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THE ADVOCATE

a regular newsletter for clients of mcphail gibson & zwart

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Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
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Facebook Fiasco

The risks employees take by venting about their employer in the social media are central in the recent Employment Court case ***Hook v. Stream Group (NZ) Pty Ltd***.

The employee, Hook, was an Information Technology Administrator for Stream Group, and had been the subject of disciplinary issues during his first year of employment, resulting in a written warning being issued on 8 February 2011. The warning was to run for 12 months, related to him being absent from the office without notification to his supervisor, and lateness. There were also concerns about his use of the email system and covert recording of a disciplinary meeting.

A further issue arose on 26 July 2011 when Hook was absent from the office without approval. He later told his supervisor that he had been attending a job interview and asked her not to report the incident. Hook's supervisor chose to report the incident which led to the initiation of the disciplinary process and Hook being issued with a final written warning.

Three days later Hook resigned on two weeks' notice, stating that "*recent events have left me with no other option".* Initially Hook proposed to work out his notice period but the company decided it would not require him to work out his notice period which would make it easier for him to attend interviews. Hook raised no concerns with that.

Hook subsequently claimed that he was constructively dismissed and filed a personal grievance claim with the Employment Relations Authority. His claim failed so he challenged that decision to the Employment Court.

An important aspect of the Employment Court hearing was the employer's reliance upon material it accessed (after the resignation) from Hook's Facebook page which was not protected by a privacy setting. At the Court hearing, the company produced the following post made on 26 July 2011, the day Hook had absented himself from work without authority:

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

And, on 18 August, the following exchanges were posted:
"Mr Hook: Going to quit my job tomorrow, while in 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 company's reliance on this evidence led to a discussion by the Court on the use of social networking posts in employment disputes. It said:

"[29] It is apparent that the increased use of social networking sites by individuals to express dissatisfaction with their employers is becoming more prevalent. 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?"

Welcome Back to Work !

We trust you have all had a relaxing festive season. We wish you all the best for a prosperous New Year and look forward to providing you with assistance.

Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Neil McPhail**, **Raewyn Gibson**, or **Peter Zwart**.

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The Court then referred to a High Court case ***Senior v. Police*** which included the following observation:

"The Court takes judicial notice that persons who use Facebook are very aware that the contents of the Facebook are often communicated to persons beyond the 'friends' who use Facebook. When information is put on a Facebook page, to which hundreds of people have access, the persons putting the information on the page know that that information will likely extend way beyond the defined class of 'friends'. Very strong personal abuse directed at a former partner, placed on Facebook, read by a large number of friends, some of whom will inevitably have contact in the natural social network with the person being abused, is at the very least highly reckless. It is somewhat improbable to say, which was not said here, 'Oh, I never thought it was possible that the person I was abusing could possibly have known about this.'"

The Court noted:

"[31] The reality is that comments made on virtual social networks can readily permeate into real-life networks. Facebook posts have a permanence and potential audience that casual conversations around the water cooler at work or at an after-hours social gathering do not."

The Court then went on to examine some Australian cases including ***Linfox Australia Pty Ltd v. Stutsel*** and said:

"[36] The cases generally recognise that Facebook is not a strictly private forum, and that asserted expectations of privacy will likely be tested. Depending on the circumstances, posted comments may substantiate a dismissal/disciplinary action or, by logical extension, vitiate a claim of constructive dismissal."

Notably the Court did not accept the approach taken in the ***Linfox*** case, which effectively excused an older worker's ignorance of the implications of posting derogatory comments on social media:

"[37] In Linfox, it was suggested that a special dispensation of sorts for older employees might exist to take into account their ignorance of social media norms. However it is unclear why a distinction along the lines of age would apply, as problems with privacy on social media tend to stem from a sort of recklessness (which does not know any age boundaries) rather than lack of technological understanding."

Finally, the Court accepted that Hook's Facebook comments were detrimental to his case of constructive dismissal:

"[38] In the present case, the defendant submitted that the Facebook entries went to credibility, undermined the plaintiff's version of events and that they tended to support the contention that Mr Hook resigned of his own free will. I accept that that is so, but even putting this evidence to one side I would not have found in the plaintiff's favour."

The Court then went on to find that there was no cause for Hook to resign on account of his final warning. It considered that he was able to comply with the terms of the warning. It held:

"[43] I do not consider that there was a breach of duty by the defendant that caused the plaintiff to resign. He was disenchanted with his employment situation but that does not, of itself, support a claim for constructive dismissal. I have no difficulty concluding that Mr Hook resigned of his own volition."

This case provides an interesting insight into the use of evidence gathered from social networking sites in defending an alleged personal grievance claim. It is likely that the Court will have little sympathy for employees who use social media recklessly. Employers should nevertheless ensure that they have clear policies around social media and the consequences of posting derogatory comments.

Employment Relations Practice Course 2014

Our next Employment Relations Practice Course has been set down for **Wednesday 5 and Thursday 6 March 2014**.

Places on this course are strictly limited.

Further information in regard to the course content and registration details can be found on our website – www.mgz.co.nz/training.

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