DYHRBERG DRAYTON

EMPLOYMENT LAW

What's New Update

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Facebook

The Employment Court has recently considered the use of social networking posts in employment disputes in *Hook v Stream Group (NZ) Pty Limited.*[1]

Mr Hook was employed as an information technology administrator with Stream Group. He was issued with a written warning and then a final written warning in relation to similar disciplinary issues. Shortly after receiving the final written warning Mr Hook resigned. Mr Hook was not required to work out his notice period as Stream Group had become concerned about the disruptive impact Mr Hook was having in the workplace. Mr Hook claimed constructive dismissal and unjustified disadvantage. Mr Hook alleged that during a conversation with his manager on 27 July 2011 he was given the option of resigning or staying with the company. This was the main reason for his resignation. Mr Hook claimed the employer had breached the implied duty of trust and confidence and this breach had caused him to resign. His grievance was dismissed by the Employment Relations Authority. Mr Hook challenged the Authority's determination to the Employment Court.

During the course of proceedings, the employer gave evidence regarding a search of Facebook following Mr Hook's departure from the company. A post on 26 July stated:

> **Mr Hook:** Welp [sic], work found out I am looking for another job today, and I may get in trouble for it. Thoughts?

The following exchanges were posted on 18 August:

> **Mr Hook:** Going to quit my job tomorrow, while in [sic] annual leave. Probably should have timed that better.
>
> **Reply:** is your boss on Facebook
>
> **Mr Hook:** Na. If he was, I'd tell him he is a dick head.
>
> **Reply:** That's putting it awfully nicely. I hope he gets mauled by a pack of rabid Dingos.

The Employment Court observed that there is an apparent increase in the *'use of social networking sites by individuals to express dissatisfaction with their employers'*. The Court continued by stating *'This carries risk. It is well established that conduct occurring outside the workplace may give rise to disciplinary action, and Facebook posts, even those ostensibly protected by a privacy setting, may not be regarded as protected communications beyond the reach of employment processes. After all, how private is a written conversation initiated over the internet with 200 "friends", who can pass the information on to a limitless audience?'*

The Court considered cases in other jurisdictions which generally recognised that Facebook is not a strictly private forum. Posted comments may substantiate a dismissal/disciplinary action or even vitiate a claim of constructive dismissal.

It was held that Mr Hook's Facebook posts undermined his credibility and tended to support the contention that Mr Hook resigned of his own free will.

The Court did not consider there was a breach of duty by the employer that caused Mr Hook to resign. The Court preferred the employer's evidence of the conversation on 27 July 2011 and that an ultimatum was not given to Mr Hook to resign or go through a disciplinary process. He resigned of his own volition. Mr Hook's claim was dismissed.

Restraints of Trade

On their face, restraints of trade are unlawful, unless they are proven to be reasonable. However, restraints of trade are becoming commonplace and there has been a recent trend by the Court to more readily enforce restraints of trade, provided the restraint is no wider than necessary to protect the former employer's proprietary interest.

The Employment Court in *Air New Zealand Ltd v Kerr*[2] recently considered the use of restraints of trade where an employment agreement also provides for a period of garden leave.

Garden leave means the employee does not attend work during their notice period, but they are paid by their employer during this time. A common example of where garden leave is used is where a senior employee is going to work for a competitor.

Mr Kerr was the General Manager of Air Nelson (a wholly owned subsidiary of Air New Zealand), but accepted a position as Head of New Zealand for Jetstar. In accordance with his employment agreement, Mr Kerr was put on garden leave for 6 months.

Mr Kerr's employment agreement contained a 6 month '*non-competition after employment'* clause. When Mr Kerr gave Air New Zealand his notice of resignation he advised them that he had accepted employment with Jetstar, and that he did not intend to comply with the six-month post-termination non-competition clause in his employment agreement because he had received legal advice that it was unenforceable.

Air New Zealand sought an injunction to prevent Mr Kerr commencing employment at Jetstar, which they alleged was in breach of the non-competition clause of his employment agreement.

The Employment Court considered whether a 6 month non-competition clause coming into force after the six months of gardening leave, was reasonable. The Judge noted there was no dispute that the relationship between Air New Zealand and Jetstar was '*aggressively competitive.'*

However, it was held that the 6 month non-competition clause that Air New Zealand was seeking to enforce was more than what was necessary to protect Air New Zealand's interests. By requiring Mr Kerr to serve out the six-month period of garden leave, Air New Zealand had already obtained all the protection it was lawfully entitled to.

Following this case, it is important for employers to bear in mind that if they put employees on garden leave, they might not then be able to enforce a restraint of trade clause. If you are unsure about what sort of restraint of trade clauses are reasonable or whether they are enforceable, seek advice.

Kiwisaver

The Court of Appeal in *Terranova Homes & Care Limited v Faitala and Anor*[3] recently considered whether, where parties are in an employment relationship and an employee is paid at the statutory minimum wage rate, the employer is entitled to deduct from that wage its compulsory employer contributions payable for that employee under the KiwiSaver scheme. The Court of Appeal dismissed the appeal and upheld the decision of the full bench of the Employment Court in favour of the employee.

Terranova employed the employees as caregivers at a rest home in Wellington on individual employment agreements. The employees were paid a gross wage of $13.50 per hour, being the statutory minimum wage at the time.

Both employees were members of a KiwiSaver scheme. The employment agreements contained a schedule which stated *'the employee's remuneration is inclusive of any KiwiSaver compulsory employer contributions'*. The compulsory employer KiwiSaver contributions were deducted from the employees' wages.

The employees issued proceedings against Terranova for arrears of wages under the Minimum Wage Act 1983 (MWA) on the basis that Terranova's deduction of its statutory contribution from their wages and meant there were being paid less than the minimum wage.

Section 6 of the MWA provides that employees are entitled to receive the minimum wage rate *'notwithstanding anything to the contrary in any enactment, award, collective agreement, or contract of service'*.

Section 101B(1) of the Kiwisaver Act 2006 (KSA) sets out that employers' compulsory KiwiSaver contributions are to be paid on top of an employee's gross salary or wages. However, from 13 December 2007 parties are able to agree to include the employer's compulsory Kiwisaver contributions as part of the employee's total remuneration under section 101B(4) of the KSA.

The Employment Court held that the purpose of the MWA was to ensure that workers received a base wage for their work to enable them to meet their daily living expenses for themselves and their family.

Deductions which might be made from an employee's pay, such as liable parent contributions and PAYE, were obligations that were owed by an employee personally. The payment of a compulsory employer contribution under the KSA was of a different character. It was the employer's, not the employee's, contribution. Section 6 of the MWA does not envisage that an employer will be entitled separately to deduct from the minimum wage an amount equal to its statutory liability relating to that worker.

The MWA was designed to impose a floor below which employers and employees cannot go and it is directed at preventing the exploitation of workers. Given the importance of the MWA, the Court of Appeal was satisfied the KSA does not impliedly repeal, limit, or override the MWA.

The KSA and MWA could not be read consistently to justify Terranova's approach. The Court of Appeal was satisfied the introductory words of section 6, *'notwithstanding anything to the contrary'* prohibits parties from entering into an employment agreement to receive payment of less than the minimum wage.

It was held in the particular situation where employees were on the minimum rate of pay, by including the employer's compulsory KiwiSaver contributions in the employees' total remuneration, the employer was in breach of the MWA. The employer's compulsory contributions had to be paid in addition to the employees' gross salary or wages which were set at the minimum rate. Failing to do so meant the employees were effectively being paid less than the minimum wage.

In light of this decision, employers should ensure that if they employ staff on the minimum wage that they pay the compulsory employer contributions to KiwiSaver on top of the minimum wage, rather than taking a total remuneration approach. For all other employees, if a total remuneration approach is taken, this must be provided for in the employee's terms and conditions of employment.

Equal Pay

Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Limited[4] involved a successful application for the determination of preliminary questions in relation to an equal pay claim.

The Union brought an equal pay claim against the employer under the Equal Pay Act 1972, on the basis that its female members, who are employed by Terranova as caregivers, were paid a lower rate of pay than if caregiving was a male dominated profession.

Six unrelated parties sought to intervene in the proceedings in light of the potential ramifications of the decision. Steph Dyhrberg acted for Coalition for Equal Value Equal Pay.

The purpose of the Equal Pay Act is to remove and prevent the effects of gender discrimination on the rates of pay of men and women. However, there have been few cases under the Act to date.

The Court accepted that the aged care sector is dominated by female workers (in 2009, 92% of workers were female) and acknowledged that low rates of pay in the sector could reflect historical and structural gender discrimination. Workers are paid caregiver rates, which are around $13.75 (being the minimum wage) to $15.00 per hour.

The Court held as a preliminary issue, that equal pay for work predominantly, or exclusively, performed by women '*is to be determined by reference to what men would be paid to do the same work abstracting from skills, responsibility, conditions and degrees of effort, as well as from any systemic undervaluation of the work derived from current, or historical, or structural gender discrimination*'.

While the union's substantive claim has not yet been heard, the Court's preliminary decision could potentially set a precedent for women in other female dominated occupational groups to compare their pay to that of males in other industries in support of an equal pay claim.

To only compare how men and women are paid in the aged care sector would be artificial because men could be paid a depressed rate for reasons relating to systemic undervaluation because they are undertaking what was traditionally view as 'women's work'. Employers could also usurp the purpose of the Act by employing and identifying a 'token male' for comparison purposes.

Although this claim was only brought in relation to a small number of workers, employees can claim equal pay going back 6 years. The potential financial liability for employers who employ staff in female dominated sectors, and operate unequal pay practices, could therefore be significant.

The case has been appealed to the Court of Appeal. We will keep you updated on any developments.

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[1] [2013] NZEmpC 188
[2] [2013] NZEmpC 153
[3] [2013] NZCA 435
[4] [2013] NZEmpC 157