520 5360 or email [co-jones.pmf@clear.net.nz](mailto:co-jones.pmf@clear.net.nz). A law firm with 100 clients who employ staff should be able to generate TENS of Thousands of new fee income every year and no new staff are required.

© LegalBestPractice