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LAWYERS

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Employment case sets new benchmark

A new Employment Court decision could radically change the way in which employers carry out restructuring and disciplinary processes.

Information that had previously been considered "off-limits" by employers must now be disclosed to employees as part of a restructuring consultation or disciplinary action.

The decision could have a major impact on an employer's ability to withhold information on the basis that it is sensitive or confidential.

Employers should assume that all documentation relating to a restructure, selection or disciplinary process may need to be disclosed. This includes the likes of Board minutes, internal memos and emails, guidance and advice from an HR manager, interview notes, and information about other candidates in a restructuring selection process.

The shift follows a recent case, *Massey University v Wrigley* in which the university moved to restructure part of its operations, with existing staff vying for fewer jobs.

The university went through what seemed like a robust selection process.

Candidates were given a lot of information about the selection process. They were subsequently given information about their scores and the recommendations that had been made about them. Information about other candidates was not provided.

But a dispute arose when the unsuccessful employees asked the university to reveal its selection information including copies of handwritten notes and information about how other, successful, candidates had been scored and assessed.

The Employment Court held that employees were entitled to access interview sheets for all candidates who applied for the same role, their scores and individual assessments; any handwritten notes taken by the interviewer and information about the successful candidates contained in the panel recommendation to the decision maker.

The Court said that although the issues in this case arose in the context of selection of candidates for redundancy, they applied equally in other cases where employment was at risk, including serious disciplinary cases.

There has long been a tension between employees and employers in general about what information to disclose, particularly in restructuring situations and delicate disciplinary situations - for example, sexual harassment or bullying.

Employers have tended to err on the side of caution and withhold relevant information where that information has been received in confidence or may be commercially sensitive.

We worry that the restructuring could potentially be drawn out by demands for disclosure of all relevant information which would sometimes involve a large volume of material.

As always, employers should seek legal advice before beginning any restructuring or disciplinary proceedings.

Your Employment Contacts

Scott Wilson
Partner
s.wilson@DuncanCotterill.com

Raewyn Lovett
Partner
r.lovett@DuncanCotterill.com

Ken Brotherson
Partner
k.brotherson@DuncanCotterill.com

Mark Lawlor
Partner
m.lawlor@DuncanCotterill.com

Aaron Dearden
Partner
a.dearden@DuncanCotterill.com

Sarah Townsend
Associate
s.townsend@DuncanCotterill.com

Kirsty Marshall
Associate
k.marshall@DuncanCotterill.com

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