The Impact of Social Media in the Workplace: An Employer's Perspective

Veronica Siow examines the key risks for employers who use social media as part of their recruitment and disciplinary processes.

Introduction

The trend of cases coming before Fair Work Commission indicates that employers (and the law) are increasingly grappling with the impact of social media in their workplace. This article considers employers' use of social media as part of their recruitment and disciplinary processes, and some of the issues that arise with respect to such use.

Assessing prospective employees through the social media filter

Increasingly, employers are using social media to assess their prospective employees. There is currently nothing at law that would prevent employers from accessing publicly available information that may be posted by or about a candidate on social media sites such as Facebook, Twitter or LinkedIn. However, in doing so, employers should be aware that there may be legal risks associated with this practice.

An employee's social media posts that humiliate, degrade or harass a work colleague are likely to be in breach of the employer's anti-bullying, anti-harassment policies

Privacy issues

An employer who collects and stores personal information[1] about candidates who are ultimately unsuccessful in their application for employment with the company should be aware that such information will not be captured by the employee records exemption in the *Privacy Act 1988* (Cth). This means that the employer must comply with the National Privacy Principles (or, when they take effect, the Australian Privacy Principles) regarding its collection, use and storage of an unsuccessful applicant's personal information.

Potential adverse action exposure

Employers who in their recruitment decisions take into account information posted by or about their candidates on social media sites should also consider their potential exposure to adverse action claims.

Under the General Protections provisions of the *Fair Work Act 2009* (Cth), prospective employers will have engaged in adverse action if they refuse to employ a prospective employee for a prohibited reason[2] or for reasons which include a prohibited reason.[3]

Let's take the following scenario. A company refuses to employ an otherwise suitable candidate. The candidate becomes aware that the company had during the application process viewed his or her Facebook wall which has a number of posts by the candidate and the candidate's friends and family. The posts suggest that the candidate has a strong union affiliation or indicate the candidate's sexual preference.

In those circumstances, the candidate could allege that the company had made its decision not to employ him or her because of their union membership[4] or because of their sexual preference[5], both of which are prohibited reasons, and in doing so, had engaged in adverse action. With the reverse onus of proof in the adverse action regime, the usual evidentiary hurdles that the candidate might otherwise have faced in making out such a claim are absent. Instead, to defend the claim successfully, the company would have to prove that its decision not to offer the candidate employment was for reason(s) other than the candidate's union affiliation or sexual preference.

In the recruitment space, therefore, employers who seek out information posted on social media sites about their prospective employees before offering employment should ensure that they do not take into account either attributes that are protected by law that their prospective employees appear to have (at least from their posts) or industrial activities in which their prospective employees might engage that are protected under the *Fair Work Act 2009* (Cth).

Disciplining employees for social media conduct

It is reasonably settled law in Australia that an employee's behaviour outside of working hours can give rise to legal consequences for the employee and their employer if there is a sufficient connection between the conduct alleged and the employment.[6] To the extent that the behaviour is said to be a breach of an express term of the employee's contract of employment, such conduct outside the workplace could nevertheless result in the termination of the employment.[7]

Social media posts about colleagues

An employee's social media posts that humiliate, degrade or harass a work colleague are likely to be in breach of the employer's anti-bullying, anti-harassment policies.

In the Good Guys case[8], the employee (Mr O'Keefe) posted on his Facebook (using his home computer, outside of business hours) the following comment:

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1 "Personal information" for the purposes of the National Privacy Principles means information or an opinion (including information or an opinion forming part of a database), whether or not true, and whether or not recorded in a material form, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion, Privacy Act 1988 (Cth).

2 Prohibited reasons, for the purposes of grounding an adverse action, include discriminating on the basis of an attribute that is protected under anti-discrimination law (such as race, religion, age, gender, family or carer's responsibility) and on the basis of industrial activities.

3 Section 342 of the Fair Work Act 2009 (Cth).

4 Section 346 of the Fair Work Act 2009 (Cth).

5 Section 351 of the Fair Work Act 2009 (Cth).

6 Griffiths v Rose [2011] FCA 30

7 Fitzgerald v Smith T/A Escape Hair Design [2010] FWA 7358 at [51]

8 O'Keefe v William Muir Pty Ltd t/as The Good Guys [2011] FWA 5311

Damien O'Keefe wonders how the f*** work can be so f***g useless and mess up my pay again. C***s are going down tomorrow

[Expletives censored for this publication]

The employee's Facebook privacy setting meant that the post was only available to his Facebook friends. Included among his Facebook friends were several fellow employees. Mr O'Keefe's comments on Facebook came to the attention of management and he was dismissed following an investigation. Mr O'Keefe made a claim for unfair dismissal against his employer.

In dismissing his claim, Fair Work Australia (as it was then called) (***FWA***) said that Mr O'Keefe's comments on Facebook were threatening and offensive, and were in breach of his employer's workplace policies on conduct, sexual harassment and bullying. The fact that the comments were made on Mr O'Keefe's home computer, out of work hours did not, in FWA's view, make any difference to this assessment. Even though his employer was not named in the post, there was a sufficient connection to the employment because his work colleagues could have read the post and it would have been obvious to them that Mr O'Keefe's comments were directed at their fellow colleagues (who were female) in their payroll department.

Social media posts about employer

An employer seeking to discipline employees who vent their feelings on social media about the company or their employment conditions will need to consider whether any damage has been done to their brand by the posts and ensure that their response is proportionate.

In the *Dover-Ray v Real Insurance case*, Ms Dover-Ray, a female sales agent in a call centre of Real Insurance had made allegations of sexual harassment against another employee. The allegations were investigated by the employer and it concluded that the allegations were not substantiated. After being informed of the outcome of the investigation, Ms Dover-Ray blogged her feelings on her MySpace page in a post entitled, 'Corruption', in which she referred to the company's values as *"absolute lies"*. Her posts also included comments such as:

- *"I have just been through an investigation that in the end advanced corruption."*
- *"The investigation sought to ensure that the evidence was tampered with, was controlled and was biased."*
- *"It is corruption at every level."*[9]

Soon after she posted the comments, a fellow employee of Real Insurance brought the blog to the company's attention. Real Insurance asked her to remove the blog but she refused and the comments on the blog remained online for a number of weeks. Ms Dover-Ray was summarily dismissed for misconduct primarily related to both her blog and her failure to comply with the direction to remove the blog. She made an unfair dismissal claim against the company.

In dismissing Ms Dover-Ray's unfair dismissal application, FWA held that although she had not identified her employer by name in her post, there was enough information on her MySpace page to tie her comments to Real Insurance. The fact that her MySpace friends included other employees of Real Insurance, and her blog could be read by others in the workplace, was a sufficient connection to her employment. FWA found that the criticisms of the company were so severe that her summary dismissal was justified.

In Fitzgerald v Smith T/A Escape Hair Design, FWA took the view that the employer had not suffered any damage as a result of the employee's Facebook post which criticised her employer for not providing a Christmas bonus. Although the unfair dismissal claim was upheld, Commissioner Bissett in that case made the following observations:

> *a Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see…It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences.*[10]

An employer seeking to discipline employees who vent their feelings on social media about the company or their employment conditions will need to consider whether any damage has been done to their brand by the posts and ensure that their response is proportionate.

This sentiment was echoed by the Full Bench of the FWA in their 2012 decision in Linfox Australia Pty Ltd v Stutsel[11]. Although the Full Bench in that case did not overturn FWA's decision in the first instance[12] to reinstate the employee, the Full Bench did not agree with Commissioner Roberts' characterisation in the earlier decision that the Facebook posts were in the flavour of a pub or café discussion between a group of friends. Instead the Full Bench expressed the view that:

> *The fact that the conversations were conducted in electronic form and on Facebook gave the comments a different characteristic and a potentially wider circulation than a pub discussion. Even if the comments were only accessible by the 170 Faceboook "friends" of Mr Stutsel, this was a wide audience and one which included employees of the Company.*
>
> *…*
>
> *Further, the nature of Facebook (and other such electronic communication on the internet) means that the comments might easily be forwarded on to others, widening the audience for their publication.*
>
> *…*
>
> *Unlike conversations in a pub or café, the Facebook conversations leave a permanent written record of statements and comments made by the participants, which can be read at any time into the future until they are taken down by the page owner. Employees should therefore exercise considerable care in using social networking sites in making comments or conducting conversations about their managers and fellow employees.*

Other conduct on social media

With the proliferation of social and professional networking sites such as Twitter and LinkedIn, two recent cases serve as a timely reminder to employees of the potential for their conduct on social media sites to impact negatively on their employment.

In *Pedley v IPMS Pty Ltd T/A peckvonhartel*[13], the employee was summarily dismissed following his email to a select group of his LinkedIn connections in which he solicited for work for his private interior design service. Among the LinkedIn connections who received the

9 [2010] FWA 8544 at [49]

10 [2010] FWA 7358 at [52]

11 [2012] FWAFB 7097

12 Stutsel v Linfox Australia Pty Ltd [2011] FWA 8444

13 Bradley Pedley v IPMS Pty Ltd T/A peckvonhartel [2013] FWC 4282

email were clients of his employer. Fair Work Commission (***FWC***) upheld the dismissal, finding that the employee's conduct was in breach of his obligations to his employer.

In Banerji v Bowles[14], the employee, Ms Banerji, applied to the Federal Circuit Court for an injunction to prevent her employer, the Department of Immigration and Citizenship, from terminating her employment. Ms Banerji, who at the time the decision was handed down on 9 August 2013 was employed by the Department as a public affairs officer, alleged that her employer had taken, and was in the course of taking, adverse action against her because of her tweets on her Twitter account, *@LALegale*. Her tweets (which the Court noted were sometimes mocking, sometimes critical) were about, among other matters, the practices and policies of the company that provides security services at Commonwealth immigration detention centres, the immigration policies of the Australian Government and the employees of the Department.

Ms Banerji claimed that the Department was taking adverse action against her by seeking to dismiss her because she had expressed her political opinion. She further claimed that the Department's action was in breach of her constitutional right as a citizen to express a political opinion. Her employer contended that Ms Banerji's comments on her Twitter account were in breach of the Australian Public Service's Code of Conduct and the Department's Guidelines on Use of Social Media by DIAC Employees.

Ms Banerji sought declaratory orders that the Department's finding that she had breached the APS Code of Conduct was a contravention of her implied unfettered constitutional right of political communication. The Court refused to make such orders, finding that no such unfettered right exists. The Court rejected any contention that Ms Banerji's political tweets, while employed by the Department under an employment contract and while subject to the APS Code of Conduct and the Department's social media guidelines, were constitutionally protected.

The Court also denied Ms Banerji's application for an injunction to stay the termination of her employment.

Summing up the employer's response

Employers must act promptly once they become aware of any alleged social media misconduct by an employee, and respond in a manner that:

- observes procedural fairness (by investigating the alleged misconduct and providing the employee with the opportunity to respond to the allegations);
- is proportionate to the misconduct (by ensuring that the disciplinary action to be taken is appropriate to deal with the misconduct, and taking into consideration also whether any damage has been suffered by the employer); and
- is consistent with its past responses to similar misconduct by other employees.

Conclusions

The cases discussed in this article show that while it remains necessary for there to be some connection between the employee's behaviour and the workplace, the prominence of social media in employees' daily life has increased the ways in which the employee's comments outside of work could make it back to their employer and become a workplace issue. To respond to these issues and minimise any adverse impact of such conduct in the workplace, employers should consider having policies on social media, anti-bullying/anti-harassment and technology usage that set out clearly the consequences for employees whose social media conduct breaches company policy or the employees' duties to their employer.

Veronica Siow is a Senior Associate at Allens. The views expressed in this article are personal to the author and do not represent any organisation.

14 [2013] FCCA 1052

SAVE THE DATE

Thursday 28 November

The Communications and Media Law Association invites members to the Annual General Meeting and End of Year Drinks

Thursday 28th November 2013
5:45pm - AGM
6:30pm - End of Year drinks

Venue: Allens
Level 28, Deutsche Bank Place
Corner of Hunter and Phillip Streets, Sydney

RSVP by Thurs 21st Nov 2013 to Cath Hill:
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