



Fact Sheet

EMPLOYMENT LAW

Social Media - A Workplace Hazard?

An employee's use of social media both at work and at home can cause harm to your business reputation.

Social media enables anybody to instantly and permanently comment in public through a variety of online forums. The use of social media is prolific and will continue to grow in the future. Once an online comment is made by an employee it is difficult if not impossible for you as their employer to remove it. Therefore it is of critical importance to your business that you have an up to date social media policy that complies with the law, protects your business and clearly sets out your expectations.

An appropriately drafted social media policy will be a useful tool for employers who wish to regain some control over their employee's use of social media, particularly in circumstances where employees are bluntly and tactlessly commenting about matters concerning their workplace or the people they work with.

The question of whether the use of social media outside of work hours can constitute misconduct justifying termination will depend on the facts

of each case, however there have been decisions of the Fair Work Commission that demonstrate that an employee's use of social media outside of work hours may in certain circumstances, justify disciplinary action or dismissal.

*Linfox Australia Pty Ltd v Stutsel*¹

Mr Stutsel was employed by Linfox as a truck driver between 1989 and the termination of his employment on 31 May 2011. Mr Stutsel was terminated for serious misconduct after posting offensive, derogatory and discriminatory comments about his managers on his personal Facebook page. The comments suggested the managers were dishonest and had engaged in sexual misconduct.

In the first instance, the Commission held that the comments were similar to 'a group of friends letting off steam and trying to outdo one another in being outrageous.' The dismissal was held to be unfair and ordered reinstatement and backpay.

The Full Bench of the Commission dismissed Linfox's appeal. It held that the findings were reasonably

1. *Linfox Australia Pty Ltd v Stutsel* [2012] FWA 7097

open to the Commissioner at first instance. The value of the decision, however, lies with the principles set out by the Full Bench when it comes to assessing the fairness of a dismissal for misconduct based on misuse of social media.

It held:

- *the posting of offensive comments on a social media page can provide a valid reason for dismissal. The nature of the comments and statements made need to be considered. The Commission will not impose unrealistic standards of behaviour or ignore the realities of the workplace;*
- *comments made on social media are not like comments made in a pub or café. Particularly given the potential for them to exist indefinitely and be circulated widely;*
- *an employer should, when assessing comments made on social networks, consider the context of the comments made, the intended audience and the range of people who have access to the material.*

continued overleaf...

Little v Credit Corp Group Limited²

Mr Little was employed with Credit Corp for a period of approximately 3 years. Mr Little was terminated for serious misconduct as a result of posting inappropriate comments on Facebook.

Mr Little posted two inappropriate comments on the Christians Against Poverty page criticising their activities. He also posted grossly inappropriate sexual comments on his own Facebook page about a new employee of Credit Corp.

The Fair Work Commission held that the posts were totally inappropriate and justified dismissal. In particular, the Fair Work Commission held that Mr Little's conduct:

- *seriously damaged the relationship between the employer and the employee;*
 - *damaged the employer's interests;*
 - *potentially damaged the relationship between the employee and other employees; and*
 - *was incompatible with the employee's duty as an employee.*³
- *having in place a clear and concise social media policy that informs employees what is acceptable and what is not, both during work hours and outside of work hours;*
 - *training your employees to that policy;*
 - *implementing a formal disciplinary procedure for employees who breach your policies;*
 - *enforcing that policy consistently;*
 - *considering restricting access to social media from work computers and electronic equipment;*
 - *directing your employee that he or she must not, under any circumstances, make any comment on social media that is unlawful or is damaging to the business reputation, its staff or is a breach of your confidential information irrespective of whether those comments are made on work time or outside it.*

detrimental to the employer or which are calculated to intimidate or harass a co-worker or client of the business by:



John Walsh Director

p: +61 8 8124 1951

john.walsh@dwfoxtucker.com.au



Ben Duggan Director

p: +61 8 8124 1881

ben.duggan@dwfoxtucker.com.au



Patrick Walsh Director

p: +61 8 8124 1941

patrick.walsh@dwfoxtucker.com.au

Minimising the risk – your social media strategy

Employers can minimise risks created by unsavoury and unfavourable comments which are

² Little v Credit Corp Group Limited [2013] FWC 9642

³ The Fair Work Commission referred to the decision of Rose v Telstra Corporation Limited [1998] AIRC 1592

DW Fox Tucker Lawyers

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 8124 1811 e: info@dwfoxtucker.com.au dwfoxtucker.com.au

COMMERCIAL | CORPORATE | DISPUTES | FAMILY | INSOLVENCY | TAX | HOSPITALITY | IP | PROPERTY | ENERGY | RESOURCES
EMPLOYMENT | WORKERS COMPENSATION | SELF INSURANCE | RISK MANAGEMENT | INSURANCE | WILLS | ESTATE PLANNING

Disclaimer: The information contained in this communication does not constitute advice and should not be relied upon as such. Professional advice should be sought prior to any action being taken in reliance on any of the information.

