DYHRBERG DRAYTON
EMPLOYMENT LAW

What's New Update: December 2019

Human Rights Review Tribunal decision highlights importance of privacy training

A recent decision of the Human Rights Review Tribunal has seen two district health boards ordered to pay $20,000 each in damages for their employees' interference with a man's privacy.

Mrs M was employed by the Hutt Valley District Health Board (**HVDHB**). In October 2017 Mr M, her husband, was diagnosed with terminal brain cancer. Mrs M sought leave without pay to care for him. Mrs M provided a medical certificate and a letter to HVDHB, advising Mrs M was required to provide full time care for her husband.

A friend of the M family had set up a Givealittle page to raise funds for Mr M, which incorrectly stated Mrs M had been made redundant. Mrs M was unaware of this.

An employee of HVDHB saw the page and reported it to Mrs M's manager. Two employees then looked at the Ms' Facebook pages. Mrs M's page was private, but Mr M's page was not. His Facebook page had details of the work he was engaged in, which involved travelling around the country. The employee was instructed by Mrs M's manager to screenshot the page.

HVDHB formed a distrust of Mrs M due to her assertion that her husband required full time care but was travelling and working, and the incorrect statement that she had been made redundant on the Givealittle page. None of these issues were put to Mrs M by HVDHB.

Mr M was treated for his cancer by Capital and Coast District Health Board (**CCDHB**). A social worker met with the M's at their home to discuss Mr M's needs and how to provide support.

Mrs M's employment issue with HVDHB escalated and she filed a statement of problem in the Employment Relations Authority (**ERA**).

Mrs M asked the social worker to provide a statement for her ERA proceedings describing what the family was going through for Mr M's treatment (with Mr M's permission). The statement outlined broad details of the treatment/impact but recorded no detailed information about the medical condition.

The statement from the CCDHB social worker was provided to HVDHB. On HVDHB's HR department's instruction, Mrs M's manager called the social worker to discuss the statement. The social worker was initially reluctant to discuss matters without Mr M's permission, but the manager pushed matters, noting permission was recorded in the letter. The social worker then gave further information about Mr M's care needs.

HVDHB filed its statement in reply in the ERA which included the file note made of Mrs M's manager's discussion with the CCDHB social worker and screenshots of Mr M's Facebook page. The statement in reply stated HVDHB's view that the level of care required was overstated. This was the first time Mr M became aware that his health had been discussed by HVDHB and the CCDHB social worker, that his Facebook page had been viewed, and the allegation that Mrs M had overstated his care needs.

Mrs M eventually reached a confidential settlement with HVDHB in relation to her employment matter.

The Office of the Privacy Commissioner investigated the matters and found an interference with Mr M's privacy. The matter then proceeded to a hearing before the Human Rights Review Tribunal.

The Tribunal found CCDHB had breached information privacy principle (**IPP**) 11 which limits when an agency can disclose personal information. The CCDHB social worker provided information additional to the written statement in his conversation with the HVDHB manager. As a health professional, the social worker should have

been aware of the sensitivity of the information and the need to obtain adequate and informed consent. The Tribunal considered this breach constituted an interference with Mr M's privacy.

The Tribunal found HVDHB had collected the information for a lawful purpose (being in connection with HVDHB's functions as an employer). It also found collecting information from Mr M's Facebook page was lawful because it was set to be publicly available. Notably, the Tribunal stated *'accessing a publicly available social media profile is not unreasonably intrusive, as it is information that anyone can see. However, the use to which personal information may be put (once collected) is governed by (inter alia) IPP 8 [requirement to ensure information is accurate prior to use]'*.

The Tribunal found HVDHB breached IPP 2, (which states an agency must collect the information from the individual concerned), by calling the CCDHB social worker to get further information about Mr M's care needs.

The Tribunal found the call also breached IPP 4, which states an agency should not collect personal information by unlawful means, or by means that, in the circumstances, are unfair or intrude unreasonably upon the personal affairs of the individual concerned. The Tribunal considered the call was *'unfair'* as the HVDHB manager had pushed the CCDHB social worker to divulge information. The social worker also considered the manager had misrepresented the reason for the call.

The Tribunal found HVDHB breached IPP 8, being the requirement to ensure information is accurate prior to use, in relation to the information on Mr M's Facebook page. The Tribunal noted:

- *'Mr M was not a party to the ERA proceedings and had no standing to contest the information or its interpretation.'*
- *'It was a simple matter for the information to be checked directly with Mr M or his wife.'*
- *'Facebook pages commonly contain highly subjective information selected for the purpose of presenting the author in a favourable light.'*
- *'Mr M was endeavouring to paint a picture of "business as usual" in the face of the devastation cancer had brought to his and his family's life. In the circumstances it was unreasonable to take his posts at face value, devoid of the context which reasonable enquiry would have otherwise revealed and clarified.'*

The Tribunal found the breaches of IPPs 2, 4 and 8 constituted an interference with Mr M's privacy.

In assessing the damages payable to Mr M, the Tribunal took into account the following factors:

- His extreme vulnerability;
- The limited terms of his consent for the CCDHB social worker to disclose information to HVDHB;
- HVDHB's failure to address its concerns with Mr and Mrs M directly;
- The use of Mr M's personal information to undermine his credibility without checking its accuracy; and
- The loss of confidence in social workers and counsellors at a time Mr M needed their support.

No mitigating factors were found on the part of the DHBs. While the CCDHB social worker had apologised to Mr M, CCDHB had not apologised and had carefully worded its response to admit as little wrongdoing as possible. The Tribunal noted while an apology cannot erase the humiliation and loss of dignity related to an interference with privacy, it can be taken into account, but must be *'timely, effective and sincere before weight can be given to it'*.

The Tribunal awarded damages in Mr M's favour in the amount of $20,000 against HVDHB and $20,000 against CCDHB.

The Tribunal placed significant weight on the fact the witnesses for CCDHB and HVDHB appeared unaware of the confidentiality attaching to personal information, particularly in a health context. Their lack of recent and relevant training on the information privacy principles was noted, in addition to a lack of caution on the part of the HR Department or involvement of the HVDHB Privacy Officer. The Tribunal stated, *'Employees*

should not be exposed to the risk of being blamed for privacy breaches which occur as a consequence of inadequate training and supervision.' While medical information is considered particularly sensitive, and the damages were likely magnified to reflect Mr M's vulnerability, the case demonstrates the need for employers to ensure employees are adequately trained in relation to the information privacy principles especially around the collection, use and disclosure of personal information.

Employment Court clarifies discretion in leave payment calculation method for employees paid on commission

The recent Employment Court decision of *GD (Tauranga) Ltd v Price & Others* has confirmed employers' ability to determine the calculation method for leave payments under the Holidays Act 2003 for employees paid on commission, when they take sick leave, bereavement leave, public holidays or alternative holidays (**other leave**).

A dispute arose between the parties regarding the employees' correct entitlement to remuneration when taking other leave, specifically, whether the correct remuneration is relevant daily pay (**RDP**) or average daily pay (**ADP**), calculated under ss 9 and 9A of the Holidays Act 2003 (**the Act**).

The employees sold house and land packages and were paid a base salary plus commissions which accrued when sale and purchase agreements went unconditional.

Previously, GD Tauranga had paid its employees ADP when they took other leave. Leave calculations therefore included commission payments in the annual income averaged on leave days, in addition to commission payments if they accrued on the leave day. This resulted in partial double-payment of the commission.

GD Tauranga sought advice and was told it was entitled to use either calculation method. It changed the employees' remuneration for other leave back to RDP. This significantly reduced the remuneration paid to the employees when they took other leave.

GD Tauranga applied to the Employment Relations Authority for a ruling to confirm it was entitled to use this method at its discretion. This argument turned on the meaning of the word *'may'* in s 9A(1) of the Act. The case was removed to the Employment Court as a test case on the basis it was an important question of law and the implications for employees and employers New Zealand-wide.

The full bench of the Employment Court agreed with GD Tauranga's position, noting if RDP is capable of being calculated, employers retain the discretion to use this method of calculation for other leave, regardless of whether the employee's daily pay varies within the relevant pay period.

The employees placed importance on GD Tauranga's past practice of calculating other leave payments using ADP. However, the Court confirmed the employer's discretion to elect the method of calculation is ongoing:

'In the present case it is possible for GD Tauranga to calculate RDP even though the employees' daily pay varies within the pay period when the other leave falls, but … in that situation the employer has a discretion as to whether it applies RDP or ADP. We can see no impediment to GD Tauranga altering the previous method of payment from ADP back to RDP. That discretion vests in the employer in this case. Indeed, it is conceivable that a need arises for an employer to change between RDP and ADP for other leave on a reasonably regular basis if the employment circumstances periodically change such that calculation of RDP becomes neither possible nor practical and s 9A comes into effect.'

The confirmation of this discretion by the Court provides employers with much needed clarification on how to properly pay employees who receive commissions when they take other leave.

Each situation will be dependent on how the employment relationships works in practice. We strongly encourage you to seek advice if you are faced with the above scenario.