

Employee's out of hours use of social media can constitute valid reason for dismissal – *The Sequel*

Reinstatement decision upheld on appeal: The Full Bench decision *Linfox Australia Pty Ltd v Stutsel* [2012] FWA 7097 (3 October 2012) reinforces the importance of employers implementing a social media policy and provides guidance as to the circumstances in which an employee's use of social media may constitute a valid reason for dismissal.

Workplace Relations Update

A Fair Work Australia Full Bench has upheld a finding that an employee had been unfairly dismissed following the posting of comments about 2 of his managers on his personal Facebook page. In granting leave to appeal the first instance decision, the Full Bench acknowledged that the use of social media by employees is a contentious, complex and novel issue, and appeared to accept that there was a public interest in considering the extent to which an employee's asserted right to freedom of speech can be called in aid when social networking sites have been used to vilify fellow employees.

Mr Stutsel had been employed by Linfox as a truck driver for 22 years, when Linfox terminated his employment in May 2011 for serious misconduct on the basis of offensive and discriminatory posts on his Facebook page regarding two Linfox managers. The comments included a number of derogatory statements about Mr Stutsel's manager, Mr A, and comments made by another employee on Mr Stutsel's page which were of a sexual nature regarding one of Mr Stutsel's female managers. (For more detail on the substance of these comments and for commentary on Commissioner Roberts' decision at first instance, see our April 2012 article 'Social media policy key to employee disciplinary action'.)

Comments on Facebook might provide a valid reason for termination of employment.

At first instance, the Commissioner concluded that although the statements and comments were distasteful, when viewed in the context of the other conversations posted on Mr Stutsel's Facebook page they were not of such a nature as to warrant dismissal for serious misconduct, or even as to constitute a valid reason for termination. On appeal, the Full Bench found that this conclusion was reasonably open to the Commissioner in the circumstances of the case, having regard to the context in which the conduct occurred and an overall assessment of the gravity of the conduct.

Who does this affect?

All employers of staff.

Article Highlights

- Employers should have social media policies in place that address the issues and risks arising from social media.
- Unacceptable use of social media even outside the workplace may result in employee disciplinary action.
- Employers must educate their employees about their social media policy.



However, the Full Bench noted that posting derogatory, offensive and discriminatory statements or comments about managers or other employees on Facebook "might" provide a valid reason for termination of employment.

In considering whether there was a valid reason for terminating Mr Stutsel's employment, the Full Bench reproduced a description of Facebook given by His Honour Brown J in the Ontario Supreme Court of Justice:

"...From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of "friends" with whom they can share information about themselves, and on which "friends" can post information about the user."

Interestingly, the Full Bench did not agree with the Commissioner's characterisation of the comments as *"having the flavour of a pub conversation"*, noting the fact that the conversations were conducted in electronic form and on Facebook gave them a potentially wider circulation and meant that they might easily be forwarded on to others. Further, unlike conversations in a pub or café, Facebook conversations leave a permanent written record of statements and comments made by the page owner.

Where an employee has used social media inappropriately, Fair Work Australia will likely consider the nature of the comments and statements made and the width of their publication. This decision illustrates that comments made directly to managers and other employees and given wide circulation in the workplace will be treated more seriously than if such comments are shared privately by a few workmates in a social setting.

Other considerations

Despite the fact that the dismissal was not procedurally flawed, the Full Bench agreed with the Commissioner's view that although posting derogatory and offensive remarks on Facebook was inappropriate, there were a range of other considerations which meant that the termination of Mr Stutsel's employment was unfair.

These factors included:

- Mr Stutsel's long period of satisfactory employment at Linfox, his age and employment prospects;
- the circumstances of the publication of the offensive comments, and particularly Mr Stutsel's belief that his page was on maximum privacy settings and that the comments could only be viewed by himself and his Facebook friends, and were never intended to be communicated to his manager (even though it was set to public);
- that some of the statements were made by Mr Stutsel's Facebook friends, and that he was unaware these could be deleted from his page; and
- that Linfox had not taken any action against other employees who had taken part in these Facebook conversations.

For more information or assistance in dealing with social media policies;

Contact



Stephen Kemp

PARTNER

t: +61 8 9426 6633

e: skemp@jacmac.com.au



Renae Harding

SENIOR ASSOCIATE

t: +61 8 9426 6802

e: jharding@jacmac.com.au



In this case, the Commissioner had accepted Mr Stutsel's evidence as to his limited understanding about Facebook communications and his ignorance regarding the privacy settings of his page. Importantly, on appeal the Full Bench noted that such a finding was reasonably open to him. However, the Full Bench noted that with increased use and understanding about Facebook in the community and the adoption of social networking policies by employers, a claim of ignorance as to the use of social networking media by an employee might be viewed differently in the future.

The Full Bench also upheld the Commissioner's decision that Mr Stutsel be reinstated, noting that he had shown no rancour towards management and recognised the foolishness of his conduct, and that the Commissioner did not consider that Mr Stutsel's conduct had been so destructive of the employment relationship as to make reinstatement inappropriate.

What should employers and employees take from this decision?

This decision demonstrates that all parties need to exercise considerable care in using social networking sites, both in making comments or participating in online conversations, and in allowing objectionable content to remain on their Facebook page. Where comments are made about managers or fellow employees, even outside of working hours and away from the workplace, an employer may have a valid reason to terminate an employee's employment.

From an employer's perspective, this decision reinforces the need to put in place and enforce policies addressing issues and risks associated with the use of social media, and to remind employees that unacceptable use, even outside the workplace, may result in disciplinary action and in some circumstances termination of employment.

Whilst in this case the dismissal was found to be unfair, this decision demonstrates that an employee's conduct on Facebook may provide a valid reason for dismissal where, viewed objectively, the conduct is sufficiently serious or extreme. The claim of employee ignorance regarding privacy settings and the operation of Facebook is less likely to be accepted in future cases, particularly where the employer has a social media policy in place.

Disclaimer: This publication is intended to provide general information only and should not be relied upon as legal advice. If you require legal advice on a matter please contact us.

Contact Us

t +61 8 9426 6611 **f** +61 8 9321 2002 **e** jacmac@jacmac.com.au

a Level 25, 140 St Georges Terrace, Perth, Western Australia 6000
GPO Box M971, Perth, Western Australia 6843

www.jacmac.com.au