

Privacy and Employment

Don't diss the boss on Facebook¹

(and other useful homilies)

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The increasing use of social networking sites to vent strongly held views about the workplace, or to divulge otherwise incriminating information, continues to provide fertile ground for employment disputes. This is hardly surprising. Facebook posts have a permanence and a potentially wider (sometimes unforeseen) audience that casual conversations over a takeaway coffee do not.

The highly publicised decision of the Human Rights Review Tribunal in *Hammond v Credit Union Baywide*³ has recently generated a considerable amount of discussion about privacy rights and what an employer can and cannot do. It is unclear whether Ms Hammond was in an employment relationship with Credit Union at the relevant time and accordingly whether she could have brought a claim against it in the employment institutions. Nevertheless, the discussion provides a useful opportunity to reflect on the circumstances in which an employer can take disciplinary action in relation to an employee's online activity, the extent to which posted comments can substantiate or undermine such action, and the way in which individual privacy interests are to be reconciled with legitimate interests of the employer.

It is worth remembering at the outset that the law has *never* recognised a right for employees to say whatever they like about their employer or their employer's business simply because they have left work for the day. There is nothing to suggest that an automatic exception is carved out for comments posted on social

¹ Editorial, Dominion Post 24 December 2013, following delivery of *Hook v Stream Group (NZ) Pty Ltd* [2013] NZEmpC 188, [2013] ERNZ 357.

² Judge of the Employment Court. The views expressed in this paper are my own personal views.

³ *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66.

media, whether subject to a privacy setting or not. Indeed the cases in New Zealand, Australia and the United Kingdom suggest otherwise.

In the employment sphere a number of issues arise, including what, if any, use can an employer make of “private” communications or activities in instituting disciplinary action? And what, if any, use can the Court make of such material in subsequent proceedings?

Resolution of the first issue ultimately reduces to an application of a fairly straightforward statutory equation, namely whether the employer’s actions and how the employer acted were what a fair and reasonable employer could have done in all the circumstances at the time.⁴ Resolution of the second issue involves consideration of the Court’s power to admit evidence and determine proceedings before it. Privacy interests are likely to be relevant to an assessment of both issues but are not determinative, and must be weighed with other relevant considerations.

It is probably fair to say that the weighting exercise has historically favoured employer assertions of a right to protect and manage their business. The pendulum may begin to shift on the back of a discernible move towards a rights based approach in the law generally and, more particularly, the developing recognition of privacy rights in the common law. It may be argued that employment law, at least in New Zealand, has been slow to coat tail on these trends. However, the increasingly porous divide between work and home highlights the importance of understanding, and giving appropriate recognition to, an employee’s right to a personal sphere of life protected from unnecessary intrusion.

The issues are not without difficulty, and are not confined to New Zealand. Other jurisdictions have also been grappling with the intersection of privacy and employment. As one overseas commentator recently observed:⁵

The stakes are high for both sides, because a single employee can damage a business by defamatory postings viewable by a large population, and an employer can damage an employee’s life by an unwarranted

⁴ Refer Employment Relations Act 2000, s 103A; and the discussion in the full Court judgment of *Angus v Ports of Auckland Ltd* [2011] NZEmpC 160, [2011] ERNZ 466.

⁵ Mary Noe “Facebook: The New Employment Battleground” June 2014, NYSBA Journal 15.

termination for nothing more than free expression of ideas on issues of little relevance to the business.

Welcome to the new battleground. This is just the beginning.

Out of work conduct

Issues relating to the extent to which employers may legitimately act on concerns about out of work behaviour are not new and pre-date the advent of social media.

It is well established that activities which might otherwise appear to have been conducted in private may give rise to legitimate concerns for an employer and disciplinary consequences for an employee. That is why a primary school teacher might justifiably be dismissed for accessing child pornography in their spare time.

As the Court of Appeal observed in *Smith v Christchurch Press Company Ltd*.⁶

Dismissal for serious misconduct cannot be confined to conduct in the course of employment in any but the widest sense. It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal.

The Court of Appeal went on to observe that:⁷

... there must be a clear relationship between the conduct and the employment. It is not so much a question of where the conduct occurs but rather its impact, or potential impact on the employer's business, whether that is because the business may be damaged in some way; because the conduct is incompatible with the proper discharge of the employee's duties; because it impacts upon the employer's obligations to other employees or for any other reason it undermines the trust and confidence necessary between employer and employee.

It is perhaps notable that the Court's focus was on establishing a nexus between the conduct complained of and the employer's business, *not* on whether the employee considered that what they were doing was private or whether they believed (reasonably or otherwise) that it might come to their employer's attention.

⁶ *Smith v Christchurch Press Company Ltd* [2001] 1 NZLR 407 (CA) at [21].

⁷ At [25].

In *Hallwright v Forsyth Barr Ltd*⁸ the required nexus was found to be present in circumstances where the employer suffered damage to its reputation following media attention arising out of criminal charges laid against Mr Hallwright, one of its senior employees. The criminal charges involved an altercation with another motorist while Mr Hallwright was away from work, driving his child to a music lesson. The altercation resulted in serious injury to the other motorist and was widely reported as a “road rage” incident.⁹ Mr Hallwright enjoyed a reasonably high media profile by virtue of his position within the company and a significant amount of media attention surrounded his criminal trial. Mr Hallwright was convicted and he was subsequently dismissed, some two years after the incident had occurred. Mr Hallwright’s dismissal was found to be justified, the Court concluding that:¹⁰

The required nexus is between the impugned conduct and the employer’s business. In the present case the offending generated a considerable amount of negative publicity that repeatedly linked Mr Hallwright to Forsyth Barr, including the headline which appeared on the 3 News website following sentencing: “Forsyth Barr analyst sentenced for road rage incident”. Given the nature of the company’s business, and concerns about maintaining its reputation both in the marketplace and within its client base, there was a sufficient connection between the conduct and the employment.

While Mr Hallwright was not at work at the time the incident occurred, it nevertheless gave rise to adverse publicity which negatively impacted on the employer’s business and Mr Hallwright’s ongoing ability to do his job.

Jurisdictional divides

Part 6 of the Privacy Act 1993 (the Privacy Act) contains twelve information privacy principles, which in the employment context describe how employers should conduct themselves in relation to employees’ personal information. Employers are brought within the purview of the Act by virtue of the definition of ‘agency’.¹¹ The definition

⁸ *Hallwright v Forsyth Barr Ltd* [2013] NZEmpC 202, [2013] ERNZ 553.

⁹ This characterisation by the media was criticised as unfair by the Judge in the District Court. See <www.stuff.co.nz/business/industries/7579697/Judge-slams-road-rage-banker-conviction>, 30 August 2012.

¹⁰ At [53].

¹¹ Privacy Act 1993, s 2.

includes “any person or body of persons, whether corporate or unincorporated, and whether in the public sector or the private sector”.¹²

As the Privacy Act itself makes clear, with the exception of Principle 6(1)¹³ the Information Privacy Principles do *not* confer legal rights enforceable in a court of law. Rather, an individual has a right to complain to the Privacy Commissioner about an alleged breach of privacy by their employer. The Commissioner may investigate the complaint or refer it to the Director of Human Rights Proceedings, as a precursor to a potential hearing before the Human Rights Review Tribunal. The Privacy Act also contemplates situations where the complaint may be more properly dealt with elsewhere, and includes a referral mechanism to enable this to occur.¹⁴ There is no ability to refer such matters to the Employment Court.

An individual (as an employee) may pursue a personal grievance against his/her employer in circumstances where the employee has been unjustifiably dismissed or disadvantaged in their employment.¹⁵ The employment institutions (the Employment Relations Authority and the Employment Court) have exclusive jurisdiction to determine such claims.¹⁶ Whether the employer’s actions were justifiable is answered by applying the test set out in s 103A(2) of the Employment Relations Act 2000 (the Act), namely whether the actions of the employer were the actions that a fair and reasonable employer could have taken in all the circumstances.

Arguments about the application of the Privacy Act in determining claims in the employment institutions have previously been raised without success. As Chief Judge Goddard observed in *Clarke v Attorney-General*:¹⁷

... I hold that the plaintiffs have made out a clear arguable case [of unjustified dismissal]. In saying so, however, I should not wish to be taken as upholding Mr Robson's argument based on alleged breaches of privacy principles for, *as I understand the Privacy Act 1993, it is not intended to be enforced in any Court of law but only through the special procedure provided by the Privacy Act 1993 itself and that, in my view, must extend*

¹² Section 2.

¹³ Access to readily retrievable information, see s 11.

¹⁴ Sections 71 – 72C.

¹⁵ Employment Relations Act, s 103(1).

¹⁶ Sections 161(1) and 187(1).

¹⁷ *Clarke v Attorney-General* [1997] ERNZ 600 (EmpC) at 610.

also to the collateral use of privacy principles. However, I do not have to finally decide the point and do not do so.

(emphasis added)

The Court of Appeal reiterated the point in the criminal context in *R v Wong-Tung*,¹⁸ observing that:

That principle [Principle 4] does not have the force of law, a status which s 11 confers only on subcl (1) of principle 6. The Privacy Commissioner has the function under s 11 of promoting the acceptance of the information privacy principles, and breach of a principle may in certain circumstances become an interference with privacy under s 66. That in turn can found a complaint under s 67 and an investigation under s 69 and ultimately an award of damages by the Privacy Tribunal under s 88. We are not persuaded that there was a breach of principle 4 in the present case, but even if there were, it would not make the interception unlawful.

The relevance of the Privacy Act and its principles in determining employment disputes was also considered in *NZ Amalgamated Engineering and Manufacturing Union Inc v Air New Zealand*.¹⁹ There the Employment Court endorsed the proposition that the Privacy Act did not confer rights or impose obligations enforceable in the Employment Court, citing submissions advanced on behalf of the Privacy Commissioner as intervener:²⁰

At the heart of the Privacy Commissioner's submissions, and not contested by any party or intervener, was the fundamental proposition that the Privacy Act 1993 does not give rights or impose obligations that are enforceable in this or any other court of law. Questions of statutory privacy are to be dealt with by a discrete and exclusive procedure involving, among others, the Privacy Commissioner and the Human Rights Review Tribunal.

While the Privacy Principles are not enforceable in the Employment Court, that does not mean that the important interests they are designed to protect and promote are irrelevant or can be ignored or undermined by employers. To do so may render them liable to complaint and subsequent action in the Human Rights Review Tribunal. Such interests are also likely to be engaged in the employment jurisdiction,

¹⁸ *R v Wong-Tung* (1995) 2 HRNZ 272 (CA) at 274.

¹⁹ *NZ Amalgamated Engineering and Manufacturing Union Inc v Air New Zealand* [2004] 1 ERNZ 614 (EmpC).

²⁰ At [218].

including at the front end (the standard the employer is required to meet in taking action) and the rear end (the evidence the Court will receive in adjudicating a claim).

The front end

It has been suggested²¹ that the Privacy Act “adds to what constitutes fair and reasonable treatment by an employer, for such treatment would entail substantial compliance with the Information Privacy Principles.”²² On this analysis a number of Privacy Principles are likely to have particular relevance, including Principle 1 (purpose of collection); Principle 4 (personal information shall not be collected by an agency by unlawful means or by means that, in the circumstances of the case, are unfair or intrude to an unreasonable extent upon the personal affairs of the individual concerned); Principle 8 (an agency that holds personal information shall not use that information without taking such steps (if any) as are, in the circumstances, reasonable to ensure that, having regard to the purpose for which the information is proposed to be used, the information is accurate, up to date, complete, relevant and not misleading); and Principle 11 (the limits on disclosure of personal information).

However, the suggested approach may be said to add an unnecessary gloss to the statutory test for justification which does not emerge from a reading of s 103A and which is likely to invite the sort of collateral attack identified as problematic by the Court in *Clarke*. It is doubtful that an asserted breach of one or more of the principles contained within the Privacy Act automatically undermines a claim of justification or constitutes the beginning and the end of the inquiry which the employment institutions must undertake. That is because employment law requires a more nuanced approach.²³

*Ravnjak v Wellington International Airport*²⁴ illustrates the point. There the employer relied on unlawfully obtained recordings in inquiring into concerns about serious misconduct, which had led to the employee’s dismissal. The Chief Judge identified a

²¹ Gordon Anderson and others *Mazengarb’s Employment Law (NZ)* (online looseleaf ed, LexisNexis).

²² At [3800.8].

²³ A more nuanced approach is also required under provisions of the Privacy Act. See, for example, s 14(a) which refers to the need for the Privacy Commissioner to have regard to competing interests.

²⁴ *Ravnjak v Wellington International Airport* [2011] NZEmpC 31, [2011] ERNZ 32.

key question as being whether a fair and reasonable employer would²⁵ have relied on the information in all of the circumstances at the time.²⁶ He went on to make it clear that the lawfulness or otherwise of obtaining the recordings did not necessarily cause the plaintiff's dismissal to be unjustified, observing that:²⁷

Although it may be said, even convincingly, that a fair and reasonable employer will not act unlawfully in respect of its employees, that alone is too simplistic an analysis and does not provide a properly considered and balanced decision under s 103A.

What can be said with a relatively high degree of confidence is that arbitrarily and vindictively hacking into an employee's Facebook page and pursuing disciplinary action on the basis of what is located there is likely to present difficulties for an employer in establishing that their actions were within the permissible range.²⁸ An employer whose attention is drawn to a Facebook post which denigrates the company to "friends" who include customers and colleagues, who raises concerns about the post with the employee and provides them with an opportunity to provide an explanation, is less likely to confront difficulties.

It is also tolerably clear that precautionary steps by an employee, such as the application of privacy settings, may be relevant but will not automatically immunise them from disciplinary action. An employer might still reasonably be concerned about a post, notwithstanding the fact that it is intended for consumption by a limited audience. Much will depend on the particular circumstances.

In *Crisp v Apple Retail (UK) Ltd* the Employment Appeals Tribunal (EAT) held that an employee was justifiably dismissed for posting disparaging comments about his employer despite the restricted privacy setting attached to those comments. The EAT considered that the nature of Facebook and the internet in general, meant that

²⁵ The case preceding the 2011 amendments to the Act, and the change from "would" to "could" in s 103A.

²⁶ At [59].

²⁷ At [64].

²⁸ See, for example, the discussion in *Crisp v Apple Retail (UK) Ltd*, Employment Tribunals, ET1500258/11 (5 August 2011) at [44].

comments made by one person can be easily forwarded on to others without any control on the part of the original commenter.²⁹

This approach was reflected in obiter observations in *Hook*, where the rhetorical question was asked: "... how private is a written conversation initiated over the internet with 200 'friends', who can pass the information on to a limitless audience?"³⁰

It should not be forgotten that employers have numerous obligations, including to provide a safe workplace. Actions taken in discharging such obligations will be relevant to an assessment of justifiability. Could an employer fairly and reasonably have regard to Facebook posts disclosing on-line bullying of employee A by employee B in circumstances where employee B has placed privacy settings on their Facebook page and blocked their manager from viewing it? The question only needs to be asked for the answer to suggest itself.

As with most issues of law, context is key. It is indisputable that employees are individuals who have a right to enjoy time away from work without unnecessary intrusion and to express their own personal views without unnecessary fear of reprisal. The realities of human interaction and workplace dynamics cannot be lost sight of. While the boundaries between work and personal time are becoming increasingly blurred, there is an obvious difference between a casual conversation with a friend, or a joking exchange with a colleague, and the publication of derisory comments in a way that might come to broad attention. So an employer was found to be justifiably concerned about an employee's Facebook post, describing herself as a "very expensive paper weight" who was "highly competent in the art of time wastage, blame shifting and stationery theft."³¹

As a full bench of Fair Work Australia in *Linfox Australia Pty Ltd v Stutsel*³² put it:

The posting of derogatory, offensive and discriminatory statements or comments about managers or other employees on Facebook might provide

²⁹ At [44].

³⁰ *Hook*, above, n 1 at [29].

³¹ *Dickinson v Chief Executive, Ministry of Social Development* ERA Auckland AA508/10, 13 December 2010 at [12].

³² *Linfox Australia Pty Ltd v Stutsel* [2012] FWA FB 7097, (2012) 217 IR 52, at [25] cited in *Hook* at [34].

a valid reason for termination of employment. In each case, the enquiry will be as to the nature of the comments and statements made and the width of their publication. *Comments made directly to managers and other employees and given wide circulation in the workplace will be treated more seriously than if such comments are shared privately by a few workmates in a social setting. In ordinary discourse there is much discussion about what happens in our work lives and the people involved. In this regard we are mindful of the need not to impose unrealistic standards of behaviour and discourse about such matters or to ignore the realities of workplaces.*

(emphasis added)

Because the test for justification is based on the fairness and reasonableness of the employer's actions in all of the circumstances, the facts of each individual case will be pivotal. In cases involving reliance on social media posts, consideration will likely be given to any privacy interests that might be engaged, the basis for the employer's asserted concerns, the means by which they came to the employer's attention, the potential or actual impact on the employer's business and/or the relationship of trust and confidence, how the information of concern was dealt with and what action was taken in response to it, weighing all relevant factors.

*Taiapa v Te Runanga O Turanganuia*³³ provides an example. The employee had advised their employer that they were sick and unable to attend work. During this time the employee was pictured on Facebook at what appeared to be a large scale sporting event, looking fit and healthy. The employer became aware of the photograph. What, if any, action could the employer fairly and reasonably take? The fundamental obligations of trust and confidence owed by an employee to an employer in such circumstances were emphasised by the Court in finding that the employer was entitled to put its concerns about malingering to the employee.³⁴ The employee was shown a copy of the photograph and asked to comment on it. Ultimately his explanation was not accepted and he was dismissed. The Court held that the dismissal was justified. The position may well have been different if the employer had failed to put the Facebook photograph to the employee for comment,

³³ *Taiapa v Te Runanga O Turanganui A Kiwa Trust (t/a Turanga Ararau Private Training Establishment)* [2013] NZEmpC 38, [2013] ERNZ 41.

³⁴ At [42]-[44].

and had lured him into giving inaccurate answers as to his whereabouts on the day in question.³⁵

The existence of a policy setting out acceptable standards of behaviour, including permissible use of office equipment, on-line activity and out of hours conduct which might give rise to concern from the employer's perspective, is likely to assist.³⁶ It is not, however, a blanket panacea. A policy which, for example, purports to allow the employer free access to the employee's private communications for no good reason is unlikely to convert an unreasonable intrusion into a reasonable one even if the policy has been adopted with ostensible employee consent.

While the focus is on the employer's actions that does not mean that the employee's actions (however culpable) will be ignored. That is because the Court is obliged, in considering any remedies, to have regard to the extent to which the employee contributed to the situation which gave rise to the grievance.³⁷ That means that posting online comments may result in a reduction in remedies, even if the employer's actions are ultimately found to be unjustified.

There is also the possibility that the nature of the employee's actions, albeit conducted in private, will be found to disentitle them to any relief in the exercise of the Court's equity and good conscience jurisdiction.³⁸ This was the approach adopted in *Clarke v Attorney-General*.³⁹ There the Court denied interim relief to a number of employees who had written offensive emails to each other about female colleagues. The emails were uncovered as a result of an unrelated inquiry and were by way of private 'banter'. The Chief Judge found that the employees had disqualified themselves by their own actions from the assistance of the Court in its equitable jurisdiction, stating that:⁴⁰

Those who seek equity must do equity, and I am sorry to say that the plaintiffs have not done equity to the women of whom they have spoken in such condescending and disrespectful terms.

³⁵ See, for example, *B W Bellis Ltd (t/a The Coachman Inn) v Canterbury Hotel etc IUOW* [1985] ACJ 956, (1985) ERNZ Sel Cas 142 (CA).

³⁶ See, for example, *Hodgson v The Warehouse Ltd* [1998] 3 ERNZ 76 (EmpC).

³⁷ See s 124 of the Act.

³⁸ Section 189 of the Act.

³⁹ *Clarke v Attorney-General*, above n 17.

⁴⁰ At 612.

While the case related to emails on the office system, sent during work time, the underlying principle expressed by the Court would appear to have much broader potential application.

The rear end

The proposition that the Employment Court is prevented from having regard to evidence obtained in alleged breach of the Privacy Act is problematic and ignores s 189 of the Employment Relations Act, which confers broad powers on the Employment Court to admit evidence whether strictly legal evidence or not.

As the Court of Appeal has made clear,⁴¹ in exercising its power to admit or refuse to admit evidence the Court must be guided by settled principles of common law and relevant provisions of the Evidence Act 2006. No mention is made of the Privacy Act and its principles, and the Privacy Act contains no provision which otherwise prevents the use of any evidence obtained in breach of its Principles in any proceeding. This can be contrasted with, for example, s 52(2) of the Private Investigators and Security Guards Act 1974, which contains an express prohibition against using evidence obtained unlawfully under that Act in any civil proceedings.⁴²

It is, however, well accepted that unfairly obtained evidence may be excluded in proceedings in the Employment Court.⁴³ In *Ravnjak v Wellington International Airport*⁴⁴ the Court drew on s 30 of the Evidence Act (although that provision relates to criminal rather than civil proceedings) to inform a decision on the admissibility of improperly obtained evidence. The definition of “improperly obtained” under the Evidence Act is delineated into several categories, the third of which characterises evidence as being improperly obtained if it has been obtained “unfairly”.⁴⁵ But even evidence which has been unfairly obtained may still be admitted, having regard to its probative value.

⁴¹ *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] ERNZ 80 at [24].

⁴² Discussed in *Ravnjak*, above n 24 at [49].

⁴³ See, for example, *Talbot v Air New Zealand Ltd* [1996] 1 NZLR 414, [1995] 2 ERNZ 356 at 369, in respect of what was said to be an unfair surreptitious recording of a meeting between an employee and employer.

⁴⁴ *Ravnjak*, above n 23.

⁴⁵ Evidence Act 2006, s 30(5)(c).

In *Hook*⁴⁶ the company sought to rely on evidence relating to a Facebook page which came to its attention after the employee relationship had come to an end. The evidence was said to be relevant to credibility. The information was freely accessible and had not been protected by a privacy setting. No issue of admissibility appears to have been raised but if it had been it is doubtful that the evidence would have been ruled inadmissible, including having regard to the means by which the information had been obtained, which could scarcely be described as unfair, and having regard to its probative value. It is, after all, difficult to see a material difference between information posted publicly on Facebook and that which is posted on a public blog.

Potential pitfalls for the employer

While it may be permissible for an employer to have regard to a social media post or 'private' communications in identifying, investigating, taking disciplinary action and/or defending proceedings, there are traps for the unwary and/or those lacking social-speak savvy.

In *Booth v Big Kahuna Ltd*⁴⁷ the managing director's attention was drawn to a string of text messages sent by a manager to a female colleague, out of work hours and seemingly focussed on social rather than work-related matters. The managing director was concerned that the female employee was being harassed. An investigation was undertaken and the manager was dismissed. The dismissal was held to be unjustified, in part because the managing director had failed to appreciate the context in which the texts had been sent and the nature of the personal relationship between the employee and her manager. In addition the managing director had misconstrued the text messages, including text abbreviations such as LOL, which he erroneously assumed was an abbreviation for Lots of Love. The Court observed that:⁴⁸

Under skilful cross examination, [the managing director] said that the "admin whore" reference [in one of the text messages] had been the "glaring thing" for him at the disciplinary meeting. Ms B confirmed in

⁴⁶ *Hook*, above n 1.

⁴⁷ *Booth v Big Kahuna Ltd* [2014] NZEmpC 134, [2014] ERNZ 295.

⁴⁸ At [68].

evidence that the phrase was a standing joke between [the employee] and Ms A and that she (Ms B) was “in on it”. If [the managing director] had asked Ms B further questions about her relationship with [the employee] and the content of the text messages and what they may or may not have revealed, relevant information about the reference may have come to light. He never took this step, despite what [the employee] had told him about the background context of the messages and his explanation as to this particular phrase. Ms B may also have been able to inform [the managing director] of relevant issues of “text speak” which, during the course of the hearing, it became apparent that [the managing director] was unfamiliar with. He was unaware that “LOL” indicated humour, conceding in cross examination that — on reflection — these texts might be seen as light hearted banter. He also accepted that he had found it hard to fathom what “LOL” meant at the time, although it is notable that he did not take steps to clarify the point with either of the people who had participated in the text exchange.

The case illustrates the need for employers to bring a sense of perspective to bear in terms of out of work communications. ‘Private’ communications which appear problematic at first blush may take on quite a different character when viewed in context. That is one of the reasons why compliance with the procedural requirements set out in s 103A(3) is of such importance, including providing information of concern to the employee to enable them to respond to it.

So what of the following examples?

An employee is home but on call. He is an active Facebook user and posts:

On standby tonight so only going to get half pissed lol.

I’m on Vodka and apple juice first time i’ve tried it no to shabby.

The post comes to the employer’s attention. The employer is concerned that the employee may have been drinking alcohol while on call and the possible health and safety implications this gives rise to. An investigation is commenced and the employee is ultimately dismissed.⁴⁹

⁴⁹ *The British Waterways Board (t/a Scottish Canals) v Smith* [2015] UKEATS/-0004/-15/SM 3 August 2015 at [11].

An employee is disgruntled with his manager and places a Facebook post out of hours on his home computer wondering:

How the f..k work can be so f..king useless and mess up my pay again.
C..ts are going down tomorrow.

Eleven co-workers are able to read the post. The employee's manager cannot because he has been blocked. However, one of the co-workers voluntarily shows it to the employee's manager. The employee is dismissed.⁵⁰

Two employees are at work and take photographs of each other "planking" on top of heavy machinery. The photographs are posted to Facebook. The employer is concerned about the possible health and safety implications of such behaviour and commences an employment investigation. The employees are subsequently dismissed.⁵¹ What of a group of employees posting on-line photographs of themselves doing a robot dance during work hours?⁵² Or posting photographs of themselves suspended from a butter factory ceiling, which customers have access to?⁵³

What if a current employee attends an out of hours function, and presents a departing colleague with a homemade cake iced with the words:⁵⁴

[Employer] F..K You

C..T

The current employee photographs the cake and uploads the photographs onto Facebook, sharing it with 150 friends. The employer hears about the photograph and asks the employee to provide a copy of it. The employee declines to do so. The employer then compels another employee, who is one of the icer's Facebook friends,

⁵⁰ *O'Keefe v Williams Muir's Pty Ltd t/a Troy Williams the Good Guys* [2011] FWA 5311.

⁵¹ *Harris v Fonterra Co-Operative Group Ltd* [2011] NZERA Christchurch 197; see also J Catanzariti "Social Media Dismissals: work/home dividing line blurred" *Law Society Journal* November 2011, 49(10) at 55.

⁵² *Taufua v Fonterra Brands (New Zealand) Ltd* [2014] NZERA Auckland 4.

⁵³ *Harris*, above n 51.

⁵⁴ A variation on *Hammond*, above, no3.

to show them the photograph. The photograph is then used as the basis for disciplinary action and the employee is dismissed. No other steps are taken by the employer in relation to the photograph.

An employee posts comments on Facebook about the “dumb Aussies” who have taken over the company he works for. He is absent from the office without explanation on the day he posts:

Employee: Going to quit my job tomorrow ...

Reply: Is your boss on Facebook?

Employee: 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 Dingoes.

The employee resigns. Although he thinks that his Facebook page is protected by a privacy setting his ex-employer is able to access it and sees a number of posts which undermine the employee's claim against it.⁵⁵ The company subsequently seeks to rely on the posts at hearing.

Dissing the Judge?

The potential perils of Facebook postings are not confined to the employment sphere. They extend more broadly, including to the criminal context. A case involving a person summonsed to appear for non-payment of fines provides a recent example. When the matter was called, the Judge had his attention drawn to the defendant's Facebook post, which made derogatory remarks about the Judge in the context of his pending retirement.

The Judge insisted that the defendant read out the whole of the Facebook post in open Court. The exchange went as follows:⁵⁶

⁵⁵ *Hook*, above n 1.

⁵⁶ *LaRue v Ministry of Justice Collections Unit* [2016] NZHC 666 at [41].

Defendant – LOL I hope the f.....s gone by Friday. Haha. F.....r, now f.....c..t whose old face and saggy chin. F... off.

Judge – Who are you talking about?

Defendant – Well, I guess I'm talking about you Sir.

Judge – Thank you.

Defendant – And I, I don't really know what to say about that, but I do apologise.

Judge – No, no you don't have to say anything, that's what you thought.

Defendant – Yup.

Judge – For your own benefit ... I don't read that drivel. That was drawn to my attention by the Registrar. You're a brave soul though aren't you?

Defendant – Well, all I can say is you got me on that one.

Judge – I got you cold mate.

Defendant – You did, and I apologise for it.

Judge – Now you're hardly a picture yourself are you?

Defendant – Oh, no.

The defendant then received a substituted sentence of 300 hours of community work.⁵⁷

Conclusion

While non-compliance with the Privacy Act will not automatically translate into the employment jurisdiction in terms of supporting a grievance claim, the principles underpinning the Act and privacy interest considerations more generally may assist in informing an assessment of whether what the employer did and how they did it was what a fair and reasonable employer could have done in all of the circumstances.

⁵⁷ On appeal the High Court reduced the sentence, finding that there was a reasonable basis for believing that the sentencing Judge had set the sentence taking into account the irrelevant consideration of the defendant's derogatory comments about him at [5]-[8].

While it is clear that employers may pursue legitimate concerns, even where they arise out of communications which the employee may regard as 'private' or actions which have occurred out of hours and away from the workplace, an employer who tramples over an employee's right to enjoy a private life away from work and to express their views without unnecessary intrusion, is likely to face an uphill battle in persuading the Court that their actions fell within the permissible range. To date the issue has tended to be analysed within a procedural framework.⁵⁸ There is, however, scope for a wider analysis and application of privacy interests in employment law that has yet to be fully explored.

There is an uncertain area in between the two permissible ends of the spectrum, representing risk for both employer and employee. Whether a grievance is made out will depend on a consideration of the competing interests in the particular circumstances, striking a balance between protecting the privacy and free speech interests of the employee and protecting the legitimate interests of the employer.

All of this suggests that employees would be wise to filter their on-line comments insofar as their employment relationship is concerned; and that employers would be wise to respect the rights of their employees to enjoy life away from work.

⁵⁸ See, for example, *Excell Corporation Ltd v Stephens (No 2)* [2003] 1 ERNZ 568 (EmpC).