cullings

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cullings is the newsletter of
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Restructuring the business

Recent developments in employer obligations

Legal issues raised in the context of restructuring processes most often involve two central enquiries; whether the process was fair, and whether decisions made were justified.

Key to these enquiries is the obligation on employers to provide access for employees to information relevant to the continuation of their employment. Employees must be given the opportunity to comment on that information before decisions are reached.

A recent case has considered this issue in detail and has extended the obligation on employers, who must now provide "a good deal more" information than was previously the case in restructuring situations.

Vice Chancellor of Massey University v Wrigley and Kelly (Massey)

Mr Wrigley and Dr Kelly were employed as senior lecturers at Massey University in Palmerston North. In 2009 the University proposed to restructure its business. Part of the proposal was to disestablish Mr Wrigley and Dr Kelly's roles among others, and to create fewer roles in their place. There was to be a "contestable reconfirmation process".

The lecturers were informed about the selection criteria and the selection panels. They were offered the opportunity to comment but did not. They were also given information about the interview content. Importantly the selection panel members were colleagues of the candidates, and were uncomfortable about being involved in a process that might result in job losses. They asked that specific comments regarding candidates not be revealed. The University agreed but cautioned that the comments might be revealed if required by law.

The University undertook a detailed selection process which included the provision of consensus outcomes (exclusive of the comments leading to them), collated anonymous scores, and typed individual assessment sheets. Both candidates made submissions having seen this information. These were considered.

Before final appointments were made, the candidates' union objected to the overall process and requested further information, some of which was provided.

Further submissions were also made. Finally, however, the proposal to disestablish both roles was confirmed and both employees were made redundant.

The University's processes appeared to be rigorous and detailed. The candidates were given considerable relevant information, had the opportunity to comment on it, and had more than one opportunity to make submissions on process and outcomes.

However, the candidates maintained that more information should have been provided. The University refused to provide interview sheets for the other candidates, assessment sheets for the successful candidates, candidate comparison sheets/handwritten notes by the panel convenor, and information in the minds of the selection panel members (for example). The candidates applied for a ruling on this issue.

The Employment Court went to considerable lengths to determine whether the additional information should have been provided. It found that some of the information not released was "relevant" and should have been provided. Some information was relevant even though it

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had not been relied on by the University. In the end it decided that relevant information could be "*a good deal more*" than what was being referenced and relied upon by the decision maker. It could, for example, include "information in the minds" of the selection panel or the employer if relevant in the circumstances. The rationale of the Court was that limiting the provision of information could restrict the opportunity of the employee to "recognise and develop alternative proposals".

The Court also considered confidentiality. It determined that while some of the information had been provided on the basis of confidentiality, and some would give rise to privacy issues (eg personal information about other candidates), there was not good reason to maintain the confidentiality or uphold the privacy of that information as it was relevant to the process. Basically, employees must have full and effective opportunity to provide input into decisions affecting the future of their employment. This was the more important factor on balance.

This case sheds new light on the good faith obligations of the Employment Relations Act in respect of providing information that is relevant to employees' ongoing employment. The Massey case has significantly 'upped the anti' on the scope of information that must be provided to employees.

This is not restricted to restructuring situations and includes disciplinary and performance processes.

Practically speaking what this means for employers is not entirely clear. Communicating relevant information that is in the mind of the employer through the process for example, may prove difficult. The sheer volume of information that may be required may also cause some administrative issues for employers.

Of course it must be remembered that this case was determined under the 'old' section 103A of the Employment Relations Act 2000, ie against the test of what a fair and reasonable employer *would* do in all the circumstances. As at 1 April 2011 the test changed to what a fair and reasonable employer *could* do in all the circumstances. Perhaps the new test might result in a wider range of reasonable options being available to employers in restructuring situations.

In the meantime, HR professionals and employer decision makers should be aware of and appreciate the wider practical implications of the decision and its impact on employment processes.