

A VISION IN THE WORKPLACE

This edition includes:

- Our new Checklist Series, which will offer insights into risks encountered in the modern workplace. Our first checklist explores ways to ensure employers are better protected in the digital age.
- A warning to employers to ensure they have a valid reason to dismiss an employee and to follow due process - especially when there is a complaint involved or if the employee is close to retirement age.



'Checklist Series'- Employment in the Digital Age

Welcome to our new Checklist Series segment of Vision in the Workplace. This 4 part series will offer employers an insight into various risks encountered in the modern workplace and provide tips on how best to mitigate these risks.

In this first checklist, we examine why the following are important areas to consider to ensure employers are better protected in the digital age:

1. Robust Surveillance Policies
2. Contractual Protection of Confidential Information & Intellectual Property
3. Social Media Policy
4. Initiatives to combat fragmentation

Robust Surveillance Policy - ensure new technologies are captured

Thanks to the never-ending emergence of new technologies, there are increasingly more and more ways for employers to monitor their employees.

In NSW, the *Workplace Surveillance Act 2005* (NSW) (the **NSW Act**) governs how employers can conduct surveillance of their employees in an appropriate and lawful manner.

While Employers should now be abreast of the NSW Act and the obligations it creates – particularly around providing notice of surveillance – it is important to ensure your policy contemplates new technologies.

For example, it is becoming commonplace for employers to require their employees to download certain mobile apps – such as payroll/HR apps, apps for internal communications, or apps to log employee hours. It is important to consider whether any of these apps intentionally or inadvertently track employees using GPS and whether, as a result, the employer may have certain disclosure obligations under the NSW Act.

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As work becomes more flexible, we are also seeing employers implementing 'bring your own device' practices and policies. If employees are using their own devices, whether at the workplace or while working remotely, employers should also consider whether any inadvertent monitoring might trigger disclosure obligations and whether any privacy issues may also be at play.

Contractual Protection of Confidential Information & Intellectual Property

In the cloud age, employers are more susceptible to the misuse of confidential information or intellectual property than ever before. For that reason, it is vital that employment contracts contemplate protection of that information and clearly:

- Define "confidential information" and "intellectual property";
- Clarify who owns "confidential information" and "intellectual property";
- Place parameters around the use and distribution of "confidential information" and "intellectual property";
- Set out a clear procedure for the irretrievable removal of company "confidential information" and "intellectual property" from employees own devices that they may have downloaded/uploaded onto personal devices or accessed through personal emails during the course of employment; and

- Set out clear limits on the use of confidential information and intellectual property post-employment.

Social Media Policy

The digital age has also necessitated the implementation of social media policies.

Of course, it will be interesting to keep an eye on any developments with the Israel Folau case which may impact the extent to which employers can encroach on employees' personal lives.

In any event, at the very least, employers should implement a social media policy that sets clear expectations for social media use during, and (to the extent appropriate) outside of working hours.

Any social media policy should:

- Place limits around use (including inadvertent) use of posting confidential information;
- Clarify how, if at all, employees should represent the company online;
- Prohibit disparaging comments about the company or other employees online; and
- Clearly specify the consequences of any breach of the policy.

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Initiatives to Address Fragmentation

Finally, as the digital age allows us to work from anywhere, it is important to introduce initiatives to combat fragmentation.

While remote work can reduce overheads and keep employees happy, it also fragments the workplace, which can be fatal to engagement, communication, storage of information, employee satisfaction, and ultimately the bottom line.

This is an often overlooked casualty of remote work, which an employers' HR function should proactively address. Fragmentation can be addressed by:

- Clear check-in policies and procedures with remote workers;
- Periodic team Skype or hang-out meetings to ensure engagement with remote workers;
- Periodic face-to-face team events;
- Ensuring clear reporting and communication lines; and
- Ensuring policies set out clear points of escalation.



\$200k Adverse Action Payout

A former Rotary International (Rotary) employee has been awarded \$205,000 by the Federal Circuit Court for his premature dismissal.

This decision provides an expensive reminder that employers must be cautious not to “manufacture” or speed up a dismissal, especially when there is a complaint involved or if the employee is close to retirement age.

The Complaint

A 61-year-old office manager was placed on a four month Performance Improvement Plan (PIP) in October 2016. The PIP contained four performance objectives.

Several weeks after the implementation of the PIP, the employee lodged an official bullying complaint regarding the way his PIP was being managed. The employee believed the PIP was a “cover” for already

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formed conclusions of unsatisfactory performance and would likely result in the termination of his employment.

In February and March 2017, Rotary confirmed that the employee had completed three of the four PIP objectives in a satisfactory manner. However, in April 2017, the employee was asked to immediately leave the office on the basis that he had failed to meet one of the four PIP objectives.

The employee lodged a General Protections Application in the Federal Circuit Court. Rotary immediately commenced enquiries into the employee's leave records, email account and attendance at work.

Rotary then claimed that the employee had breached an "obligation of confidence" by communicating with a Regional Director responsible for the International Office and had failed to ensure the accuracy of leave records within the payroll system. Rotary then issued the employee with a further show cause letter. The employee failed to attend a Skype meeting to respond to the show cause letter and was dismissed in June 2017.

The Court's Decision - "set up to fail"

Judge Rolf Driver found that Rotary failed to provide adequate reasons for the employee's termination stating there was certainly "a change of attitude on the part of the responsible persons in Rotary" following the bullying complaint and commencement of the court proceedings. Further, Judge Driver noted that the claimed breach of "confidence" had an "air of artificiality to it" and considered the leave issue to be a "storm in a teacup".

The Court also criticised Rotary's management of the PIP stating, "the goalposts of the PIP themselves changed following the commencement of proceedings" causing the employee to be "from that point, set up to fail".

Damages - consideration of age and length of time unemployed

In calculating the \$205,000 damages award, Judge Driver considered the employee's 11 years of service, his age and the effect his age had on his ability to gain new employment, that resulted in a two-year unemployment period following his termination from Rotary.

Judge Driver stated that "had the employment been persevered with, it would have continued until at least the end of 2017 and there would not have been any period of unemployment". Further, had Rotary negotiated an exit plan with the employee it is more likely that he would have found "equivalent and suitable employment... (without) a period of unemployment".

Lessons to Learn

Employers must ensure that they have a valid reason to dismiss an employee, and follow due process, especially when there is a complaint involved.

When implementing and managing PIPs, employers should follow clear and transparent processes to avoid miscommunication between themselves and employees. Finally, it is evident that age is a key consideration of the Court when awarding damages in adverse action claims.

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If you have any queries on the above issues, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

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