Freedom of speech in a master / servant relationship

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Snapshot

- Tensions have been emerging about the rights of employers to limit how their employees express their personal views.
- Despite recent attention, the law surrounding discipline of an employee by their employer for the publication of controversial opinions has not changed.
- There is no general immunity for free speech in an employment relationship.

Over recent years, the framework of employment laws has been challenged by changes in the way work has been performed. The emergence of the 'gig' economy, in particular, has marginalised the traditional employment paradigm. There has been intense debate and inquiry about the adequacy of the existing employment laws to meet the emergence of non-traditional work relationships. Within the employment framework however, the fundamental pillars of employment remain in place. Archaic language to describe the employment relationship, such as 'Master and Servant' and a contract of service, is a reminder that an employee must comply with an employer's reasonable and lawful instructions. The employment relationship is a personal one that either party can end.

This month we have seen the spotlight squarely placed on the issue of freedom of speech in employment. The Israel Folau controversy has sparked a debate about whether he should be allowed to reproduce views or express his own, contrary to the views supported by his employer. It has led to discussions about the adequacy of legal protections for freedom of speech, and religious freedom. But for all the noise, it highlights that the basic employment law concepts remain paramount.

Private lives and personal views

One concept that has evolved from the nature of the employment relationship is that an employer has a right to regulate employees' out-of-hours conduct where that conduct has sufficient connection to the employment relationship. The oft-quoted principles in *Rose v Telstra Corporation Limited* ([1998] AIRC 1592 set out three situations in which out-of-hours conduct may warrant employer intervention in the form of dismissal or discipline:

- 'the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employee and employer;
- the conduct damages the employer's interests; or
- the conduct is incompatible with the employee's duty as an employee' – i.e. their duty of fidelity and good faith.

When these principles were established over 20 years ago, it was considered that these circumstances would be exceptional. With the advent of social media, they have become far less so. In fact, social media has now become the central villain in a litany of cases and tolerance for conduct that accompanied the use of social media years ago (see, for example, *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097) has now passed.

As the more recent authorities have made clear, use of social media that is contrary to an employer's interests, or is crass, careless and shows an absence of judgement, can constitute a valid reason for dismissal (see *Renton v Bendigo Health Care Group* [2016] FWC 9089). These cases often turn on whether the employer has a social media policy – as most employers do. Like other employment policies, these are expressions of what the employer considers to be lawful and reasonable directions in employment.

Irrespective, the cases illustrate that when disrespectful or offensive comments are made in public forums and fall outside an employer's 'behavioural expectations', it can lead to dismissal. There is no overriding protection for the expression of personal views, be they political, religious or even scientific.

Right to free speech?

The effect of these policies, or other directions about an employer's views on behavioural expectations, is that free speech in an employment context can be muted. The cases where there has been a protection afforded to the expression of views in an employment context are limited, and rely on a separate and express right to protection. The recent decision in *Ridd v James Cook University* [2019] FCCA 997 is a good illustration.

In that case, Professor Ridd publicly criticised a number of studies on the effect of climate change on the Great Barrier Reef. He essentially said the findings were overstated and the studies lacked quality assurance. The studies that were criticised were undertaken by a colleague and a related institution of the University. His views were initially broadcast on a Sky News channel.

The University censured Professor Ridd for breaching its Code of Conduct, taking issue with the way he expressed his views

and the effect those responses had on the University and his colleagues. It also directed him to keep the matter confidential. Following further publicity in *The Australian*, and conduct demonstrating Professor Ridd did not accept the University's censure or direction, the University made 17 findings of misconduct against him.

The matter touched on a range of sensitive issues, but tellingly it turned on a very narrow one i.e. whether the directions and findings of the University were lawful in the context of the 'Intellectual Freedom' clause in the relevant enterprise agreement. That clause stated, amongst other things, that: 'All staff have the right to express unpopular or controversial views. However, this comes with a responsibility to respect the rights of others and they do not have the right to harass, vilify, bully or intimidate those who disagree with their views'. This is a relatively common iteration of an intellectual freedom clause, as confirmed by the *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers*, published on 27 March 2019.

As the opening two paragraphs of the Federal Circuit Court decision stated: 'Some have thought that this trial was about freedom of speech and intellectual freedom. Others have thought that this trial was about the manner in which academics should conduct themselves. Some observers may have thought that this trial was about the use of non-offensive words when promulgating scientific ideas. Media reports have considered that this trial was about silencing persons with controversial or unpopular views. Though many of those issues were canvased and discussed throughout the hearing of this matter, this trial was about none of the above. Rather, this trial was purely and simply about the proper construction of a clause in an Enterprise Agreement.'

The Court held that Mr Ridd's views reflected his genuine opinion and, while insulting to some individuals/institutions, did not qualify as harassment, vilification, bullying or intimidation. The Court also held that Mr Ridd's right to express disagreement with university decisions and processes meant that he was not bound by confidentiality directions issued during the disciplinary process. As a consequence, the Court held that each of the 17 findings of misconduct, the associated confidentiality directions, and Professor Ridd's dismissal, were unlawful. The fact the case was conducted on the narrow grounds of the specific terms of the enterprise agreement highlights the limitations of other legal protections available for the expression of opinions of this nature.

These limitations may be explored in similar proceedings recently commenced on behalf of Dr Tim Anderson, a Sydney University Academic. From May 2017, Dr Anderson posted on twitter and Facebook a number of controversial views the University considered to be contrary to its Code of Conduct and Public Comment Policy. The posts ranged from criticism of Israel to allegations the media fabricated a 'genocide threat' in order to intimidate anti-war activists, and accusations that former US Senator John McCain as a 'US war criminal'. In August 2018, Dr Anderson posted photographs of powerpoint slides, used in a seminar he delivered earlier in the year at the University, containing a graphic of a Nazi Swastika superimposed over the Israeli flag. Dr Anderson received warnings from the University, including a final warning in October 2018, and a direction to remove the relevant posts from his social media accounts. During this period, he states he made a number of complaints about the University's conduct. His employment was terminated in February 2019 following his continued use of social media, contrary to the directions of the University.

Dr Anderson has alleged the termination, and warnings that preceded the termination, were in breach of the 'intellectual freedom' provisions of the applicable enterprise agreement. He has also alleged the conduct contravened the provisions of the *Fair Work Act 2009* (Cth) (***'FW Act'***) in that the University has taken adverse action because of the exercise of a 'workplace right' (being the complaints he made) contrary to s 340 of the *FW Act* and that it terminated his employment for reason of, or for reasons including, his political opinion contrary to s 772 of the *FW Act.* The proceedings are at an early stage.

Another high profile example of proceedings commenced in reliance on the *FW Act* is that of the former government relations manager for Cricket Australia, Angela Williamson, who was dismissed following 'tweets' criticising the Tasmanian government's abortion policies. Ms Williamson claimed her dismissal was unlawful discrimination on the basis of political opinion. Cricket Australia said that it respects an individual's right to their opinions but expects employees to comply with its social media policies. The matter settled.

For all these claims, the protections in the *FW Act* against 'adverse action' because of a person's political opinion or religion, have their limitations. Generally speaking, and in the context of a public statement expressing a political or religious view, there remains a distinction between action taken because public statements were contrary to social media policies or the employer's behavioural expectations (which is lawful), compared to action taken because of the political opinion or religion itself (which would be unlawful). Examples of where the protection for 'political opinions' has been explored, with mixed fortunes, include *Heathcote v University of Sydney* [2014] FCCA 1170 and *Sayed v Construction, Forestry, Mining and Energy Union* [2015] FCA 27.

Is it different in the public service?

The adverse action provisions in the *FW Act* also formed the basis of a 2013 claim brought by an employee of the (then) Department of Immigration and Citizenship. In 2013, the Department received a complaint that lead it to find Ms Banerji (the employee), had posted a number of anonymous 'tweets' (and retweets) through the Twitter handle *LaLegale.* The tweets were highly critical of the government, the then Minister, the Department's policies and a colleague. The Department investigated the complaint, and ultimately found Ms Banerji's

conduct amounted to a breach of the Australian Public Service ('**APS**') Code of Conduct (as found in s 13 of the *Public Service Act 1999* (Cth)). The Code prescribes that 'an APS employee must at all times behave in way that upholds the APS Values and the integrity and good reputation of the APS'. Guidelines published by the Department specifically provided that employees must not publish harsh or extreme criticism of the government or ministers, including while operating anonymously.

In the course of the investigation and disciplinary process, Ms Banerji alleged the Department was seeking to dismiss her for expressing her political opinion and that it had acted in breach of her constitutional right to express her political opinion. She sought an injunction and/or declarations to stop the Department from progressing disciplinary action. The Federal Circuit Court refused to intervene in the Department's process. The Court rejected the proposition that there was an unfettered implied right (or freedom) of political expression/communication. In any case, the Court observed that it would not provide employees with a licence to breach their employment contract by flaunting codes of conduct and social media policies.

One month after the decision, the Department terminated Ms Banerji's employment on the basis of misconduct. Ms Banerji made a claim for workers' compensation alleging a psychological condition arising from the events leading to and including the termination of her employment. After the claim was initially rejected by Comcare and on review, and after a number of interlocutory steps in various courts, the Administrative Appeals Tribunal ('**AAT**') in *Banerji and Comcare (Compensation)* [2018] AATA 892, held that Ms Banerji suffered a compensable adjustment disorder.

The sole issue in the proceedings before the AAT was whether the termination of Ms Banerji's employment was 'reasonable administrative action taken in a reasonable manner' such that liability for her condition would be excluded. The AAT held that it was not reasonable administrative action because it was unreasonable for the Department to infringe on the freedom of political expression to such an extent that it dismissed an employee for making anonymous comments. The fact they were anonymous, and not open, was critical to the AAT's decision. While anonymity does not absolve an employee from 'the burden of the duty of fidelity and loyalty', the AAT considered 'that burden is slight in comparison with the burden on the implied freedom of an employee to express political opinions where to do so occasions minimal damage to the employer by virtue of the opinions being expressed anonymously' (at [118]).

The implied freedom of political expression could be considered in the case because the Code of Conduct and the Department's power to dismiss were contained in legislation, while arguably the decision to dismiss was an executive decision also subject to the same implied freedom. The AAT found that the Code itself was within the legislative competence of the Commonwealth, but in this case the actual exercise of the power by the delegate trespassed upon the implied freedom.

The AAT decision has been appealed to the High Court (through the Attorney-General's intervention). The High Court heard the matter in late March 2019, and should provide instruction on the extent of the implied freedom of political communication and its interaction with the Public Service Code of Conduct.

The appeal also heard a submission on the 2017 case of *Chief of the Defence Force v Gaynor* [2017] FCAFC 41. In that case, Mr Gaynor sought judicial review of the decision to dismiss him for his social media comments criticising the Defence Force and the government for their support of homosexual and transgender recruitment in the Defence Force, as well as their actions in the Middle East. He also made general comments opposed to homosexuality, transgender behaviour and Islam. In considering the dismissal, the Full Federal Court commented on the legitimate need of the Defence Force to be able to terminate the employment of individuals who are not suitable, including those who directly undermine the Defence Force's interests in cohesion and diversity.

The Court determined that the dismissal should stand. The Court considered the implied freedom of political communication when interpreting the relevant *Defence (Personnel) Regulations 2002* (Cth), which provided the power to terminate Mr Gaynor's employment, but held that the regulations did not infringe on the implied freedom, as they were reasonably appropriate and adapted to serve a legitimate end. The Court also held that, even if s 116 of the *Constitution* applied (which states that no religious test should be applied to public servants), the fact that Mr Gaynor had a religious basis for his statements did not mean he was entitled to disobey the lawful orders of his superiors.

Conclusion

For all the noise generated by recent high profile cases, the general law in relation to dismissal for controversial public statements has not been subject to any significant change. An employee remains subject to an employer's reasonable and lawful directions, most commonly contained in the form of policies setting behavioural expectations such as an employer's Code of Conduct or social media policies.

The recent cases that appear to support a protection afforded to public comments disparaging of their employer have been confined to limited situations i.e. public service employees with a greater ability to argue that their employment is subject to the implied freedom of political communication, and an employee with a specific right enshrined through the terms of a specific enterprise agreement.

Employees who make controversial public statements that have the potential to damage their employer's interests or their personal employment relationship do so at the risk of the employment relationship. The freedom to make such comments sits alongside the freedom to continue an employment relationship. From time to time, the two may not be compatible. **LSJ**