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Dismissed for misconduct: facing the consequences of Facebook postings

Two recent decisions highlight the differing outcomes for employees who criticise their employers on social media sites outside working hours. In *O'Keefe v Williams Muir's Pty Ltd T/A Troy Williams The Good Guys* [2011] FWA 5311, a decision of Fair Work Australia delivered on 11 August 2011, a Townsville worker who was dismissed after making insulting and aggressive comments about his employer on Facebook lost his claim. The claim failed primarily due to the threatening nature of some of the comments, which he conceded were directed at a particular co-worker. Angry at the company's delay in paying his commissions, Mr O'Keefe wrote on his Facebook page that he: "...wonders how the f... work can be so f...king useless and mess up my pay again. C...s are going down tomorrow." The comments were posted outside of working hours but were visible to 70 of the worker's Facebook friends including 11 co-workers: the female co-worker at whom the comments were directed soon became aware of them.

The employer's Staff Handbook stated 'Employees will not use offensive language, resort to personal abuse or threaten or engage in physical contact'. The employer interpreted the worker's comments as threatening the safety of the female staff member responsible for the worker's pay, with whom the worker had been in email contact for some time before the posting. The manner in which the threat was made and the nature of the words used provided sufficient reason for the dismissal of Mr O'Keefe on the ground of serious misconduct. The worker did, however, receive three weeks' pay in lieu of notice which is usually withheld where misconduct is alleged.

Clearly, the worker was angry about the non-payment of his outstanding



commissions but he was criticised by Deputy President Swan for choosing to vent his anger on his Facebook page instead of raising the matter with the store manager, instigating a grievance resolution mechanism available to him and/or following up with the Fair Work Ombudsman whom he had previously contacted about the matter.

APPEAL DISMISSED

Contrast the outcome in the above case with the failure of the employer's appeal in *Smith T/A Escape Hair Design v Sally-Anne Fitzgerald* [2011] FWAFB 1422. The Full Bench of Fair Work Australia dismissed the employer's appeal against a previous finding that its dismissal of an employee for reasons including displaying 'public dissatisfaction with the basis of her employment' was unfair. After working hours, Ms Fitzgerald posted the following comment on her Facebook page: "Xmas 'bonus' along side a job warning, followed by no holiday pay!!! Whooooooo! The Hairdressing Industry rocks man!!! AWSOME!!! [sic]".

Ms Fitzgerald's comments were sarcastic rather than aggressive and, importantly, her

comments had not been seen by her colleagues and did not identify her workplace, although her employer was later notified of the comments. While the employer failed on the issue of the fairness of the dismissal, it succeeded in having the matter remitted back to FWA to determine the compensation payable. The outcome in this case is obviously very different to the O'Keefe case but in practical terms, while Ms Fitzgerald won her unfair dismissal claim, she has incurred the considerable and unrecoverable costs of both proceedings in Fair Work Australia. The net outcome in financial terms is likely to be very modest for Ms Fitzgerald.

SOCIAL MEDIA DAMAGING

These cases illustrate how employees' use of social media outside of working hours can irreparably damage their relationship with their employer. After hours activities are no longer immune from scrutiny and possible sanction. Even in the absence of a company policy covering social media usage and conduct outside the workplace, employees should be aware that posting comments on their Facebook page (or on other social media such as Twitter) or conducting themselves in a manner that is critical of their employer or offensive or threatening towards colleagues, may expose them to disciplinary action or dismissal. Language that is considered unacceptable if used face to face within the workplace does not become acceptable simply because it is published via social media out of working hours. Employers are advised to avoid uncertainty about the use their employees are entitled to make of social media both in and outside the workplace by implementing appropriate social media policies. **HC**

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