SQUIRE PATTON BOGGS

WORKPLACE VIEW

September 2014

Social Media Use Away From Work – How Misuse Can Impact Working Relationships

By Kylie Groves and Elizabeth Honey

While more and more organisations are recognising the advantages of encouraging employees to use social media at work, it is the misuse o social media out of work that often impacts the employment relationship.

It seems that many employees still fail to recognise that what they do online away from work is not always private and can have a significant impact on the employment relationship. Equally many employers who become aware of inappropriate on line conduct are often unsure whether they can discipline employees over this conduct.

Facebook Rants

There have (and continue to be) unfair dismissal cases involving employees terminated for something they have said or done on social media. These cases have included situations where an employee has:

- Posted the comment on Facebook "*wonders how the f*** work can be so f***ing useless and mess up my pay again c**** are going down tomorrow*";
- Publicly aired their dissatisfaction with their employer, posting on Facebook "*Xmas 'bonus' alongside a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man!!! AWESOME!!!*";
- Expressed their discontent in rather public terms, posting on Facebook: "*working long weekends at normal pay sucks b**** hard core*" and describing her employer as "*stingy C****"; and
- Posted about a new employee the comment "*on behalf of all the staff at [name of company] I would like to welcome our newest victim of b*** r*** [name of new employee]. I'm looking forward to sexually harassing you behind the stationary cupboard big boy.*"

In all of these cases, the Facebook comments were made outside of work and the employees who were all dismissed after their comments became known to their employers attempted to argue their comments couldn't be relied on to terminate the employment.

Using Out of Work Conduct to Discipline Employees

In deciding cases involving out of work online conduct, the Fair Work Commission (**FWC**) has consistently applied the principles in *Rose v Telstra Corporation* [1998] AIRC 1592 (**Rose Case**) (which did not relate to social media transgressions). This case identified three circumstances which entitles an employer to terminate an employee for out of work conduct – regardless of the nature of the out of work conduct. Those circumstances are where the conduct outside of work:

- viewed objectively, is likely to cause damage to the employment relationship;
- damages the employer's interests; and
- is incompatible with the employee's duties as an employee.

Is It Damaging the Relationship?

Applying the first of these circumstances to the social media context this means that if an employee does something online, for instance making comments about their manager or supervisor that are so disparaging that the manager or supervisor is going to find it difficult speaking to the employee again let alone working with them, this is probably enough to have damaged the working relationship.

Is It Damaging the Employer's Interests?

An example of doing something online that damages the employer's interests is the case of opera singer Tamar Iveri, who was dropped from Opera Australia's production of Othello in response to homophobic posts that appeared on Ms Iveri's Facebook page. Pressure mounted on Opera Australia to distance itself from the opera singer after the posts became public and the company was inundated with complaints and threats from its members to cancel their subscriptions. The opera singer (although a contractor) was clearly associated with Opera Australia which meant her out of work Facebook posts had a real impact on Opera Australia's interests.

Is It Incompatible With the Employee's Duties?

The third circumstance is related to the nature of the employee's employment and requires a consideration of whether there are particular standards or expectations of behaviour that apply. So conduct online that could be regarded as incompatible with a school teacher's or a police officer's duties (such as online boasts about recreational drug use outside work hours) may not be incompatible with the duties of a truck driver.

Implications For Employer

What is clear from the cases that have applied the Rose Case principles is that an employer can rely on an employee's out of work conduct on social media to take disciplinary action (including dismissal) so long as there is a clear connection between that conduct and the employment.

As the FWC has indicated in a number of decisions, employees are entitled to their personal opinions about work related issues but they are not entitled to disclose them to the "world at large" via social media where to do so reflects poorly on their employer and/or damages its reputation and viability.

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Employer Reminder

We remind employers, particularly those companies entering Australia from abroad, to ensure that the contracts for their senior employees contain clear terms about the length of the notice period on termination. A disciplined approach will ensure they are not required to pay "reasonable notice" on the departure of a long-serving senior employee because this term was implied into the contract in the absence of an express term.

In June this year the NSW Supreme Court awarded a senior employee, who left her employer after 24 years' service as "Financial Controller - South Pacific", the sum of more than AU$1 million in damages, and a significant part of that consisted of reasonable notice amounting to ten months. The employer had provided only five weeks' notice. The US-based employer had provided this employee with a letter of appointment which contained no express provisions about termination.

Did You Know?

This month the full Federal Court handed down its appeal decision in the watershed sexual harassment case, *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82. The Court overturned the original judge's finding that there was no link between Richardson's harassment and her resignation and, in doing so, acknowledged the inadequacy of past decisions in compensating victims of sexual harassment. The Full Court increased Richardson's compensation from less than AU$20,000 to AU$130,000. This decision of the Court is of particular importance as it signifies a move away from awarding relatively low amounts of compensation, to recognising that community standards now demand higher compensation for non-economic loss in sexual harassment cases.

Save the Date! Events Update

Squire Patton Boggs, Perth 2014, Labour & Employment Breakfast Series, Level 21, 300 Murray Street Perth 7 a.m. (for 7:30 a.m. start) to 9 a.m.

Please RSVP to Isla Rollason at perth.rsvp@squirepb.com

Wednesday 26 November

Safety Prosecutions – Lessons Learned

Client Quiz

Which two States have not enacted the harmonised work, health and safety legislation?

a) Western Australia and Queensland

b) Western Australia and Victoria

c) Western Australia and South Australia

d) Western Australia and Tasmania

The first correct entry emailed to luci.browne@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Legislation Update

Legislation	Update
Work Health and Safety	• In **Queensland**, amendments have been made to the Work Health Safety Act 2011 (Qld), which took effect in May, to reduce compliance costs for employers and right of entry provisions have been tightened. • Union right of entry is also being explored by **South Australia's** Stewart-Crompton statutory review, as part of that state's participation in the COAG-mandated review of the original model WHS Act which was to harmonise safety laws across all states and territories. • In **Western Australia** a version of the Work Health and Safety laws will soon be tabled in Parliament as a 'green bill' which will then be released for public comment as part of a proposed three month consultation period.
Offshore Visas	• Workers participating in an **offshore resources activity** were from 30 June 2014 taken to be in the Australian Migration zone. The effect was to entitle foreign offshore workers to minimum employment standards under Australian law. • In March this year, the Coalition sought to repeal the law before it took effect, however the measure was stalled in the Senate. The Coalition then attempted to amend the Migration Regulations 1994 (Cth) to wind back the changes. However that bill was disallowed by the current Senate. • Finally, on 17 July, Michaelia Cash, the Assistant Minister for Immigration and Border Protection issued a 'determination' under the Migration Act. This has created a special visa and the effect is to rewind the rules regarding offshore workers. • The Maritime Union has now mounted a challenge in the Federal Court to the Federal Government's ongoing efforts to exclude offshore workers from Australia's labour laws.

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