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Court rejects manager's price-fixing claims; says pornography wouldn't justify sacking

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A court has rejected claims by the former general manager of Swatch Group Australia that he was directed to engage in price-fixing, in breach of both the Trade Practices Act and the implied terms of his employment contract, while the company failed in its counter claim that pornographic material found on his computer after his sacking justified his summary dismissal.

Judge Maree Kennedy in the County Court of Victoria went on to reject the former manager's argument that he was entitled to a reasonable bonus for the year in which he was sacked, but accepted that his three months' payment in lieu of notice should have been calculated on his total, not base, salary.

The company, part of the Swiss-based watch manufacturing giant the Swatch Group, hired the man as its Australian manager in 2003. It dismissed him five years later for having "not managed the Australian business in a responsible fashion". Its termination letter continued that "you also appear to have shown poor leadership". At the time, he was on a base salary of $202,623 with a potential bonus of $70,000.

The manager was in the witness box for more than five days during the hearing, and Justice Kennedy in her August 20 decision said that she was "unable to consider him a reliable witness". While this didn't mean he was to be "disbelieved in every respect", care should be taken, she said, in accepting his evidence in the absence of objective material to support his allegations.

After it sacked him, Swatch Group Australia (SGA) discovered on his computer - filed under "Fun" - sexually explicit material showing multiple photos of naked women in a solarium, apparently taken without their consent. It argued during proceedings that this amounted to misconduct, and justified his summary dismissal under his employment contract.

But Justice Kennedy said she was not satisfied that the conduct was incompatible with, or impeded the faithful performance of, his duties so as to warrant summary dismissal. And, she continued, she was also not satisfied that the simple act of storing the material "without more" - such as evidence he disseminated it - was destructive of the confidence between the parties.

"This is not meant to countenance such behaviour which modern standards would condemn. [The manager's] incredible claim that he did not read the attachment also reflects badly on his credit. However, after considering the evidence before me, I am not satisfied that [the manager] has engaged in 'misconduct' within the meaning of clause 8(a) [of his employment contract]."

On his argument that SGA breached the Trade Practices Act's s53B misleading conduct provision, the former manager argued there was an implied representation by the company that he wouldn't be required to undertake tasks contrary to the law. This was implied, he said, from his knowledge of Swatch Group, including that it was the largest maker and seller of watches in the world; discussions with three senior Swatch executives before he was employed; and the fact that at no time was he warned that he might be required to break the law.

But Justice Kennedy held there was "no conduct from which the representation alleged may be implied". She said the corporate structure and size of Swatch conveyed nothing about what tasks the manager might be directed to undertake and discussions with executives did not support the claim.

"Although it may well be hoped that employees would not be directed to engage in tasks that were contrary to law, no representation, implied or otherwise, can be spelt out of the generalised statements made (or not made) to [the former manager]," she said.

And, she continued, she was not satisfied that the manager relied on the alleged representation, even if it were made. She said the evidence suggested that the "law-abiding" nature of SGA played no part at all in his decision-making process. "In such circumstances, I am not prepared to infer that the representation, if made, acted as an inducement."

The former manager also argued that not having to act illegally was an implied term of his employment contract - as was mutual trust and confidence - and he claimed distress on the basis that the company breached both.

Justice Kennedy said there were good grounds for suggesting that the "unlawful act" term should be implied into a contract of employment based on *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*, and noted there was conflicting authority as to whether there should be an implied term of trust and confidence. For the purposes of the case, however, she presumed that both existed, and that a direction by a superior to undertake an unlawful task would breach them.

But after examining the evidence on the manager's conversation with his superiors within the Justice Kennedy held there was no evidence that he was directed to engage in unlawful price fixing in breach of s96(3) of the TPA.

And, she continued, even if an unlawful direction was given, the former manager had failed to demonstrate that he had suffered any distress beyond the ordinary level association with a high powered position which he clearly "loved".

On the manager's claim that he was entitled to a bonus payment for 2008 - the year in which he was sacked - Justice Kennedy held that the bonus was not an entitlement but a discretionary payment, and the decision not to pay it "did not miscarry". Even if there were a "change of the rules" on how it was paid, he was given notice of such changes. She also rejected his bonus claim based on estoppels.

The manager got up on his final claim, which was that the notice provision in his contract referred to his "salary" not his "base salary", and his $52,606 payment for three months in lieu as such was $12,285 short.

She said there would be judgment for the former manager for $12,285.

Keith Mark Watson v Swatch Group (Australia) Pty Ltd [2010] VCC 1067 (20 August 2010)