

Article

EMPLOYMENT LAW

Protecting a Business' Brand in the Age of Social Media

By Patrick Walsh & Tiffany Walsh

The termination of Israel Folau's multimillion dollar playing contract with Rugby Australia has been a divisive issue across Australia. On one hand, Rugby Australia have argued that Folau breached conditions of his employment, and on the other hand, Folau (and others) have claimed that the termination infringed Folau's 'free speech', and was an unlawful termination.

Folau has been no stranger to controversy as a result of previously publishing his religious beliefs on social media. In 2017, he "tweeted" that he was not supportive of same-sex marriage being legalised. In 2018, he commented on one of his own Twitter posts that God's plan for homosexuals was "HELL... Unless they repent of their sins and turn to God."

As a professional rugby player, Folau was bound by Rugby Australia's code of conduct, and after the 2018 post Folau received a formal warning with respect to his use of social media and it "was made clear to him that any social media posts or commentary that is in any way disrespectful to people

*because of their sexuality will result in disciplinary action."*¹

In April 2019, Folau posted on social media that hell awaits "drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters". Following this, Rugby Australia found that Folau had committed a high-level breach of their code of conduct and issued him with a breach notice. Rugby Australia Chief Executive Raelene Castle stated that:

"At its core, this is an issue of the responsibilities an employee owes to their employer and the commitments they make to their employer to abide by their employer's policies and procedures and adhere to their employer's values... He was unapologetic for his posts and his position and that left us with no option..."

On 17 May 2019, a three person panel delivered their decision with respect to Folau's Code of Conduct hearing. The sanction the panel delivered was termination of his

playing contract. Rugby Australia Chief Executive Raelene Castle stated that :

"... Rugby Australia fully supports [the players'] right to their own belief and nothing that has happened changes that... People need to feel safe and welcomed in our game regardless of their gender, race, background, religion, or sexuality."

The New South Wales Rugby Union CEO, Andrew Hore, also stated that:

"... rugby has a Code of Conduct and values that we must adhere to ensure that our game remains a game for all, no matter people's backgrounds or beliefs."

Folau has now challenged the panel's decision through the Fair Work Commission on the basis that the termination of his employment breached Section 772(1)(f) of the *Fair Work Act 2009* (Cth), which states that employment cannot be terminated on the grounds of an employee's religion. One of the

¹ Rugby Australia Chief Executive Raelene Castle.

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key issues in this dispute will be whether Rugby Australia's decision to terminate Folau's employment, which was primarily for **how** he communicated his 'beliefs', constitutes a breach of Section 772(1)(f) of the *Fair Work Act 2009* (Cth).

"Freedom of Speech"

In Australia we do not have the same 'freedom of speech' that is enshrined in the Constitution of the United States. The only such 'freedom of speech' that we have is an implied constitutional freedom of political communication.

Australia is also a party to the *International Covenant on Civil and Political Rights* ("ICCPR"), which states that:

*"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom.... and in public or private to manifest his religion or belief in worship, observance, practice and teaching."*²

*"Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals of the fundamental rights and freedoms of others."*³

This does not, however, specifically protect the "**expression**" of religious beliefs, and the "**freedom to manifest**" religious beliefs is subject to limitations.

Impact of social media and electronic communication

The creation of social media has meant that a person's published views can reach a much larger audience than ever before. This creates an obvious issue for employers when they can be easily identified on their employee's social media accounts and the views being published by the employee reflect poorly on the employer.

In Rugby Australia's case, the organisation has made a concerted effort to market itself as an 'inclusive' code that doesn't discriminate against LGBTI people.

Although the relevant misconduct was racist, the decision of the Full Bench in *Anderson v Thiess Pty Ltd*⁴ makes for interesting reading in the context of Folau's misconduct. In *Anderson v Thiess Pty Ltd*⁵, Anderson, an employee of Thiess Pty Ltd ("**Thiess**"), sent an email to a number of other Thiess employees (as well as other people) expressing anti-Muslim sentiments. As a result, Anderson's employment was terminated, and he lodged an application for unfair dismissal. Anderson had previously been informally counselled with respect to the large number of non-work related emails that he had sent using the Thiess email system. Anderson "**displayed no awareness about the offensiveness of the email or the impact it could have on work colleagues or Thiess' reputation**".⁶

⁴ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478.
⁵ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478.
⁶ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478, [10].

In the first instance, it was found that Anderson was "**free to hold whatever views he wishes to hold... [and] free to receive and disseminate material expressing those views, provided that he does not break any law in doing so.**"⁷

However, it was found that he had breached Thiess' policies in sending such an email on their electronic information system, and that the email "**had real potential to damage Thiess' reputation in Australia and internationally**".⁸ Ultimately, however, the Deputy President found that Anderson's dismissal was unfair as it was harsh and unreasonable (although not unjust).⁹

The matter proceeded, on appeal to the Full Bench, Their Honours stated that:

"In the employment context, the express terms of the employment contract, employer policies incorporated into or authorised by the employment contract, and the employer's lawful and reasonable directions may also operate to impose significant constraints upon an employee's freedom of expression." (Emphasis added)

The practical implication of this statement is that an employer can place obligations on their employees and curtail the manner of their religious expression – with or without express policy or contractual obligations. The extent to which an employer is entitled to do this will usually turn on the individual

⁷ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478, [11].

⁸ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478, [11].

⁹ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478, [11]-[13].

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² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force for Australia 13 November 1980) art 18.

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, [1980] ATS 23 (entered into force for Australia 13 November 1980) art 18.

facts of the dispute. The facts in Folau's case can be distinguished from *Anderson v Thiess Pty Ltd*¹⁰ in that Folau was well aware of the controversial nature of his views, Rugby Australia's stance, and the reach of his social media presence.

Folau's Fair Work Commission challenge

As noted above, Folau has filed an application with the Fair Work Commission challenging his dismissal as a result of him practising his religion. He is seeking damages with respect to lost future earnings, as well as the lost opportunities including contract renewals and sponsorships.

On the face of it, it would look as though Folau's case is not without merit – he has had his employment terminated for expressing genuinely held religious views. It is difficult to accept, however, that Rugby Australia terminated Folau because of those views when it had tolerated them for a significant period of time. The Rugby Australia Code of Conduct specifically states that players are required to:

“Treat everyone equally, fairly and with dignity regardless of gender or gender identity, sexual orientation, ethnicity, cultural or religious background, age or disability. Any form of bullying, harassment or discrimination has no place in Rugby.”¹¹

¹⁰ *Anderson v Thiess Pty Ltd* [2015] FWCFB 478.

¹¹ Rugby Australia Code of Conduct, Part 2, [1.3].

“Use Social Media appropriately. By all means share your positive experiences of Rugby but do not use Social Media as a means to breach any of the expectations and requirements of you as a player contained in this Code or in any Union, club or competition rules and regulations.”¹²

Conclusion

The tension between Folau's right to express himself and Rugby Australia's right to protect itself from reputational damage is a high profile example of what has become a fairly common issue in employment generally. There have been a number of disputes in the Fair Work Commission in relation to this issue, including:

- *Construction, Forestry, Mining and Energy Union v Oaky Creek Coal Pty Ltd* [2017] FWC 5380;
- *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186;
- *Starr v Department of Human Services* [2016] FWC 1460; and
- *Little v Credit Corp Group Limited* [2013] FWC 9642.

In this regard it is common practice for employers to have in place social media policies so that their employees understand their expectations.

¹² Rugby Australia Code of Conduct, Part 2, [1.7].

For employees, what has become clear is that if you want your private life to be kept separate from work, it is best to keep those social media accounts private as well.



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