



Social Media & Unfair Dismissal

A Guide for Employers

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The recent decision by a full bench at Fair Work Australia in [*Dianna Smith T/A Escape Hair Design v Sally-Anne Fitzgerald \[2011\]FWAFB 1422 \(15 March 2011\)*](#) upholding an unfair dismissal finding is a timely reminder for employers to ensure they observe the correct procedures when considering terminating an employee, and that they have clear guidelines in place for the use of social media where employees comment on their place of work.

The case dealt with an appeal against a decision in which the employer was found to have unfairly dismissed an employee for, inter alia, posting comments on facebook about her employer.

The employee had not received her holiday pay in cash and her bonus had been smaller than expected. She posted the following on her facebook page: "Xmas 'bonus' along side a job warning, followed by no holiday pay!!! Whooooooo! The Hairdressing Industry rocks man!!! AWSOME!!!"

In her original findings (which were accepted by the full bench) the Commissioner commented that:

"Postings on Facebook and the general use of social networking sites by individuals to display their displeasure with their employer or a co-worker are becoming more common." She then went on to say that "It is well accepted that behaviour outside working hours may have an impact on employment 'to the extent that it can be said to breach an express term of [an employee's] contract of employment'".

In this case as the employee did not name the salon where she worked the Commissioner found that there would be no adverse effect. However the lesson for employers is that such postings could be in breach of an employee's conditions of employment where there is a clear definition of what is acceptable in the context of social media, and what the consequences are when those conditions are breached. Clearly then the solution for employers is to ensure their suite of policies and procedures includes a social media policy which deals directly with such matters as:

- The nature of conduct that the employer seeks to protect itself against

- The nature of control over social media use for example, a total ban, limited use, total accessibility
- Who should such a policy apply to for example, the entire business or levels within the business
- Authority limits or restrictions for use for example, is permission required, content pre-approval, who is responsible for such approvals
- What can or cannot be discussed on social media forums
- What logos, icons, ideas can or cannot be published on social media forums
- What disclaimers or other information must be included when participating in a social media forum
- The nature of behaviour that is acceptable or unacceptable
- When it is and isn't acceptable to use or participate in a social media forum
- Reporting any breach
- Consequences of breach

In relation to unfair dismissal, section 385 of The Fair Work Act provides that a person has been unfairly dismissed if:

- a. The person has been dismissed; and
- b. The dismissal was harsh, unjust or unreasonable; and
- c. The dismissal was not consistent with the Small Business Fair Dismissal Code; and
- d. The dismissal was not a case of genuine redundancy.

The following guidelines aim to assist employers in ensuring they do not dismiss an employee unfairly and incorporate the comments from the full bench in the above case.



EMPLOYERS - WHAT TO DO

- Have a clear policy about the use of social media by employees and ensure employees are aware of the consequences of posting comments on social media sites that may concern the employer.
- Provide a warning letter outlining in detail the employee's unacceptable behaviour and what they can do to correct it. Eg "It is unacceptable to consistently arrive late to work. You are required to be at work no later than 8.30am from Monday to Friday".
- Give the employee an opportunity to correct their behaviour- it is good practice to set a review date 3-4 weeks after the warning letter has been sent.
- Ensure that the employee is notified of the **specific behaviour(s)** that may lead to their termination so that they have an opportunity to respond- advising the employee of the reason for termination at the time they are terminated is not sufficient.
- Note an exception to the requirement to give a warning where there is serious misconduct by the employee- this would include theft, fraud, violence and serious breach of OH&S procedures.
- If there are circumstances particular to an employee that would indicate the employee is under emotional stress or strain (eg death of friend or family member) then it is prudent for the employer to ensure a support person is present when warning or advising the employee in relation to their termination.

For further details about social media policies, unfair dismissal or any other workplace issue please contact:



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