

GOOD FAITH – REDUNDANCY RAMIFICATIONS

The full Court’s much-anticipated decision about the information employers need to provide employees when termination is a possibility has caused consternation and uncertainty. No appeal appears forthcoming so there is much consideration being given to its practical implications and discussion as to whether those implications were intended.

The Claim

Vice-Chancellor of Massey University v Wrigley & Kelly concerned two lecturers who were made redundant during a restructuring process undertaken by Massey University in 2009. The process involved the disestablishment of a number of positions and the creation of a smaller number of new positions in their place. A panel interview process was used to determine which existing staff would fill the new positions. The two lecturers were unsuccessful in obtaining new positions.

The issue considered by the full Court was how much information from the panel interview process the lecturers were entitled to. Amongst other things, the lecturers were seeking access to the scores the panellists had given to other candidates, and to information which was contained only in the panellists’ minds.

Good Faith

The extent of the lecturers’ entitlement to receive further information turned on the duty of good faith, the central concept of the Employment Relations Act 2000. Under section 4(1A)(c) of the Act, that duty means that when an employer proposes to make a decision which might adversely affect an employee’s employment, it must provide them with access to relevant information about the decision and an opportunity to comment before the decision is made. That obligation is subject to section 4(1B) and 4(1C) of the Act, under which an employer may withhold relevant information if it is confidential and there is good reason to maintain confidentiality.

Relevant Information

The first issue for the full Court to decide was whether the information being requested was “relevant”. The university argued that “relevant” information was limited to that sufficient to fairly and adequately inform the lecturers about what was being proposed to enable them to respond meaningfully.

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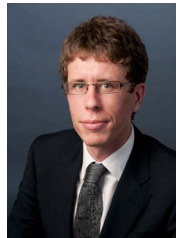
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The lecturers argued for a broader interpretation. The full Court agreed. It found that “relevant” information would include more than just the information the employer relied on in formulating the restructuring proposal. It could include comparisons between employees, information about the perceptions and opinions of those leading the process, and information contained only in people’s minds.

Confidentiality

The full Court found that all of the documentation sought by the lecturers was “relevant”. It therefore went on to consider whether the university was entitled to withhold it on the basis that it was confidential, and that there were good reasons for maintaining that confidentiality. It found that this required a balancing exercise, in which the adverse effects of disclosure would be weighed against the importance of the information for the affected employees.

In this situation, the full Court found that almost all of the information being sought was confidential: it had been provided on the expectation it would be kept in confidence unless ordered to be disclosed by the Court, and dealt with private matters.

The Court therefore went on to consider whether there were good reasons for maintaining that confidentiality. It found that the potential adverse effects on privacy of providing access to the documents were not great: the panellists had been aware of the possibility that their comments could be disclosed. Noting that academics are used to differences of opinion, the Court found that there was no good reason for withholding the comments.

Implications

The approach of many employers until now has been like that of the university: that employees need only be



provided with enough information to allow them to respond meaningfully to the proposal.

This decision may change this:

- It is likely to mean that consultation processes in redundancy situations, and indeed any other process which might lead to an employee’s employment coming to an end, will involve the provision of more information by employers.
- In some circumstances, it will mean that employees can require access to decision-makers’ unwritten impressions.
- Perhaps most significantly, it seems to indicate that the Court will take a narrow view on the circumstances in which information that is relevant but confidential should be kept confidential. This may require employers to make redactions from documents in order to disclose as much relevant information as possible while also protecting privacy interests.
- Greater care and time will need to be taken by employers when embarking on processes that may affect employees’ employment, particularly possible redundancy situations.

EMPLOYMENT AGREEMENTS – NEW REQUIREMENTS FROM 1 JULY



As part of the recent amendments to the Employment Relations Act 2000, employers must now (from 1 July 2011) keep a signed copy of the employment

agreement or the current terms and conditions of employment for **all** employees. This includes casual and fixed-term employees.

This requirement applies regardless of the employee’s start date and also applies to any subsequent variations to an employee’s terms and conditions. Employees also have the right to request a copy of their individual employment agreement or terms and conditions at any time and their employer must provide the employee with a copy as soon as is reasonably practicable.

From 1 April 2011, employers became liable to increased penalties imposed by the Employment Relations Authority if proceedings are brought by a Labour Inspector for any breach of the requirements in relation to employment agreements. Before any such action is brought, an employer must be given notice of the breach and seven days in which to remedy it. Maximum penalties for a failure to comply with the requirements are now \$10,000 for individuals and \$20,000 for companies.

Advice

- Ensure now there exists a signed employment agreement for all employees
- Keep such agreements in a safe place
- Don’t start new employees without having a signed employment agreement in place.

COURT OF APPEAL UPHOLDS REINSTATEMENT

The Court of Appeal recently dismissed Air New Zealand’s application for leave to appeal a decision of the Employment Court. In that decision, *Air New Zealand Limited v Wulff*, the Court upheld Randall Wulff’s claim of unjustified dismissal and ordered that Mr Wulff be reinstated to his position as an international flight attendant.

Facts

A dispute arose between Air New Zealand and the Flight Attendants and Related Services Association (FARSA), of which Mr Wulff was Vice President, as to the safety guidelines that were to apply in situations of turbulence. Mr Wulff was involved in preparing a FARSA notice to flight attendants recommending that whenever the seatbelt sign was illuminated cabin staff refrain from all activities and return to their seats unless assisting in a life threatening situation. Air New Zealand responded to this notice stating that it seemed to alter the established Turbulence Management Policy. FARSA then issued a further notice to its members stating that all members must continue to comply with the standard operating procedures.

Two incidents then occurred on two separate flights that Mr Wulff was a crew member on. The first involved Mr Wulff discussing with the pilot-in-command, Captain Pattie, about how he would behave during turbulence. Captain Pattie questioned whether Mr Wulff could be relied on to follow safety procedures and, as a result, whether he could fly with Mr Wulff again. Similar issues arose in relation to the second flight, which involved Mr Wulff and two other cabin crew being seated during turbulence while the remaining cabin crew continued to provide the meal service.

An investigation by Mr Wulff's Manager then took place. As a result of the investigation, Mr Wulff's Manager concluded that Mr Wulff's conduct amounted to misconduct, some of which was serious. Mr Wulff was then dismissed.

Employment Court

The Employment Court considered that Air New Zealand's actions in the course of its investigation regarding Mr Wulff's conduct were not those of a fair and reasonable employer. The Court considered that a fair and reasonable employer would not have concluded that Mr Wulff's actions amounted to serious misconduct.

In reaching this conclusion, the Court referred to several issues with regard to the investigation process. This included the fact that staff members who could

have corroborated Mr Wulff's account on particular matters were not interviewed. The Court was also critical of Air New Zealand's failure to take into account more favourable statements by Captain Pattie about Mr Wulff and the various assurances that Mr Wulff had given that he would in the future follow the relevant safety policies and procedures. Finally, the Court noted that the investigation failed to differentiate between the union's actions and those of Mr Wulff in his personal capacity.

Court of Appeal

Air New Zealand sought leave to appeal the Employment Court's decision on the basis of two questions of law. The first was whether an employer is precluded from taking into account an employee's actions while the employee is acting in a capacity other than that of the employee (e.g. as a union representative). The second question was whether it was open to the Employment Court to find

that reinstatement was practicable, in view of Air New Zealand's statutory and regulatory responsibilities under the Civil Aviation Act and the Civil Aviation Rules.

Air New Zealand submitted that the Employment Court should have proceeded on the basis that the union's views were shared by Mr Wulff personally and that by not taking those views into account, the Court had ignored behaviour that was arguably relevant when considering whether Mr Wulff continued to possess the attributes essential for his job as a flight attendant.



With regard to the second question, Air New Zealand submitted that reinstatement was not practicable because it would place the airline in conflict with its statutory and regulatory responsibilities, particularly those relating to safety.

In response, Mr Wulff argued that the Employment Court had simply found as a matter of fact that he was not acting in his personal capacity when communicating with Air New Zealand about union matters. Mr Wulff also argued that the question of practicability of reinstatement was simply a disagreement over the factual findings and thus not a question of law for the Court of Appeal to decide.

The Court of Appeal agreed with Mr Wulff and held that no questions of law were raised by the Employment Court's judgment. It held that the purported questions of law were essentially factual matters that the Court had taken into consideration when making his decision. The Court were satisfied that it was not a situation where there was no evidence on which the Court could reach the finding it did in relation to whether Mr Wulff's actions as a union representative were to be attributed to him or the union itself.

In relation to the second question of law, the Court of Appeal held that the Employment Court had ruled that there was never any issue that Mr Wulff would not comply with the safety procedures generally. Thus, this issue again turned on the factual findings in the Employment Court and was not open to appeal.

Implications

The decision in the Employment Court was in itself an interesting one given that while Mr Wulff was reinstated, his remedies were restricted to a small amount of lost remuneration in light of his contribution. The decision of the Court of Appeal upholding the Employment Court's decision also emphasises the need for employers to be extremely careful when taking into account an employee's union involvement in a disciplinary context. In short, employers must be mindful that generally when a union's representative is acting on behalf of the union, his or her actions must be attributed to the union, and not the representative personally.

FACEBOOK AND ARSON



Tania Dickinson was employed by the Ministry of Social Development as a Prisoner Reintegration Case Manager. In August 2009, she was charged with arson. After a suspension of some months, and Ms Dickinson's transfer to a different service centre, the Ministry received a complaint from a member of the public about the contents of Ms Dickinson's Facebook page. Coincidentally or not, the complainant owned the house Ms Dickinson had allegedly set on fire.

The comments complained of included Ms Dickinson describing herself as a "very expensive paperweight" who was "highly competent in the art of time wastage, blame shifting and stationary [sic] theft." Ms Dickinson included in her favourite quotes "hey boss, can I go home sick????",

and described her political views as "hard core left wing conservative".

The Ministry placed Ms Dickinson on a paid leave of absence, and told her it was considering suspending her. The Ministry later dismissed Ms Dickinson, relying on the Facebook comments and on the erosion of its trust and confidence in her caused by the combination of those comments and the arson charges. Ms Dickinson applied to the Employment Relations Authority, claiming unjustified disadvantage (on the basis that the paid leave of absence was an unjustified suspension) and unjustified dismissal. She sought reinstatement, compensation, and lost wages.

The Authority described the Facebook comments as unfortunate. Although finding that the political references did not undermine the need for neutrality in the public service, the Authority did find that the Facebook comments "endorsed a stereotyped view of slothful and exploitative public servants" and were derogatory and disparaging of the public service.

Noting that Ms Dickinson had (since her dismissal) been convicted of arson, the Authority found that reinstatement was impossible. Considering the suspension claim, the Authority found that Ms Dickinson's placement on paid leave amounted to suspension without an opportunity to respond before it took effect. It was therefore a breach of her employment agreement (which provided for such an opportunity) and amounted to an unjustified disadvantage. However, as there was no evidence of any humiliation or distress suffered by Ms Dickinson, no remedies were awarded.

On the issue of the dismissal, the Authority found that while the Facebook entries would not alone have justified dismissal, the dismissal was justified in the context of Ms Dickinson's history with the Ministry and her past behaviour.

Comment

As the volume of cases involving comments on Facebook and other social media continues to grow, definition of the line between employees' freedom of expression and employers' reputational interests will continue to produce interesting law. To protect their interests, we recommend that employers (particularly those in the state sector) have clear policies governing employees' public comments on work-related issues.

CAR CRASHES AND WAGE FORFEITURE

Jarred Steele was an employee of Brake and Transmission NZ Limited ("BNT"). He worked as a parts person in Whanganui. The terms of his employment included a vehicle policy under which he would be given a final warning and may be liable to reimburse BNT for any insurance excess payable if he was at fault in an accident while driving a BNT vehicle.

In 2009, Mr Steele backed into another vehicle, causing \$686.25 worth of panel damage to the BNT car he was driving. BNT lodged an insurance claim. However, since the two insurance companies had a 'knock for knock' agreement, BNT only had to pay its own costs. Since its excess was \$2,000, BNT paid the \$686.25 costs. Mr Steele was asked to reimburse BNT that amount, but declined.

The Authority found that since the motor vehicle clause dealt only with the excess, and since no excess was in fact payable, BNT could not rely on it. However, the Authority went on to find Mr Steele liable for the \$686.25 as special damages for breach of an implied contractual term that he would exercise due care and diligence in his work. Mr Steele was also required to contribute \$1,200 towards BNT's actual costs of \$20,324.11.

Comment

Although BNT were able to rely on the implied term of

due care and diligence, the matter is likely to have been resolved sooner and with less debate had BNT's motor vehicle clause been more broadly drafted.

SIS AND SECRET EVIDENCE



The Employment Court has recently ruled on several preliminary matters in respect of a case that was removed from the Employment Relations Authority late last year. In *Zhou v Chief Executive of the Department of Labour*, Mr Zhou has claimed that he was both unjustifiably disadvantaged and unjustifiably dismissed by the Department.

Mr Zhou was employed as a compliance officer in the Department's Border Security Workforce Group. It was a condition of Mr Zhou's employment that he obtained, and retained, a suitable Government security clearance. In December 2008 the New Zealand SIS made a formal recommendation to the Department that Mr Zhou's security clearance be revoked.

Mr Zhou was told that the recommendation had been made because he had been in "unauthorised contact with representatives of a foreign government" in the course of his work with the Department. The Department informed Mr Zhou that because of this recommendation, the Department was required to decide whether to revoke his security clearance. Since Mr Zhou's retention of a security clearance was a requirement of his role, this meant his employment was at risk. After a meeting to discuss the possible revocation of the security clearance Mr Zhou went on a period of 'special leave'.

Mr Zhou sought information under both the Official Information Act and the Privacy Act concerning the basis for the SIS's adverse recommendation. While some information was released, other information was

withheld on the basis that there were concerns that release may prejudice the security or defence of New Zealand or the international relations of the Government. Mr Zhou also sought a review of the SIS's recommendation by the Inspector-General of Intelligence and Security. Eventually, the Inspector-General recommended that the SIS's recommendation be reassessed.

While all this was going on, Mr Zhou was anxious to return to work and indicated to the Department that he was no longer willing to remain on special leave. Upon reassessment, the SIS again recommended against Mr Zhou being provided with a security clearance, seemingly for the same reasons as its original recommendation. The Department then indicated to Mr Zhou that it had made the preliminary decision to revoke his security clearance and terminate his employment due to his inability to comply with the minimum requirements of his position. This decision was confirmed subsequent to the parties meeting.

Mr Zhou, amongst other things, is now alleging disadvantage resulting from the Department withholding information that was relevant to its decision to dismiss him. This information naturally includes information relating to the SIS's recommendation that his security clearance be revoked.

The substantive case is yet to be argued before the Employment Court. Of real interest will be the extent to which an employee can gain access to information that is clearly relevant to their employer's decision to dismiss, but subject to restrictions on its publication on national security grounds. This issue is especially timely given the full Court's decision in the *Massey* case referred to above. Watch this space!

HUMAN RESOURCES MANAGER FINED

In Australia a former human resources manager has been fined \$3,750 in the first sham contracting prosecution brought by the Fair Work Ombudsman. In his judgment, Magistrate Robert Cameron said that he accepted that Mr Chorazy had exercised "no independent judgment" in the sham contracting breaches. The Magistrate however went on to state:

"Nevertheless, as human resources manager, he should have been aware of, and at least attempted to give advice on, Centennial's obligations under the Workplace Relations Act"

Mr Chorazy's employer was Centennial Financial Services. It dismissed nine employees who were then rehired as contractors to perform the same duties under the company's direction. They were then only paid on commission rather than wages and had no entitlement to leave. The company went into liquidation in 2009.

As a result of the sham contracts 9 sales staff were underpaid \$39,533. In addition to fining Mr Chorazy \$3,750, the former owner of Centennial Financial Services was fined \$13,200. The Magistrate ordered that these fines totalling \$16,950 be paid to the 9 employees to partly make up the shortfall of their earnings.

OVERSEAS SNIPPETS

Australia:

New Laws to Restrict Executive Pay

Widespread objections to the level of executive salaries in recessionary times have led to new laws in Australia designed to curb excessive remuneration. The new laws came into effect on 1 July 2011 and give stockholders of listed companies the ability to vote out company boards if more than 25% of shareholders rule against a remuneration report in two consecutive years. This is being labeled as the 'two strikes' rule.

The new rules will also restrict executive personnel and related parties from voting on any resolutions relating to remuneration, and affects the manner in which remuneration consultants are appointed and report to Companies. The latter requirement is designed to ensure that any remuneration consultants' recommendations are free from undue influence.

An analysis performed by CitiGroup prior to the new laws coming into effect revealed that had the new laws applied at that time, at least a dozen of the 100 largest listed companies in Australia would have been affected.



United Kingdom:

News of the World journalists may sue for 'stigma' damages

Journalists dismissed following the closure of *News of the World* are being invited to consider suing their former employer for 'stigma' damages caused to professional reputations.

The basis for such a claim comes from the 1997 case of *Malik vs Bank of Credit and Commerce International*, where two former employees sought damages in relation to their struggle to find alternative employment after their employer (described by their Lordships as "a dishonest and corrupt business") collapsed amid accusations of money laundering and other financial crime.

In that case, the House of Lords found that in exceptional circumstances an employee could recover damages on the basis that their employer's breach of the implied duty of trust and confidence prejudicially affected their future employment prospects. Lord Nicholls of Birkenhead found that:

"... Employers must take care not to damage their employees' future employment prospects, by harsh and oppressive behaviour or by any other form of conduct which is unacceptable today as falling below the standards set by the implied trust and confidence term."

Referring to the B.C.C.I. decision, a City of London firm has now set up an 'Employee Action Group' on its website seeking expressions of interest from "angered" and "scape-goated" former *News of the World* employees.