

NEWSLETTER

FEBRUARY 2011

Cornwalls' E&IR Team Welcomes

Alexandra Klimovics, lawyer, has sadly resigned. If you worked with Alex, you will know what a big loss that is for our team. We wish her all the best in her future endeavours.

On a happier note, new trainee Lauren Bartlett has joined the E&IR team. Lauren completed a double degree in Law/Business at La Trobe University before embarking on an around-the-world trip. Lauren may be familiar to some of you; she was a seasonal clerk here in 2009 with our Property & Finance team and was also a paralegal with our Commercial Litigation team during her studies. We look forward to having Lauren with us for the next 3 months.

Jane, having completed her final rotation before admission, will continue in our team until at least the end of March.

[*Click on image to view Tracey's profile](#)

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IMPORTANT INTERPRETATION: Annual leave loading is payable on termination

The Fair Work Ombudsman (**FWO**) has determined that employers required to pay annual leave loading must pay the loading on accrued annual leave when making termination payments to employees. This decision is based on a provision in the National Employment Standards (**NES**), which requires that a terminated employee with a period of untaken annual leave *be paid what they would have been paid if they had taken that period of leave* (see *Fair Work Act 2009* (Cth), s90(2)).

This requirement cannot be excluded by any term in a modern award, agreement or other workplace instrument.

The aftermath of this determination, according to the Australian Chamber of Commerce and Industry (**ACCI**), is that employers who have not paid leave loading on termination payments since the *Fair Work Act 2009* (Cth) took effect might be liable for backpay (although this matter has not been tested by the courts).

The Workplace Relations Minister acknowledged there seemed to be an 'undesirable' conflict between the NES and leave loading provisions in some awards. The federal government will hold a teleconference with employers and unions in the first week of March in an attempt to resolve questions regarding this interpretation by the FWO.

In the interim, employers should ensure they include accrued annual leave and annual leave loading entitlements in an employee's final

pay (even if a modern award, agreement or contract expressly states that either is not payable). Employers concerned about retrospective claims should seek further advice regarding this new interpretation. When new information becomes available, we will let you know.

Six month job a suitable alternative

Fair Work Australia (**FWA**) recently found that a new non-ongoing position was suitable alternative employment.

In June last year, Affinity Risk Brothers (**Affinity**) made an employee redundant, after a major client for whom the employee was performing services, terminated the contract and brought the work in-house.

The CEO of Affinity arranged for the employee to follow the work to the new employer. This job was identical in all respects to the employee's previous job, except that it was offered for six months only, with no guarantee of employment beyond that time.

Affinity brought an application under section 120 of the *Fair Work Act 2009* (Cth) to reduce to nil the redundancy that would otherwise be payable to the employee.

At the hearing, the employee submitted that he felt obligated to actively seek other employment – which he had obtained.

Affinity submitted that the loss of the client had '*impacted seriously on the business and as a result of this and other changes they had had to make seven employees redundant*'. They stated that a redundancy payment to the employee would be a '*windfall*' and '*unfair on Affinity*' and '*against the spirit of the legislation*'.



FWA determined that the employee was 'fortunate' to have had suitable alternative employment arranged for him and, other than a change in employer, he had avoided any reduction in the terms and conditions other than that 'the employment was, on its face, only for six months'.

Affinity won a 75% reduction in the severance payment it was required to make to the employee from four weeks to one.

Griffiths v Rose – Upholding the rights of employers to monitor and enforce their IT usage policies

The Federal Court has upheld the termination of a senior public servant who used a departmental laptop to access a number of pornographic websites while at home, using his own internet connection.

Although the employee deleted the entries in his browser's internet history, the laptop was loaded with a 'desktop logging system' called Spector360, which collected data on the occurrence of keywords being typed into the system and took snapshots of the user's desktop every

30 seconds. The laptop was configured so that when the employee next connected to the Department of Resources, Energy and Tourism's (**Department**) network, the data collected by Spector360 would be sent to a dedicated server.

The data obtained revealed that the employee had logged an internet search for the term 'knockers'. After the detection of that word by Department security officers, further inquiry ensued and an investigation was launched into the employee's use of the laptop.

When confronted with the allegations, the employee initially maintained that he had accessed the material by accident. When he was provided with the information from Spector360, he changed his story and said he had searched for and viewed the images for 'research and inquiry' purposes.

The investigation found that the employee had used the laptop to view pornography and in doing so had breached the *Australian Public Service Code of Conduct* (**APS Code of Conduct**), contained in s13 of the *Public Service Act 1999* (Cth).

The investigation also concluded that the employee had breached the requirement to 'use Commonwealth resources in a proper manner' and the requirement to 'at all times behave in a way that upholds the Australian Public Service Values and the integrity and good reputation of the Australian Public Sector'.

As a consequence of his conduct in accessing the pornography, in conjunction with the aggravating factor of his dishonesty, the employee was terminated.

Was there a reasonable and lawful direction?

The employee maintained that the direction was not lawful or reasonable, primarily because:

- it breached s16 of the *Privacy Act 1988* (Cth) (**Privacy Act**) or his common law right to privacy; or
- it breached Article 17 of the *International Covenant on Civil and Political Rights* (**ICCPR**).

No breach of privacy

Justice Nye Perram held that the Department had not breached the Privacy Act or the employee's common law right to privacy (if it existed) when it directed the employee not to access pornography and took steps to monitor his compliance with its direction.

Using Spector360 to collect information to enforce the APS Code of Conduct was a lawful purpose and the Department had a legitimate interest in ensuring that its equipment did not come into contact with pornography. His Honour held it was not unfair to warn a person that their computer use would be monitored in order to detect if the person accesses pornography and then to do so.

Although Justice Perram held that the use of Spector360 did not infringe s16 of the Privacy Act on the facts of this case, he acknowledged that in other circumstances such an argument may carry more force, for example where Spector360 gratuitously collects personal banking information.

No arbitrary or unlawful interference

Article 17 of the ICCPR protects against the arbitrary or unlawful interference of one's privacy, family, home or correspondence. Justice Perram rejected the argument that Article 17 had been breached, saying there was nothing arbitrary or unlawful about monitoring the employee's usage when he had been expressly told that it would be monitored.



Conclusion

Unlike the unfair dismissal jurisdiction, the court was not reviewing the merits of the decision to terminate the public servant, but rather whether the decision was one at which any decision-maker could arrive. His Honour expressed the view that terminating an employee's employment *solely* on the basis of the employee viewing lawful pornography out of hours, in his own home and using his own internet connection, would be very close to being so unreasonable as to render the decision subject to review. However, because the employee had sought to disguise his usage and subsequently lied about it, it would be impossible to say the decision-maker's decision was unreasonable in the requisite sense.

Although it is a rare instance when costs are ordered in termination cases, the application was dismissed and costs were ordered against the employee.

Lessons for employers

This case makes clear that logging software **could** breach privacy laws. Its use might give rise to the unfair collection of information in some circumstances, ie where you do not have the requisite interest in collecting the information.

Employers should:

- have a policy prohibiting the use of their IT facilities to access pornography, and ensure their employees have read and understood the policy (by a signed document recording they understand it);
- make known to employees that the company monitors their computer use; and
- if you operate an IT policy that permits limited personal use of your IT facilities, ensure the policy makes plain that personal use of the facilities **does not** include the accessing of pornography.

Getting to grips with social media

The rising popularity of social networking sites (eg Facebook and MySpace) and other communication services (eg Twitter) can be a cause of concern for many employers. But how can you go about limiting employee access to such sites without alienating your staff, and is that even wise?

Some of the pitfalls

The use of such websites as Facebook and Twitter often involves individuals broadcasting (or posting) their views and activities and the like to a very wide audience. This would not be alarming if every post were along the lines of 'Jody thinks Cornwall's really deserved the

Corporate INTL Magazine 2010 Legal Award for Construction Law Firm of the Year'. However, the reality is that posts may be damaging to your business because the employee is complaining about work, or even revealing your confidential or sensitive information.

Postings on social networking sites can also be discriminatory or amount to unlawful harassment (or both). Inappropriate conduct, including bullying and harassment, has emerged in recent case law as one of the real risks of social networking sites. The conduct might include employees complaining about fellow employees or managers, referring to other employees using offensive terms, or posting inappropriate photos (for example, pictures of coworkers drunk at social functions) without their permission.

Although these sorts of behaviours would form reasonable grounds for disciplinary action, it is obviously preferable to manage this risk in a way that avoids the pitfalls altogether.

Additionally, a disgruntled employee can retaliate and achieve maximum damage by blogging or posting offensive comments about their former employer.

Is it a distraction or an innovation?

Employees can spend a significant amount of time checking and posting on social networking sites, thus the sites can be a time waster. This can present a problem for management – do you ignore it, or do you control it and risk employee disenchantment?

Many employers prohibit the use of social media sites during work hours. However the imposition of such policies without communication and adequate training can create a negative workplace. This is particularly true if employees are left wondering about the reasons behind such an autocratic approach.



A large part of the population is linked into the social network. The next generation coming through the workplace is an 'online' generation. Your company could harness the power of social media to innovate the way your employees interact with each other and customers. Using social networking sites and tools can increase the channels of communication you can use.

Moreover, if for example an employee posts good things about your business, this can attract new employees and send a positive message to investors.

For employers

It is recommended that employers take a proactive approach to managing these issues through prevention and risk management. Employers should:

- consider the ways in which your employees use social media in and outside the workplace and assess what steps your business has taken to minimise potential issues;
- review your social media policies currently in place and ensure employees understand the policies;
- set boundaries for employees, informing them of what is acceptable and what is off-limits in terms of their blogging and postings – issues such as anonymous blogging and mentioning an employer should be protected against;
- ensure any damaging posts are quickly removed to limit any damage to the company's reputation; and
- when taking disciplinary action, ensure that the employee's conduct is sufficiently connected to the employment.

If you do not have a social media policy in place, consider whether adopting such a policy might help you avoid the pitfalls discussed in this article!

Further information and assistance on drafting or reviewing your social media policy can be obtained from the E&IR team.

Workplace Relations Highlights (Watch this Space)

Late last year, Shadow Small Business Minister Bruce Billson proposed amendments to the newly introduced paid parental leave scheme. The *Paid Parental Leave (Reduction of Compliance Burden for Employers) Amendment Bill 2010* is expected to be debated in parliament this month. The Bill seeks to make permanent the interim arrangements under which the Family Assistance Office pays the benefit to parents. Employers should be aware that under the current arrangement, they will be required to administer the payments from July 1. However, if the changes are approved by parliament, employers will be relieved of this requirement.

Fair Work Australia's release of quarterly performance data indicates a growing trend in unfair dismissal and general protection matters. The reports are accessible on the FWA website, and can be found by clicking [here](#).

Among some of the employment-related legislation proposed for introduction for the Autumn session of parliament is the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill*. The legislation is intended to implement the government's commitment to abolish the Australian Building and Construction Commission and to transfer its responsibilities to a specialist Fair Work Inspectorate. The Bill will also remove a range of industry specific regulation, including laws that provide higher penalties for breaches of industrial laws and broader circumstances under which industrial action attracts penalties and introduces safeguards in relation to the use of the power to compulsorily obtain information or documents. We will feature further developments on this legislation in future newsletters.

From 15 February 2011, new requirements for 457 visa applicants apply:

- Applicants who will be paid at, or above, an annual salary of \$85,090 will not have to satisfy the English language proficiency requirement (this is determined by the base rate of pay).
- Other applicants who will not have to satisfy the English language proficiency requirements include those whose nominated occupation does not require English and: who are the holder of a passport from certain identified countries; or who have completed at least 5 consecutive years of full-time study in a secondary and/or higher education institution where the instruction was delivered in English; and other certain sponsored applicants working at a diplomatic or consular mission of another country.

The list of occupations for which employers may nominate to sponsor workers under the 457 visa has also been updated.