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Workplace View

July 2019

Israel Folau and Protecting the Employer's Reputation

Carly Corbett-Burns, Senior Associate, and John Oakes, Partner

The recent media attention on the termination of Rugby Union player Israel Folau's contract with Rugby Australia following his social media comments is a reminder of the complexities involved when the behaviour of an employee outside of work impacts their employer and its reputation.

The introduction and increased popularity of social media in our day-to-day lives has added an additional layer of concern for companies, whose branding or reputation can be negatively impacted by comments made by employees, often without much prior thought. Without the right employment documentation in place, employers can face an expensive and difficult road in taking action to mitigate the damage done to their brand.

Background

In April 2019, Folau posted on Instagram, stating hell awaits certain groups of people, including homosexuals. Relevantly, prior to the recent April 2019 post, Folau had been warned by Rugby Australia about comments made on social media platforms in relation to the LGBTQI community in both September 2017 and April 2018.

As widely reported in Australian media, Folau's contract with Rugby Australia has now been terminated based on a "high-level breach" of the Professional Players' Code of Conduct. Folau did not engage in the internal appeals process (citing his belief that such a process would be biased and unfair). Folau has now commenced legal action and therefore it is likely the wording of Rugby Australia's policies and the processes followed will come under heavy scrutiny.

Grounds for Termination of Folau's Contract

Rugby Australia has both a Code of Conduct (Code) and an Inclusion Policy. The Inclusion Policy was introduced in 2014 and focuses directly on eradicating homophobia in rugby and preventing any behaviour that could create an "unwelcoming environment". This policy expressly states, "There is no place for homophobia or any form of discrimination in our game and our actions and words both on and off the field must reflect this." The Code obliges players to treat everyone equally, fairly and with dignity regardless of sexual orientation. It prevents players from making any public comment that would likely be detrimental to the best interests of Rugby Union or from acting in a way that may adversely reflect on rugby or bring it into disrepute, as well as requiring social media be used appropriately.

The Law

Generally, conduct outside of the workplace is beyond the employer's reach to enforce disciplinary sanctions. However, action can be taken where there is a sufficient link to the employment relationship. An employee's behaviour outside of work can justify termination of employment where the conduct is likely to cause serious damage to the relationship of employment, damages the employer's interests or is incompatible with the employee's duty as an employee. For high-profile sports stars such as Folau, public comment, while unrelated to their profession, can be of such a nature as to bring their sport or team into disrepute or otherwise damage the employer's interests by way of the negative media that follows.

Rugby Australia has relied on its clear policies and previous warnings given to Folau in relation to his use of social media. However, Folau has commenced proceedings in the Fair Work Commission for unlawful termination. Folau argues the termination of his contract by Rugby Australia was unlawful as it was based on his religion.

Of interest to any such argument from Folau is a similar case heard by the High Court earlier this year, with a decision yet to be handed down. In *Comcare v Banerji*, the government is appealing an Administrative Appeals Tribunal decision that found the employer's decision to terminate Ms. Banerji following tweets on Twitter "unacceptably trespassed on the implied freedom of political communication", was unlawful and, therefore, the psychological injury that followed was compensable.

Lessons for Employers

It will be of great interest to see where the High Court will draw the line between the freedoms of the individuals and the legitimate concerns of employers, and how Folau's legal challenge will unfold. Though it is still to be seen how the courts or FWC will view enforcement of workplace policies in this context, in the meantime, in light of the readily accessible public voice provided by numerous social media tools, the best pre-emptive action employers can take is to ensure that their policies are specifically tailored to address relevant actions outside of work.

Companies should consider their values, objectives and expectations and make these clear to employees via policies and training, including training managers who may be tasked with dealing with these difficult situations. Areas of particular concern, including the use of social media in either a personal or a professional capacity, should be specifically addressed in policies. It may also be appropriate at times to include explicit responsibilities in employment contracts.

Did You Know?

The Final Report of the Ministerial Review of WA's Industrial Relations System Has Been Released

Sharon Payn, Associate

The report makes 85 recommendations to improve Western Australia's industrial relations system.

Who Is Covered by the State Industrial System?

The following types of businesses and their employees are generally covered by the state industrial relations system:

- Sole traders
- Unincorporated partnerships
- Unincorporated trust arrangements
- Incorporated associations (that are not trading or financial corporations)
- Other not-for-profit organisations (that are not trading or financial corporations)

It is estimated that as many as 36.2% of employees in Western Australia are covered by the state industrial relations system.

What Are Some of the Key Recommendations in the Report?

- An equal remuneration provision to be included in the Industrial Relations Act 1979 (WA) (IR Act) to assist with the issue of gender pay gap and to enable the Western Australian Industrial Relations Commission (WAIRC) to deal with applications for equal remuneration orders
- Express provision for casual employees and seasonal workers to be entitled to long-service leave and guidance on how continuous employment should be calculated
- Enabling workers to seek an order from the WAIRC to stop workplace bullying
- Providing greater power to the WAIRC to vary the scope of awards to ensure state private sector employees are covered by an award (except for employees not traditionally covered by an award)
- Increased penalties for breaches of employment law consistent with the civil remedy provisions set out in the Fair Work Act 2009 (Cth)

I Am an Employer Covered by the State Industrial System – What Do I Need to Do?

Employers who are covered by the state industrial system should familiarise themselves with the Final Report and watch out for further amendments to the IR Act (only one of the recommendations, to abolish the position of the President of the WAIRC, has already come into effect).

OSH Alert

Barnaby Austin, Associate

Landmark Conviction of Company Director Set Aside – Retrial Ordered

A landmark decision by the District Court of Queensland to imprison a Queensland company director for WHS breaches has been set aside on appeal and a retrial ordered.

The conviction related to an incident that occurred on 29 July 2014 on the Sunshine Coast involving a worker fatally falling six meters after tripping in a gutter while working on the roof of a factory. There was no safety railing in place, the worker was not wearing a harness, and a scissor lift being used to prevent falls was not positioned where the worker fell, because the ground was uneven and made positioning difficult.

The sole director of the worker's employer was convicted by majority verdict with offences against s 31 of the Work Health and Safety Act 2011 (Qld) for reckless conduct that exposed an individual to the risk of death or serious illness – the first prosecution under that provision. He was sentenced to a period of imprisonment of 12 months to be suspended after serving four months.

On 3 May 2019, the Court of Appeal set aside the conviction and ordered a retrial after finding that the trial judge had misdirected the jury in stating that "the question is whether that step [installing the railing] has been proven by the prosecution to have been a reasonable excuse measured against the definition of reasonable practicably which is the key".

The Court of Appeal found that "in determining whether there was a 'reasonable excuse' the jury was obliged to consider the alternative measures which the appellant directed to be put in place (the harnesses and the use of the scissor lifts), not just whether it was reasonably practicable to install the railing." That is, was the direction that the workers wear a harness if working near the edge of the roof and that scissor lifts be positioned in such a way as to constitute a barrier a reasonable excuse for causing a railing not to be installed?

R v Lavin **[2019] QCA 109**

Legislation Update

Barnaby Austin, Associate

National Minimum Wage Increased by 3%

The Fair Work Commission released the Annual Wage Review 2018-19 Decision on 30 May 2019. That decision concluded that the national minimum wage order will contain a national minimum wage of AU$740.80 per week or AU$19.49 per hour, which follows that from the first full pay period on or after 1 July 2019, minimum weekly wages are increased by 3%, with commensurate increases in hourly rates on the basis of a 38-hour week.

Further Update on the Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018

In our December 2018 edition of Workplace View, we mentioned that the Corporations Amendments (Strengthening Protections for Employee Entitlements) Bill 2018 was introduced into Parliament with the aim of bolstering enforcement and recovery options against company directors engaging in corporate practices and behaviours, which prevent, avoid or significantly diminish the payment of employee entitlements in insolvency situations. As of 6 April 2019, that bill is now law as the Corporations Amendment (Strengthening Protections for Employee Entitlements) Act 2019, after the House agreed to minor Senate amendments on 4 April 2019 and the act received the Royal Assent on 5 April 2019.

Case Law Update

Dismissal Unjust in Fingerprint Scanner Saga – Employer in Contravention of Privacy Obligations

Barnaby Austin, Associate

The Full Bench of the FWC has found that an employer did not have a valid reason for dismissing an employee, because the dismissal was in contravention of the employer's obligations under the Privacy Act 1988 (Privacy Act) which, among other things, prohibits the collection of sensitive information about an individual, unless that person consents to the collection of the information under Australian Privacy Principle 3.3.

The employer had directed the employee to use a biometric scanner (which used fingerprint data) to record attendance on a work site. The employer directed that "it is policy that all employees must use biometric scanners to record attendance on site ... please ensure you scan in when arriving on site and leaving site at the end of your shift ... if you fail to use or attempt to use the biometric scanner then disciplinary action may be taken." The employee refused the direction and the employer dismissed the employee.

However, that dismissal, the Full Bench said, was unjust because the employee was not guilty of the conduct alleged (failing to follow a lawful and reasonable direction), as the employer's direction was unlawful and the employee was entitled to refuse to follow it. The employer's direction was unlawful because the fingerprint data was sensitive information, and the employee did not consent to its collection.

The employer's direction would have had a better chance of being found to be a lawful direction had the employer had an appropriate privacy policy in place, obtained express consent from the employee to collect his sensitive information, and taken reasonable steps to notify the employee of certain matters in compliance with Principle 5 of Schedule 1 to the Privacy Act.

Interestingly, in its decision, the Full Bench observed that the employer was not exempt from complying with Principle 3.3 by reason of the employee records exemption in section 7B(3) of the Privacy Act. The employee records exemption in section 7B(3) of the Privacy Act applied to employee records once they have been obtained or held. It did not ameliorate the obligation on the employer to issue a privacy collection notice to employees when collecting their sensitive information.

Lee v Superior Wood **[2019] FWCFB 2946**

Migration Alert

Rachel Barnett, Registered Migration Agent (MARN 1800448)

New Sponsorship Framework for Partner Visas

The Migration Amendments (Family Violence and Other Measures) Act 2018 (Cth) (the Act) was passed by the Australian government on 28 November 2018 to pave the way for a new sponsorship framework for sponsored family visas, including partner visas such as the Subclass 820/801 and Subclass 309/100.

What Does This Mean?

Once the law relating to partner visas has commenced (the commencement date is still to be announced), the Australian partner will be required to first lodge their sponsorship application and be approved to be a sponsor, **before** the onshore or offshore partner visas can be lodged.

The sponsor will need to provide the Department of Home Affairs (DHA) with:

- An Australian and foreign police check when he/she applies for sponsorship
- His/her consent for the DHA to disclose any of their convictions for relevant offences to the visa applicant

When the new law comes into effect, it may be a lengthy and complex process. Even the smallest mistake in the application could result in the partner visa being refused or having significant delays. Therefore, if you are planning to lodge a partner visa, we would recommend you contact one of us for a preliminary discussion.

Events Update

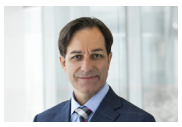
Our Labour and Employment Seminar Series 2019

With the liberal government remaining in power, we have replaced our planned post-election employment for August with a webinar at **9 a.m. AWST/11 a.m. AEST** on **14 August 2019**.

The second presentation in our seminar series will provide an "Adverse Action Update". Adverse action claims under the Fair Work Act 2009 (Cth) have increasingly become the claim of choice for employees, with the attraction of compensation awards being uncapped and one of the easier grounds being adverse action caused by a complaint or inquiry. We will explore the key areas of risk and how employers can avoid such claims.

An invitation will be sent out shortly. If you have any queries regarding this event, please contact Kristy Anthony on +61 8 9429 7425.

Contacts



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