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Privacy in the Workplace

What's yours is mine?

In a world where technology is becoming more prevalent, it's easy to feel that privacy rights are a thing of the past.

During the recent election campaign, New Zealand First leader Winston Peters accused government officials of breaching his privacy by leaking information to the media regarding errors in his superannuation payments. This created an uproar and, as yet, it's not clear how the information was provided to the media. Not all privacy breaches are so high profile but they are becoming increasingly common given developments in technology and social media. Considering the numerous forms of communication we have now, there are many ways that information can be disseminated.

We think nothing of sending emails whether at work or at home. It's quicker and often more effective than traditional letters or a phone call which can remain between two people.

Employment agreements

Most employment agreements will contain provisions regarding an employee's use of the employer's IT systems. These provisions generally allow employers to monitor employees' emails at any stage. There can be many genuine reasons for this such as quality control, staff management, and ensuring security of company and client information.

Generally speaking, an employer's IT systems and the information contained in them belong to the employer. However, most employment agreements also allow limited personal use of the email system.

What happens, however, when you use your work computer to send personal emails to friends and family? Is it a breach of your privacy if your employer accesses those emails?

International example

Earlier this year, the European Court of Human Rights considered this issue of privacy and work emails. Bogdan Barbulescu, a Romanian engineer, was fired from his job in 2007 after his employer found dozens of messages he had sent to family members while at work. The emails were sent from a Yahoo account that Mr Barbulescu had set up on his employer's instruction. Mr Barbulescu argued that his right to private correspondence had been violated.

Mr Barbulescu's employer relied on its company policies which banned the use of office resources for anything that wasn't work-related. It argued there were clear rules about the use of email for personal reasons during work hours.

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After various appeals, the European Court of Human Rights ruled that Mr Barbulescu's employer had breached Article 8 of the European Convention of Human Rights when it accessed his emails. Article 8 provides the right to respect for private and family life, and correspondence.

What about New Zealand?

In this country, there is no law that's equivalent to Article 8. However, the Privacy Act 1993 protects and promotes individual privacy. It prevents the collection of personal information in a way that intrudes on an individual to an unreasonable extent.

There are 12 principles in the privacy legislation that must be observed when it comes to collecting, using, storing and disclosing an employee's personal information. These include restrictions on how people and organisations can use or disclose personal information.

Employees are entitled to privacy of their personal details. Any information obtained by an employer when accessing an employee's personal email cannot be used to breach the employee's right to privacy, but it can be used in respect of disciplinary actions.

Monitoring emails

Most emails and other correspondence can be monitored in the workplace provided the employment agreement refers to this. The communications are the property of the employer. All employees should be aware that anything they send or receive can be seen, or accessed, by their employer.

This may not apply if the employee uses a personal Google mail or Yahoo account. If the employment agreement doesn't allow using the work IT system for personal email, it may be argued an employee should not be logging into these accounts during work hours.

There are some limits though

There are limits to an employer's right to access personal information. In March 2015, the Human Rights Review Tribunal[1] awarded $168,000 to Karen Hammond, a former employee of NZ Credit Union Baywide. Ms Hammond left the company in 2012. Several days later she baked a cake for a colleague who she believed had been unfairly dismissed by the company. The cake was iced with crass comments about the employer. After a dinner party, photos of the cake appeared on Ms Hammond's private Facebook page. It was only accessible to her chosen Facebook friends although the employer persuaded another staff member to copy the photos. These images were distributed by her previous employer to employment agencies and Ms Hammond's new employer.

The Tribunal concluded that NZ Credit Union Baywide had interfered with Ms Hammond's privacy by disclosing personal information about her. The award of $168,000 was an expensive lesson for her previous employer.

Care with confidential information

Employers also need to ensure they have policies in place to ensure staff don't breach the privacy of colleagues or clients by passing on confidential personal information. This is not just in the context of technology, but also in personal conversations and at social functions.

In some circumstances, employees may face criminal charges for accessing personal information. In July 2017, former police officer Jeremy Malifa was sentenced after admitting to illegally accessing the police national intelligence system. Mr Malifa had accessed personal information of women in whom he had a romantic interest and he used that information to contact the women. Not only was this a breach of his employment agreement, but it was also a criminal offence.

In another case[2], a university student union president complained to the Privacy Commissioner after excerpts of a written warning letter regarding her performance appeared in a student magazine. The student president's complaint was against both the magazine and the vice president who had given the letter to the magazine. The Commissioner said that the Privacy Act did not apply to the student magazine and the investigation looked at the person who gave the letter to the magazine. The Commissioner decided there had been a privacy breach. The case went to the Human Rights Review Tribunal. The complainant was awarded $18,000 in compensation for her humiliation, loss of dignity and injury to her feelings. The other party was ordered to undertake training on the Privacy Act.

Protecting privacy

The protection of personal information is important for any organisation. Employment agreements should address these matters. Any breach may well lead to disciplinary action. Of course, both parties should remember a key principle of employment law is that the relationship should be one of good faith.

In a world where technology is constantly developing, employers should regularly review their organisations' processes to make sure they're up to date. Employees need to be mindful of the consequences of information shared via email and other forms of communication.

We should all remember that within minutes private information can be sent around the world with the click of a mouse. Once the information is in cyberspace, the original sender can quickly lose control of it.

If you don't want someone to see something or for information to be leaked, think again before writing or typing. The same rules apply whether it's an old-fashioned letter written with a fountain pen or an email sent from the 21st century office.

Despite advances in technology and our more 'tell all' society, privacy is an important legal right. If you hesitate before sending something, perhaps it's not a good idea to share. ✱

1 *Hammond v Credit Union Baywide* [2015] NZHRRT 6

2 Case Note 253397 [2017]

Blended Families – Wills and Trusts

Can it be fair for everyone?

Making sure everyone you care about gets a fair share of your property after you die is an issue most of us grapple with. This may also have additional complications when you have a blended family.

It's not always as easy as just writing your Will and specifying who gets what. There are several statutes that give family members and/or your new partner's family, a right to contest your Will. The two main statutes are the Family Protection Act 1955 (FPA) and the Property (Relationships) Act 1976 (PRA).

Leaving it all to your partner?

A common way of structuring your affairs is to leave everything to your partner or spouse, knowing they will provide for your children as well as their own in their Will. These are often called 'mirror Wills'. Unfortunately, this structure doesn't always satisfy all the children involved, as we have seen in several recent court cases. You also run the risk of your partner or spouse changing their Will at a later date after you have died.

- *Claims from the children:* The FPA allows family members to make a claim against your estate if they believe they have not been properly provided for. This can happen even if your spouse has a 'mirror Will' which will leave the whole estate to your children as well as their own when they die. An example of this blended family situation is the Chambers case, which has recently received media attention. Lady Deborah Chambers QC was left everything by her husband, Sir Robert Chambers, on the understanding that when she died, her estate would be split into four parts, going equally to Sir Robert's two sons and to Lady Deborah's two daughters. One of Sir Robert's sons successfully brought a claim against his father's estate under the FPA, despite having his own lucrative income and not being in any financial need.
- *Your spouse could change their Will:* If your partner or spouse outlives you by some time, there is the possibility that they may change their Will as their circumstances change. They may remarry, have a new relationship, or more children may be brought into the family. This could mean that the portion of your estate that you envisioned being left to your biological children is now eroded by your partner leaving more to new partners or children than you had never anticipated.

Leaving it all to your children?

In light of these two options, it may be tempting to consider leaving your estate entirely to your children. Unfortunately, doing this can bring similar problems. Your partner could bring the same claim that your children could under the FPA or they could make an application under the PRA.

Property (Relationships) Act 1976

The PRA allows your partner to make an application to have your estate divided as relationship property, rather than in accordance with your Will. Under current law, you have a duty to provide for the partner you leave behind.

If an application is made under the PRA, any relationship property is divided accordingly and the balance of the estate is distributed according to your wishes. Again, this may leave your loved ones with a different portion than you envisaged.

You also need to know that jointly-owned property is automatically transferred to the survivor and does not form part of your estate.

Possible solutions

To find a solution that works best for your family and fits your wishes, do discuss this with us as one size definitely doesn't fit all. Some options are:

- Contracting out agreements: you come to an agreement with your partner which overrides the PRA
- Setting up trusts in your Will or before you die: if established correctly, trusts can be effective in defeating claims through the FPA and the PRA, and
- Life interest Wills: leaving your spouse an interest in your property during their lifetime, but that interest will expire on their death and the property will be distributed to your children.

The above points merely brush over some issues in what is an incredibly murky and complex area of law. If you are in a blended family situation, let's discuss the options in order to structure your affairs in a way that works best for you and your family. *

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Stay Safe this Summer

Driving, swimming pools and drinking

With the Christmas holidays coming up, we want to remind you about keeping safe this summer – on the roads and in the pool, and to reinforce the message about not serving alcohol to people who are not yet 18 years old.

On the roads

New Zealand's road toll for 2017 is set to be one of the highest in recent years. These deaths and injuries from road accidents are a cause of great concern for police and road safety experts. A combination of speed, fatigue, alcohol and lack of driving skills are contributing to this year's tragic statistics.

Drink driving: In 2014, new drink driving levels were introduced in an attempt to reduce the number of drink driving accidents. It is an offence to drive if your breath alcohol limit exceeds 250 micrograms of alcohol per litre of breath or your blood alcohol limit exceeds 50 milligrams of alcohol per 100 millilitres of blood.

If your breath alcohol level is over 400 mcg (breath) or 80 mls (blood) you will find yourself appearing in the District Court. The maximum penalty for a drink driving conviction (400 mcgs or over) is three months' imprisonment and disqualification of your licence for six months. The six-month disqualification is mandatory, other than in certain special circumstances.

New Zealand has a zero alcohol limit for drivers under the age of 20.

Other road offences: As well as drink driving, there are many other offences in the Land Transport Act 1998 including careless driving, careless driving causing injury and dangerous driving.

Many of the driving offences in the Act will result in a disqualification from driving and, at the other end of the scale, a prison term. Don't be that person who goes to jail.

The best advice when it comes to driving is simple: comply with the road rules at all times. It's not hard and it could save your life. As the slogan says, 'it's better to arrive late than be dead on time.'

Swimming pools

We are all looking forward to a hot summer and spending time at the pool. The rule is that swimming pools must be fenced at all times. If you have a pool at home, you must know the rules about pool fencing – for the safety of your family, neighbours and visitors.

In January this year, the Building (Pools) Amendment Act 2016 regarding pool safety took effect. Provisions relating to residential pool safety have been added to the Building Act 2004. All residential swimming pools must be fenced (and that includes certain inflatable pools). The key changes in the new law are:

- Swimming pool owners can use alarmed gates or doors rather than automatically-locking gates
- All residential swimming pools have to be inspected and certified by the local authority or a professional organisation every three years, and
- Local authorities can issue notices to fix the fence, and can fine pool owners.

The new law removed the mandatory requirement to fence spa pools and hot tubs. Instead of fencing, those pools now require a lockable cover.

Alcohol

It's not a Kiwi summer without a barbecue and relaxing with friends over a few cold ones.

Being a responsible host means keeping an eye on your guests' alcohol consumption. Of particular concern is that when your children's friends are over, you must comply with the rules around alcohol and teenagers. It's a criminal offence to supply alcohol to people under 18 without the express consent of their parents. This means you must specifically ask those parents: you're breaking the law if you don't do this.

Everyone loves summer and the chance to spend time with family and friends over the Christmas break. Just remember to look after everyone around you – at home, on the roads and in the pool.

To read more about keeping yourself safe this summer, Postscript on page 6 has an item about keeping safe whilst boating, fishing and diving. ✱

Recent Workplace Health and Safety Sentencing

Legislation is showing its teeth

The hefty sentencing in the recent Budget Plastics workplace health and safety case confirms the strict attitude now taken by WorkSafe and the courts. With the Health and Safety at Work Act 2015 having been in place 18 months or so, this case reinforces the need for all businesses to ensure they comply with their obligations under the new regime.

Worksafe New Zealand v Budget Plastics (New Zealand) Ltd[3] involved a worker who had his hand amputated after it was caught in the auger of a plastic extrusion machine. His employer, Budget Plastics, pleaded guilty for failing to ensure the safety of its employee while at work, so far as was reasonably practicable, which led to serious injury. The maximum penalty was a fine of up to $1.5 million.

Budget Plastics was found to have failed to comply with a number of industry standards and WorkSafe guidelines. It had also not implemented all the recommendations which arose from a health and safety audit six weeks before the accident.

The court confirmed its robust approach based on the old Health and Safety in Employment Act 1992, albeit with more severe penalties. Previously there were three 'bands' for sentences depending on the culpability of the employer. For 'medium' culpability cases, the band was $50,000–$100,000. Under the previous regime, the Pike River disaster (involving 29 fatalities) resulted in a range of $200,000–$230,000 per offence; this was in the high end of the 'high' culpability band.

WorkSafe argued that under the new regime the appropriate band for medium culpability cases (such as Budget Plastics) would be a fine of $500,000–$1 million. It suggested that cases of low culpability could attract fines of up to $500,000.

Medium culpability for Budget Plastics

The court considered the Budget Plastics case reflected medium culpability, but decided that under the new regime the appropriate starting point (before allowing for any discounts) was $400,000–$600,000. That is, *six to eight* times the level under the previous regime.

Ultimately, the court decided the appropriate 'end' sentence (after discounts for reparation, remorse, a guilty plea and so on) was $210,000–$315,000. In this case, however, the court accepted that the company could not afford to pay any more than $100,000 (in addition to reparation). The case was not considered so serious that the company should be put out of business by the imposition of a fine although, in some cases, that might be appropriate. The court imposed a fine of $100,000, together with reparation of $37,500 and costs of $1,000.

Make sure your business complies

The Budget Plastics case clearly shows that the courts will impose significant penalties for serious breaches of the 'new' health and safety legislation. Directors and managers can also potentially be personally liable in some cases.

If you have not yet reviewed your health and safety compliance since the new regime was enacted last year, you should do so now. We have people who can assist. ✱

3 *Worksafe New Zealand v Budget Plastics (New Zealand) Ltd* [2017] NZDC 17395.

Postscript

New provisional tax option for small businesses

From 1 April 2018, small businesses with a turnover of less than $5 million a year will not need to be exposed to use-of-money interest when calculating their provisional tax. Tax payments do need to be made in full and on time.

Using the accounting income method (AIM) which is included in approved accounting software such as MYOB and Xero, small businesses will only pay provisional tax when their business makes a profit. If your business makes a loss, you can get your refund immediately rather than waiting until the end of the tax year.

To use AIM, you must opt-in at the beginning of the tax year before your first payment would be due.

To find out more, go to the IRD's website (www.ird.govt.nz) and/or talk with your chartered accountant. *

Catch fish and come home this summer

Kiwis love getting out on or in the water boating, fishing and diving for seafood, but water safety MUST be part of your routine. Water Safety New Zealand has put together this simple checklist to help you stay safe this summer.

Safer boating

- Always wear a fitting lifejacket – no excuses
- Take two forms of waterproof communication
- Check the marine forecast
- Avoid alcohol
- Skipper, take responsibility and lead by example, and
- Before every trip do a safety check of all your gear.

Safer rock fishing

- Fish with a buddy and wear a lifejacket. Last year four out of the five land-based fishing deaths were men fishing alone.

Safer diving

- Always dive with a buddy
- Use dive flags – always
- Make sure you're fit enough. If you're over 45 – get a medical assessment, and
- After each dive carry out a safety check of your gear.

Water Safety New Zealand's CEO Jonty Mills says, "Follow the water safety code. Be prepared, watch out for yourself and each other, be aware of the dangers, know your limits and you'll come home safely at the end of the day."

Visit www.watersafety.org.nz/comehome for more details. *

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PARSONAGE CHAMBERS
125 High Street
PO Box 11
Blenheim 7240

Ph: (03) 520 6103
Fax: (03) 578 0831
Email: enquiries@wainlaw.co.nz
Website: www.wainlaw.co.nz

Also at 37 High Street, Picton

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