



## Social Media Misconduct by Employees

***The use of social media sites, such as Facebook, Instagram and Twitter has become widely accepted in today's society. The Fair Work Commission has increasingly been asked to consider issues raised by employee's online use of these social media sites whilst not at work, to make comment about their workplace and their work mates and claims by employees for unfair dismissal when their employment has been terminated because of that use.***

The Fair Work Commission has found that derogatory, discriminatory or offensive comments made about other employees or an employee's workplace can provide a valid basis for dismissal, but this will not always be the case. Whether or not termination is warranted will depend upon the particular facts and circumstances of the case.

When an employee's dismissal is found to be unfair, one of the remedies available to the employee is to seek reinstatement. However, if the employee's conduct on social media has irreparably damaged the relationship with the employer, reinstatement may not be available.

Some examples of derogatory comments on social media resulting in termination are:

1. Mr Little used his personal Facebook account to criticise a third party organisation with which his employer, Credit Corp Group Ltd had professional dealings and to make sexually aggressive comments about a new employee. This was held to breach the employer's Code of Conduct which addressed appropriate use of social media. Mr Little was aware of and had received training about the code. The termination of Mr Little's employment for misuse of social media in breach of the Code of Conduct was held to be valid.
2. Mrs Anders was a teacher at The Hutchins School. While on leave she was removed from teaching a subject she had always taught. Mrs Anders posted derogatory comments on Facebook about her employer and an unresolved workplace dispute. Her privacy settings were restricted to her friends and the school was not listed as her employer, nor named in her posts. Nonetheless, a number of staff were Facebook friends of Mrs Anders and the comments came to the school's attention, which instructed her to refrain from posting harmful or derogatory comments on her Facebook page.

Mrs Anders had other issues with the school and was then dismissed on the basis that the school had lost trust and confidence in her.

Mrs Anders commenced unfair dismissal proceedings seeking reinstatement. Whilst the Fair Work Commission concluded that the dismissal was harsh and disproportionate, it nonetheless refused Mrs Anders' application for reinstatement on the basis that it would be "impracticable and would affect the continued functioning and harmony of the school as it was not possible to re-establish a collegial working relationship in the maths faculty", but instead awarded her compensation.

3. Mr Marroun's employment had been terminated and he took proceedings to be reinstated. Mr Marroun posted two comments on his Facebook page calling his employer a "bastard" and a "criminal". These comments remained visible on the employee's Facebook page for a number of months. The NSW Industrial Relations



Commission refused to reinstate Mr Marroun saying reinstatement would not be an appropriate remedy, because of these posts.

The Commission decided asking an employer to put trust and confidence in an employee that had publicly characterised that employer as a bastard and criminal was not within the maximum elasticity of the employment contract.

## Conclusion

These examples indicate employers should ensure that:

- they implement a comprehensive social media policy;
- employees are adequately trained in the policy and are aware of the employer's expectation around social media in and out of the workplace; and
- the policy is reviewed regularly in order to maintain currency.

Likewise, employees should proceed with caution when engaging with social media, and avoid posting any comments that may be deemed defamatory or derogatory of their employer. If they don't, even a wrongfully dismissed employee might still be looking for a new job.

*If you would like more information or require assistance or advice regarding an employment issue, please contact Ken Gray or Michael Battersby on 4731 5899 or email [commercial@batemanbattersby.com.au](mailto:commercial@batemanbattersby.com.au).*