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Employment Law E-alert

Return to Sender – Protect your confidential information from employee misuse

Employers often express justifiable concern regarding misuse of email or internet by current, and particularly former employees, to access confidential or copyright information.

The recent decision of the Supreme Court of NSW in *Luxtottica Retail Australia (OPSM) –v– Janet Grant & Ors* is a timely reminder to employers of:

1. The need to take immediate and urgent steps to minimise damage, as soon as they become aware of a breach, and
2. The importance of appropriate clauses in contracts of employment, codes of conduct and internet and email policies to protect confidential information.

Grant was employed by OPSM as an optometrist. She subsequently accepted employment with Specsavers, a competitor of OPSM. Four days before she resigned she used her manager's computer to send a number of emails and attachments to her home and work computers.

Grant was immediately dismissed the following day after OPSM's National Recruitment manager discovered her actions. OPSM obtained injunctions 2 days later restraining the use of information attached to 4 of the emails sent by Grant.

OPSM relied upon confidentiality clauses in Grant's employment contract, company policies relating to Internet and email usage, and the OPSM's code of conduct.

Although Specsavers and Grant's husband, who also resigned from OPSM to join Specsavers, were named as defendants, there was no evidence that they had acted improperly and no additional final orders were made against them by the Court.

Justice White accepted that Grant sent the emails for personal reasons, including pride in her input in their creation. Nevertheless his Honour confirmed that OPSM had rights with respect to both confidential non-public information and copyright over the attachments.

OPSM's early detection of the soon to be ex-employee's acts and expeditious action in obtaining the injunction restricted damage caused by release of this information. Although only nominal damages were awarded, and the issue of costs is yet to be determined, OPSM maintained and protected its right to property contained in the email attachments.

The principles considered in this case are equally applicable in circumstances where employees misuse computer storage devices such as USB memory sticks or compact discs, to obtain confidential non public information or copyright documents.

In the circumstances of this case, the Court considered the employee's actions were relatively innocent and declined to award additional (deterrence) damages under the *Copyright Act*. In other circumstances the Court may not be as sympathetic.

Employers should protect their valuable confidential and copyright information by ensuring that:

1. Contracts of employment and codes of conduct sufficiently define and prescribe employee obligations.
2. Internet and email policies include details of monitoring (surveillance) of employee usage, and all employees are notified of these policies and that monitoring is conducted in accordance with these policies.
3. Action is taken immediately as any breach is discovered. This will be a major consideration in deciding whether a court will issue an injunction.

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