

NFP'S, EMPLOYEES AND SOCIAL MEDIA

In recent months there has been a heightened interest in social media and its application in both NFP and For Profit worlds.

Some of this interest has been contributed by two decisions in the UK namely, *Whitmar Publications Limited v Gamage and others* [2013] EWHC 188 Ch, 4 July 2013 (Whitmar) and *Hays Specialist Recruitment (Holdings) Limited & Anor v Ions & Anor* [2008] EWHC 745 Ch. (Hays).

Both cases dealt with the ownership of LinkedIn accounts and contacts, that is, did the employer or the employee own the contacts?

In Whitmar the Court found that LinkedIn contacts can constitute an employer's confidential information. A group of former employees were found to have conspired to establish a rival business together both during and subsequent to their employment. The Court decided that contact databases, a large number of business cards and LinkedIn groups constituted confidential information of the employer. The Court ordered that the employees could not use the information as it constituted an unfair advantage.

In the earlier decision of Hays the Court found that contacts uploaded to a personal LinkedIn account by a former employee after ceasing employment constituted company property. The former employee had sought to use the contacts for the benefit of himself and a rival business. The Court found in favour of the former employer.

The position in Australia is to be tested in the case of *Naiman Clarke Pty Ltd v Marianna Tuccia* which is currently before the Supreme Court of New South Wales. This case should provide some clarity in Australia. The case again involves a recruitment company which alleges its former employee Marianna Tuccia misused its databases and LinkedIn information to further a Competitor's business. In Australia it has previously been decided that the personal connections of an employee with customers may be a legitimate business interest that can be protected (see *Cactus Imaging Pty Ltd v Peters* [2006] NSW SC 717).

On the face of it, NFP's may consider these issues have little relevance to them, but in an increasingly competitive environment for available funding these issues may become more relevant and a greater emphasis placed on enforceable contracts.

We are already seeing greater use of confidentiality agreements where previously such agreements had generally not been adopted. It may well be influenced by NFP's seeking greater partnering opportunities with the private sector.

However, the broader question of social media needs to be considered and evaluated with appropriate contractual and policy obligations for employees.

For example, does your NFP have policies on the use of social media within the workplace and related work matters? Who can speak for the NFP and in what format? Are there guidelines on appropriate social media content? Is there monitoring of social media? What are the consequences for breach of social media policies? Is there an appropriate employment contract and social media policy connection?

If you require specialised assistance in this area we have found Peter Tapscott helpful and he can be contacted at peter@socialeffect.com.au. Social Effect website is www.socialeffect.com.au .

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