A $300,000 lesson for employers on misleading and deceptive conduct

By Meryl Remedios of Gadens Lawyers, Sydney

The Federal Court of Australia recently awarded an advertising consultant over $300,000 in damages as a result of misleading and deceptive conduct engaged in by his employer prior to and during the consultant's employment.

The advertising consultant alleged that misleading and deceptive conduct involving representations that were made to him prior to and during his employment misled him about the financial position and success of his employer's business. The consultant claimed that the employer's representations lured him away from his own business, only for him to be made redundant 18 months later.

What happened?

The Group Managing Director of the agency when courting the consultant was alleged to have made a number of representations about the agency's attractiveness as an employer. The representations, which were both express and implied, included that:

- the company was a financially successful agency in Australian advertising at the time
- the company was in a great position and was likely to be financially successful in the future, implying that it was a desirable employer
- redundancies which occurred just prior to the consultant commencing work placed the company in a very healthy financial position
- savings made would result in a $1,000,000 operating profit.

These representations, along with a failure to disclose information, misled if not deceived the consultant into entering a contract of employment and remaining an employee.

The Group Managing Director admitted to making the first two representations, but disputed the other two. The agency conceded that the true financial position of the company was not disclosed to the consultant however, it argued that there was no obligation of disclosure. Further, the employer submitted that any misleading and deceptive conduct was not 'in trade or commerce' and therefore did not fall within the ambit of the *Trade Practices Act 1974* (Cth) (**TPA**).

The case addressed the issue of whether it is misleading or deceptive to describe a business as successful when it would be insolvent without the continued support of its parent company, which was also experiencing financial difficulty. Justice Katzmann found that it was. It was also submitted that the extended definition of 'in trade or commerce' in the *Fair Trading Act 1987* (NSW) (**FTA**) incorporates '*any business or professional activity*'. Her Honour agreed that the breadth of this definition encompassed the employer's conduct.

In relation to the non-disclosure, Justice Katzmann held that disclosure was necessitated by the circumstances in which the consultant found himself, particularly given that he had made specific inquiries. She stated that '*keeping him in the dark was apt to lead him into an erroneous view about his job security*'.

The Federal Court found that it was unlikely that the consultant would have accepted the offer of employment without the repeated assurances about the strength of the business and the implicit representations regarding the company's financial security. The consultant was awarded

$306,740 in damages representing the difference between what the consultant's business would have earned if he had not left it to join the agency as an employee and his actual wages.

Implications for employers

Employers should exercise caution when making statements to prospective employees to ensure that they are not misleading. While employers may not want to advertise their financial difficulties when trying to attract new employees, statements made in trade and commerce are subject to the provisions of the *Competition and Consumer Act 2010* (Cth) (which now incorporates the relevant provisions of the TPA) and FTA. Care should therefore be taken when making pre-contractual and post-contractual representations.

This article first appeared in Gadens Lawyers Workplace Relations Update (February 2011)