

## Social media policy key to employee disciplinary action

The recent case of *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 (19 December 2011) highlights the importance of employers implementing a defined social media policy and educating their employees about the policy.

### Workplace Relations Update

In *Stutsel* Commissioner Roberts found that a Linfox Australia Pty Ltd (**Linfox**) truck driver's offensive comments on his Facebook page about Linfox managers was not a valid reason for the driver's dismissal. Commissioner Roberts ordered that the truck driver be reinstated and criticised Linfox, which relied on its induction training and relevant handbook to ground its action, for not having a social media policy in this current electronic age.

The truck driver was employed by Linfox from April 1989 until his employment was terminated for serious misconduct. The reasons Linfox gave for terminating the employee were that, on his publicly open Facebook page, he made:

- a) a number of racially derogatory statements about his manager, Mr A;
- b) a statement about his manager, Ms R, which amounted to sexual discrimination and harassment; and
- c) extremely derogatory comments about Mr A and Ms R.

The employee told the hearing that his wife and daughter had initially set up his Facebook account and that he believed it had been set up with 'maximum privacy restrictions' (although this later turned out to be incorrect). He was also unaware that he could delete comments from Facebook friends once they had been posted on his Facebook wall.

The employee had 170 Facebook friends, many of them Linfox employees. Ms R, who was also employed by Linfox, became aware of the offensive comments when she accessed the employee's Facebook page through a mutual Facebook friend's page and then showed the comments to Mr A.

#### Who does this affect?

All employers of staff.

#### Article Highlights

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



During the hearing, Linfox told the Commission that it was concerned that the employee's views could be mistaken as being endorsed by Linfox.

The employee gave evidence that it was not his intention to offend Mr A or Ms R and that he had asked throughout the process for the opportunity to apologise to them personally.

### Commissioner's findings regarding the offensive comments

The Commissioner accepted the employee's evidence that the comments he posted about terrorism and the death of a terrorist were an expression of his private views at the time and that he later came to regret the making of some or all of those comments. Continuing on to say ...

*"...I consider [the employee's] comments to be within his right to free speech in such matters even though many, including myself, would find much of the Facebook discourse which is in evidence to be distasteful. It is a bridge too far in my opinion to make a connection between those comments and any personal attack on Mr [A]. The Applicant's Facebook page was not a web blog, intended to be on public display. It was not a public forum."*

The employee's description of Mr A as a 'bacon hater' was held by the Commissioner to be in poor taste but did not amount to *"being a racially derogatory remark intended, or acting to, vilify Mr [A] on racial grounds"*. The Commissioner noted that the comment could just as easily be used in relation to members of other religious groups (not just Mr A and Muslims) and formed the view that the remark was not intended to be hurtful.

There was also dialogue on the employee's Facebook page between himself and another Linfox employee regarding a bear's hibernation habit, during which the employee wrote:

*"...I admire any creature that has the capacity to rip [Ms R's] and [Mr A's] heads off, shit down their throats and then chew up and spit out their lifeless body!"*

Ms R gave evidence that she considered this comment to be a graphic detail of what could only be described as her 'torture, mutilation and death'. Disagreeing with this, Commissioner Roberts held it was:

*"an attempt at humour...and did not contain any credible threat to [Ms R's] wellbeing. The material was metaphorical ... It might be ... 'disgusting' but it was in no way threatening"*.

In relation to comments that had been made about Ms R which were of a sexual nature, Commissioner Roberts held that Ms R was entitled to be outraged and to complain about them. However, the main offending comments were not made by

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the employee (they were instead made by other people posting on the employee's Facebook page) and given that the employee was not aware that he could delete these comments, Commissioner Roberts found that the employee was not at fault in relation to those comments.

### **Nature and context of the communications**

Commissioner Roberts noted that none of the employee's Facebook friends posted any objections to the material complained of and apparently found the material unexceptionable. Noting that while this did not excuse the comments it did indicate the context in which the remarks were made. He noted that:

*"The chains of comments have very much the favour of a group of friends letting off steam and trying to outdo one another in being outrageous. Indeed it has much of the favour of a conversation in a pub or cafe, although conducted in an electronic format."*

Moreover, Commissioner Roberts found that an external reader not familiar with Linfox would probably not have understood what was being discussed and would have had difficulty in determining about whom some of the remarks were made. In addition, the Commissioner observed:

*"The fact that some of the material is not complimentary towards Linfox managers is unsurprising. This always has been, and always will be the fate of those holding managerial positions."*

### **Criticism for not having a social media policy**

Linfox did not have a social media policy in place at the time the offending remarks were posted on the employee's facebook page. Instead, Linfox relied on its induction training and relevant handbook which covered matters such as equal opportunity and diversity practices to ground its basis for terminating the employee.

In fact, Linfox still did not have a social media policy in place by the time the matter went to hearing. Commissioner Roberts noting this, criticised Linfox:

*"In the current electronic age, this is not sufficient and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies. Linfox did not."*

The Commissioner's criticism highlights the need for employers to have policies in place addressing issues and risks with the use of social media. Had such a policy been in place this may have aided in preventing the employee in question, and other Linfox employees, from participating in discussions of this nature in the first place. Employers should remind employees that unacceptable use, even outside



the workplace, may result in disciplinary action and in some circumstances, termination of employment.

NB: Linfox have appealed the decision to the full bench of Fair Work Australia. Arguments were heard on 22 February 2012 and a decision is expected in the near future.

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