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Employment Alert

"Using the internet for good – how far can your social media policy go?"

Wilkinson–Reed v Launtoy Pty Ltd T/A Launceston Toyota [2014] FWC 644
Pearson v Linfox Australia Pty Ltd [2014] FWC 446

WHAT YOU NEED TO KNOW

- A social media policy is highly desirable for setting clear standards in the workplace, but employer regulation of employees' out of work activities must be reasonable.

WHAT YOU NEED TO DO

- Develop and/or review your existing social media policy in your workplace to ensure that:
  - The policy is clear about its application to employees' online activities out of work.
  - The scope of the policy goes no wider than to protect the genuine interests of your business (which may include the interests of employees). Attempting to control all private communications of employees is a step too far.

***"The Internet, in particular, offers immense possibilities for encounter and solidarity. This is something truly good, a gift from God."* — Pope Francis**

Papal recognition of the world of social media is perhaps confirmation of how ubiquitous online communication has become as a form of self-expression.

Employers are increasingly responding to the need to clarify their expectations about social media usage to employees by developing a social media policy.

The scope of employer regulation into employee's online activity has again been examined by the Fair Work Commission. Two recent cases provide useful guidance to employers about how far you can go to regulate what employees do online in their own time.

Regulating out of work activity is a legitimate exercise

Employees cannot simply draw a line around what they do outside work and expect immunity from employer sanctions if their conduct affects their employer's business.

The employee in the *Pearson v Linfox Australia Pty Ltd* decision refused to acknowledge Linfox's social media policy because it "*sought to constrain his actions outside of working hours*". The Commission found that Linfox's policy was a reasonable and lawful means of protecting its reputation and security. Indeed, to limit such a policy to "at work" activities only would be impractical and could defeat the very purpose of the policy if it left employees free to release confidential information or damage an employer's reputation once they left the workplace.

However, employers should be mindful that the regulation of employee's private activities is not open ended. Employer policy must have a legitimate purpose – such as to protect its business reputation and security or the interests of other employees.

Posting can be private

In *Wilkinson-Reed v Launtoy Pty Ltd*, the communication in question was a Facebook conversation between the employee (Ms Wilkinson-Reed) and her friend, who also happened to be the

estranged wife of the employee's manager. The employee made comments critical of the manager.

However, the Commission accepted that the comments were not intended to be made public and they were "*not made as a post on a Facebook 'wall' that was then accessible to the 'Friends' of either party, or as a tweet that has wide ranging capability to be viewed by many followers*". The remarks were not made in public or to employees or to customers of the business. Indeed, the only reason the comments became known to the manager was because he had accessed his wife's Facebook account without her knowledge.

The employer had a social media policy stating that employees should not make derogatory comments about the business, colleagues or customers on the internet. The Commission found that Ms Wilkinson-Reed had not breached this policy, notwithstanding that Facebook is on the internet, because the communication was in the manner of a private email.

An employee's private email with a third party sent and received in their own time and on their own equipment is generally unlikely to have a "relevant connection to work" such as to justify disciplinary action (even if employer policy purports to regulate all online communications).

Derogatory postings may not justify dismissal

In the *Wilkinson-Reed* case, the Commission considered the employer's submission that Ms Wilkinson-Reed's conduct alone made her ongoing employment untenable. The Commission held that something more was required to justify dismissal than "*the discovery by a manager that an employee holds a low opinion of him*". Evidence that the employee's opinion had a deleterious effect on the workplace, its employees or the business would be necessary to validate the dismissal of a long standing employee.

SOCIAL MEDIA Insights from Geoff Giudice

These two cases illustrate different things about the use of social media in the employment context. In *Pearson* it was decided that an employer is entitled to make and implement a social media policy which by its nature affects employee conduct away from work. An employee who refused to comply with the policy and was dismissed as a consequence was not entitled to an unfair dismissal remedy. The decision supports the general proposition that an employer can require its employees not to damage the employer's reputation through comments on social media.

Launtoy was concerned with the application of an employer's social media policy. An employee made some derogatory comments about her manager on social media. The comments were "private" in that they could only be accessed via her friend's account. The Commission found the comments did not breach the social media policy – because they were private.

Taken together, the cases are a reminder that while sound policies will provide a degree of protection, the circumstances of the particular case must always be taken into account. When contemplating dismissal for breach of a social media policy much will depend on whether the comments in question are public or private – and sometimes it might be hard to tell.

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