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Disclosure order for Facebook, bank account – an outrage or fair play?

Despite the excitable reaction from Tech Liberty, the Employment Relations Authority (*ERA*) was acting well within its powers when it ordered an employee to hand over her Facebook pages and bank accounts for the period in dispute[1].

Rather unremarkable, really. Certainly not an unwarranted invasion of the employee's privacy.

The background

The employee concerned, Gina, was dismissed after she took sick leave, purportedly to look after her sister. Gina has challenged her dismissal. The genuineness of her sick leave is a central issue to the dispute.

As a defendant, Air NZ has a right to ask for disclosure of all material that could be relevant. Obviously this would include information which might shed light on Gina's activities on the days in question.

If this suggests she was not caring for her sister, then any remedies to which she might otherwise be entitled – for any established failure by Air NZ in the manner in which it arrived at its decision to dismiss her – could be reduced. If the documents support her story, her claim for redress will be strengthened.

Privacy

In considering requests for disclosure, the ERA must weigh up any competing interests to the material, including privacy interests.

That was the basis for the Employment Court's order in *Wrigley* for the disclosure of interviews from other candidates in the selection process as a result of which Mr Wrigley was made redundant. The Court held that the material was relevant to the issues in dispute, and that Mr Wrigley's interest in seeing the material outweighed the other employees' rights to privacy.

It's hard to see how a complainant's own privacy interests can be said to compete with his or her obligation to disclose information. In *Wrigley*, the point was that an obligation to disclose may even overcome third party privacy interests.

Chapman Tripp comments

The Employment Relations Amendment Bill, now before the select committee, seeks to remedy the position in *Wrigley* by amending the duty of good faith in section 4 of the Employment Relations Act (*ERA*) to clarify that employers are not required to provide an employee with confidential personal information about another person, or evaluative material about the employee concerned, where the employer is proposing to make a decision that will, or is likely to, affect an employee's continued employment.

This will bring the ERA largely back into line with the Privacy Act 1993 and is a welcome move. But it would do nothing to disturb the Authority's finding in relation to Gina – and neither should it.

Employees challenging a dismissal must be taken to have waived their own privacy interests in material relevant to the dispute. This is a perfectly ordinary and reasonable rule and – indeed – one that applies to general civil disputes.

If anything, the decision serves not as a cause for concern but as a reminder for prospective litigants to think strategically of the benefits and risks of litigation.

Footnotes

1. [2013] NZERA Auckland 332 5421308

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