

EMPLOYMENT UPDATE

AUGUST 11

THE USE OF SOCIAL MEDIA BY EMPLOYEES

In this Employment Update, we discuss regulation of social media use by employees.

► IN THIS ISSUE

Out of hours Conduct	1
Termination for use	3
Managing Social Media	3

Facebook and other social media websites, including Twitter and My Space, have fast become a medium through which employees express their displeasure with their workplace or colleagues.

Generally speaking, the derogatory comments posted by employees on social networking sites are made outside of working hours. This presents a problem as employers enter the blurry divide between private and public and their ability to discipline employees for behaviour conducted outside of working hours.

Case law has established that behaviour outside of work can lead to dismissal if the conduct could be regarded as a breach of the relevant employee's employment contract. The behaviour itself must have a relevant connection to their employment and be conduct that is likely to cause damage to the employer or damage to the relationship between the employer and employee.

With the rapid growth and application of social media, employers should give serious consideration as to how they can convey their expectations to

employees regarding the use of social media either as part of their job, or in a personal capacity.

This is particularly important where the social media engagement is about the employer, its products and services, its people, its competitors and/or other business-related individuals or organisations given the possible liability that may arise through inappropriate comments. For example, inappropriate use of social media could give rise to claims for bullying and harassment, discrimination and defamation as well as form the basis of unfair dismissal proceedings.

Out of hours conduct and valid reason for termination

One of the key case authorities on whether out of hours conduct by employees can give rise to disciplinary action by their employer is the case of *Rose v Telstra Corp Ltd* (unreported, AIRC, Vice President Ross, 4 December 1998) where it was held that: "It is clear that in certain circumstances an

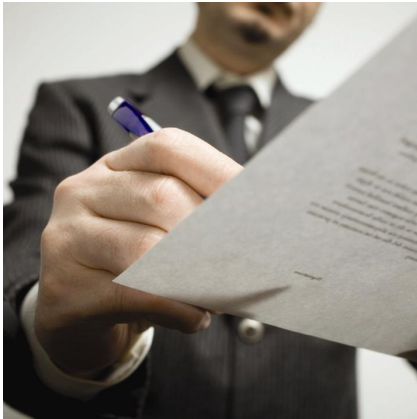


Employment Law Specialists

► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment	Employee Entitlements	Contractor Agreements
Redundancies	Employment Contracts	Contractor Issues
Workplace Health & Safety	Enterprise Bargaining	Statutory Leave Issues
Discrimination & Harassment	Enterprise Agreements	Workplace Training
Unfair Dismissal Claims	Employment Policies	Workplace Investigations
General Protection Claims	Misconduct & Poor Performance	Transmission of Business

www.aitkenlegal.com.au



employee's employment may be validly terminated because of out of hours conduct. But such circumstances are limited to the following:

- the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee; or
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee."

As such, the behaviour itself must have a relevant connection to their employment and be conduct that is likely to cause damage to the employer or damage to the relationship between the employer and employee.

A Facebook posting could therefore conceivably fall within these principles. In *Fitzgerald v Dianna Smith T/A Escape Hair Design* [2011] FWAFB 1422, the Full Bench of Fair Work Australia (FWA) considered that a public posting of a work-related comment on a social media website would come within the scope contemplated by the *Rose v Telstra* factors in justifying whether there is a valid reason for

termination.

In that case, a hairdresser was dismissed for multiple reasons including a lack of punctuality, taking products from the store without authority, rearranging client appointments without authority and posting disrespectful comments on her Facebook page which were said to negatively reflect on her employer. The Facebook comment posted by the hairdresser read:

"Xmas 'bonus' alongside a job warning, followed by no holiday pay!!!Whooooooo! The Hairdressing Industry rocks man!!!"

FWA observed that the Facebook posting was a 'foolish outburst' which, whilst serving to undermine the employer's trust and confidence in the employee, had not otherwise damaged the employer's business. FWA also took into account that when the employer had first learned about the Facebook comment, they had done nothing about it and only chose to rely upon it as a valid reason for her dismissal at a later date. This weakened the employer's argument that the comment was enough to cause serious damage to the employment relationship.

FWA held that although the comment fell short of providing a valid reason for termination:

"it would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences."

Importantly, the key message for employers is that a derogatory Facebook comment about the workplace is not an immediate reason for dismissal. Factors such as the intent and effect of the comment,

whether people are named and the level of exposure are all relevant considerations.

This can be contrasted with an earlier decision of FWA in *Ms Tamicka Louise Dover-Ray v Real Insurance Pty Ltd* (U2009/4528). In that case, the employee in question posted a comment on her MySpace blog which included:

"This place covers peoples lives, offering to protect them when catastrophe happens and yet fails to protect the people that work for them. Chasing dollars over safety. Witch hunting. Nothing but witch hunters. So where is the integrity of the workplace?They were absolute lies, absolute mockeries of what they stood for...This is corruption at its rawest. It is corruption at every level."

In finding that there was a valid reason for the employee's termination of employment, FWA found that:

- the blog was publicly accessible through a Google search;
- the employee intended that her blog be read within the workplace where it would either be known or become known to other employees;
- the blog identified the employee by photograph and name, it contained a date and referred to the investigation she had just been through;
- the blog was, in effect, an attack on the integrity of the management of the employer and the criticism of corruption is of such a nature and degree that it cannot be brushed aside by the submission that the employer was being 'precious' by being personally offended by the

► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment
Redundancies
Workplace Health & Safety
Discrimination & Harassment
Unfair Dismissal Claims
General Protection Claims

Employee Entitlements
Employment Contracts
Enterprise Bargaining
Enterprise Agreements
Employment Policies
Misconduct & Poor Performance

Contractor Agreements
Contractor Issues
Statutory Leave Issues
Workplace Training
Workplace Investigations
Transmission of Business

- criticism within the blog; and
- the employee's failure to remove or modify the blog within a reasonable timeframe was also taken into account.

The most recent decision to be published by FWA in relation to a Facebook related dismissal is that of *Damien O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys*. In that case a Good Guys employee had posted an insulting and threatening comment on his Facebook status directed towards one of the store's female operations manager.

The comment read: "*wonders how the f- -k work can be so f-king useless and mess up my pay again. C- -ts are going down tomorrow.*"

The employee argued that he had blocked the targeted colleague from being able to view his comment and further that his privacy settings were set to maximum levels so only his group of 70 friends had access to his Facebook page. Deputy President Swan considered however, that other colleagues had access to the comment and the manager was nevertheless informed of the Facebook comment.

The employer submitted that its Employee Handbook imposed an obligation on the employees to communicate with colleagues in a polite and courteous manner and that the employee was therefore aware his conduct would have consequences, particularly in relation to the Sexual Harassment and Workplace Bullying policies also contained in the Handbook.

DP Swan accepted the employer's submission and considered that the conduct of the employee was repudiatory to his employment, amounted to serious misconduct and

a valid reason for his dismissal. Further, as the employee had been afforded procedural fairness in his dismissal, his application for an unfair dismissal remedy was dismissed.

Termination based on the use of social media

As the three cases above demonstrate, and as is the case with any termination, there needs to be a valid reason formed by a thorough consideration of all the relevant issues. Each case is different and may have complex issues to consider.

The risks attached to terminating an employee for actions related to the use of the social media will depend on a variety of factors including:

- the nature and seriousness of the conduct;
- whether the conduct breaches any contractual obligations, common law obligations or workplace policies;
- the nature and extent that the conduct damages the employment relationship or the employer's business interests.

It is therefore important that employers consider the seriousness of the comment first, and take immediate and informed action in serious circumstances.

Managing out of hours use of social media

The use of social media websites by employees is best governed by well drafted policies which identify the circumstances where conduct on a public forum will be inappropriate. For example, employers should have a well drafted *Internet and Email Usage Policy*, a *Social Media Policy* and a *Discrimination, Harassment*

and Workplace Bullying Policy which should together cover the bases for unacceptable public forum comments related to an employee's employment.

The policies should be comprehensive and make employees aware of the rules and requirements for social media use set by the employer and make employees aware of the employer's rights in respect of their use of social media. Employees should be made aware that publicly displayed comments reflecting negatively on the company, or individuals in the workplace, would constitute unacceptable conduct and may result in disciplinary action being taken against them.

The consequences for breach of the policy should also be very clear.

Key Points: The growing use of social media by employees, both during and outside work hours, poses a number of issues for employers. Although employees are entitled to a private life, there are circumstances in which their out of hours conduct on a social media website can be relied upon as a valid reason for their termination. Whilst it may be tempting to presume that an unfavourable or disrespectful public forum comment will constitute a valid reason for termination, hasty action should be avoided and replaced with a careful consideration of whether the conduct breaches any policies, common law duties or contractual obligations.

Mark Bunch

Partner

+61 7 5593 1665

► AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment
Redundancies
Workplace Health & Safety
Discrimination & Harassment
Unfair Dismissal Claims
General Protection Claims

Employee Entitlements
Employment Contracts
Enterprise Bargaining
Enterprise Agreements
Employment Policies
Misconduct & Poor Performance

Contractor Agreements
Contractor Issues
Statutory Leave Issues
Workplace Training
Workplace Investigations
Transmission of Business

WE CAN HELP YOU WITH

- ▶ Contracts of Employment
- ▶ Enterprise Agreements
- ▶ Understanding the *Fair Work Act* and other legislation
- ▶ Termination of Employment & Redundancies
- ▶ Employee Misconduct & Performance Issues
- ▶ Discrimination, Harassment & Workplace Bullying
- ▶ Workplace Health & Safety
- ▶ Workplace Policies & Employee Handbooks
- ▶ Employee Entitlements & the Fair Work Ombudsman
- ▶ Reviewing & Appealing Workers' Compensation Determinations
- ▶ Unfair Dismissal & General Protection Claims

FOR MORE INFORMATION PLEASE CONTACT

AITKEN LEGAL

Sunshine Coast Office

Level 1, Regatta Corporate,
2 Innovation Parkway,
Birtinya Qld 4575

PO Box 256 Wurtulla Qld 4575

Phone: 07 5413 4000

Fax: 07 5413 4099

Email: info@aitkenlegal.com.au

Gold Coast Office

Level 6, The Rocket
203 Robina Town Centre Drive
Robina Qld 4226

Phone: 07 5593 1665

Fax: 07 5593 1668

Email: info@aitkenlegal.com.au



LISA AITKEN

Managing Partner

lisa.aitken@aitkenlegal.com.au



CHRISTOPHER CAMPBELL

Partner

chris.campbell@aitkenlegal.com.au



MARK BUNCH

Partner

mark.bunch@aitkenlegal.com.au



Disclaimer: The information contained this update is intended as a guide only. Professional advice should be sought before applying any of the information to particular circumstances. While every reasonable care has been taken in the preparation of this update, Aitken Legal does not accept liability for any errors it may contain. Liability limited by a scheme approved under professional standards legislation. [Contact Aitken Legal here.](#)

▶ AN EMPLOYMENT LAW SERVICE FOR EMPLOYERS SPECIALISING IN:

Termination of employment	Employee Entitlements	Contractor Agreements
Redundancies	Employment Contracts	Contractor Issues
Workplace Health & Safety	Enterprise Bargaining	Statutory Leave Issues
Discrimination & Harassment	Enterprise Agreements	Workplace Training
Unfair Dismissal Claims	Employment Policies	Workplace Investigations
General Protection Claims	Misconduct & Poor Performance	Transmission of Business