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In The Post – FWC Delivers Mixed Messages On Dismissal For Social Media Indiscretions

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Following recent differing decisions of the Fair Work Commission (**FWC**) it seems that Australian employers must still tread a fine and uncertain line in determining whether employee misconduct on social media is a valid reason for dismissal.

In the recent case of *Stephen Campbell v Qube Ports Pty Ltd t/a Qube Ports & Bulk* in March 2017, the FWC considered the conduct of a veteran employee who publicly disrespected his employer's management on social media. Mr Campbell had been investigated for misconduct after damaging company property, failing to report the damage and lying when questioned about it. Taking serious umbrage at these allegations Campbell took to social media to label the Chairman a "pig" in a post that also stuck the boot into the employer's management and policies on a more general level.

While the employee's social media conduct was not the reason given for his dismissal (that was the other issues alleged) the FWC noted that this type of conduct was "unacceptable" and suggested this conduct would have been enough to warrant Campbell's dismissal too.

In other recent decisions however, the FWC has found that conduct on social media did **not** warrant dismissal. These included thinly-veiled criticisms and disparaging comments made by a teacher in a social media post to friends and colleagues in *Mary-Jane Anders v The Hutchins School* last year: "…*We teach to have confidence in our abilities; do not allow others to put you down…the discrimination you receive is totally debilitating*". While the post itself was not referred to in the School's letters of allegation leading to dismissal (its having already been the subject of a warning), the FWC found it was relevant to Ms Anders' behaviour, which included failing to treat her colleagues respectfully and disloyal behaviour. The FWC found the comments gave rise to the possibility of the School being exposed to ridicule and causing distress to those employees targeted, but found they showed no more than a lack of judgement on her part.

In the case of *Michael Renton v Bendigo Health Care Group* five months ago, a nurse who "tagged" work colleagues in sexually explicit videos on social media and called his supervisor a "red-headed c**t" in personal messages to a fellow employee was found to have been unfairly dismissed. The nurse's termination was deemed by Commissioner Bissett to be "disproportionate to the gravity of the misconduct". The conduct was said to be boorish, offensive and distressing to his work

colleagues. However, the Commissioner was careful to note that the question to be considered was not whether the employee engaged in serious misconduct, but whether the dismissal was harsh, unjust or unreasonable. Although the 'pranks' could justifiably be considered serious misconduct, the "one-off" nature of the event did not justify a decision to terminate. The conduct was said to have deserved a swift and strong response from the employer and the employee should have apologised unequivocally, but the termination was nonetheless harsh in the circumstances. In our view, Mr Renton can consider himself more than a little fortunate here – another Commissioner could well have reached the opposite conclusion. The case is certainly *not* authority for the proposition that you can say pretty much whatever you want about your management online so long as you only do so once, or that a failure to apologise is irrelevant to whether termination is justified.

Lessons for employers

What constitutes social media conduct worthy of dismissal therefore remains ambiguous at the margins. Employers should have a clear and comprehensive social media policy which provides examples of unacceptable conduct, and provide training on that policy, so that all employees are aware of the employer's expectations on acceptable conduct and when disciplinary action may be taken (including up to termination of employment). They can then more readily seek to rely on a policy breach to support disciplinary action (including dismissal) for misconduct on social media.

But do be aware that although such a policy is persuasive it is not determinative, the FWC retaining an overriding discretion to deem conduct insufficiently offensive to warrant dismissal even if your policy says otherwise. Aside from the words themselves, context will also be important – how public was the post, what harm does it do, is it aimed at a live and sensitive individual or an inanimate corporate, was there some background disagreement or provocation or was the criticism implicit in the role (e.g. a union officer inciting strike action), was there a prompt retraction/apology etc.

Connor McClymont authored this post.

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