Insights / Employment

Employees' Social Media Usage – When can Employers 'unfriend' an Employee for their behaviour online?

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Whether an employer can take disciplinary action against an employee for misconduct outside of the workplace has long been a fraught topic. Generally speaking, an employee may be dismissed for misconduct that occurs outside of the workplace, and outside of working hours, if there is a link between the employee's conduct and their employment. However, in recent years we have seen employers grappling with how to apply this rule to employees' behaviour on social media.

Before the rise of social media, it was far easier for employees to keep their private lives strictly private. However, social media has provided employees with a platform that proliferates their thoughts, opinions, connectedness and behaviour and, ultimately, has made it more difficult to distinguish one's online self and conduct from the person who comes to work each day. This has made it tricky for employers to know where to draw a line around the circumstances in which they can lawfully terminate or discipline an employee for their behaviour on social media.

The Employment Court provided some recent guidance on this. *Turner v Te Whatu Ora - Health New Zealand, in respect of the Former Wairarapa District Health Board* discusses what employers should keep in mind when considering whether to dismiss an employee due to their conduct on social media.

In this article, we explore the key facts and justification behind the Employment Court's decision to uphold the Employment Relations Authority's determination in favour of the Wairarapa District Health Board (**WDHB**).

Ms Turner was employed by WDHB as a registered palliative care nurse at an aged care facility, until her summary dismissal on 23 April 2021. WDHB dismissed her due to a number of her Facebook posts, which WDHB found were contrary to the organisation's interests and/or were offensive. The posts, broadly, contained anti-vaccination and anti-Muslim content. The Court described the posts, as *not considered or balanced discussions, but* as involving *memes and strongly worded,* (and in some cases derogatory), *statements or allegations against individuals and groups.*

Ms Turner claimed that WDHB's decision to dismiss her, and the disciplinary process it undertook leading up to that, were substantively and procedurally unjustified. She also argued that her social media posts were private and only accessible by her Facebook friends, and that they contained her own personal opinions, which she was entitled to have. Ms Turner said that because of this, WDHB's decision to dismiss her was contrary to her rights to free speech and to freedom of thought, conscience, and religion, as set out in the New Zealand Bill of Rights Act 1990 (**NZBORA**).

The Court rejected Ms Turner's arguments, ultimately, finding that WDHB's decision to dismiss her, and the disciplinary process it undertook in relation to her, were justified - both substantively and procedurally. This included suspending her pending the ultimate decision to dismiss her.

The Court said that while the offending Facebook posts were done in Ms Turner's own time and contained her own personal opinions, that did not automatically protect her from possible employment consequences. Ms Turner had 86 Facebook 'friends' and this was significant enough that her posts could not be regarded as truly private, including because the posts could be, and were, accessed by other WDHB employees. The Court commented further that, *even if the material in the posts had been said or sent directly to one or only a few other employees or professional contacts, that could have been of concern to the WDHB; being posted on a Facebook page with a much wider audience is even more of an issue.*

WDHB's Code of Conduct and social media policy also set express expectations around employees' social media activity and made the consequences for failing to adhere to those expectations clear. This included actions that might cause damage to WDHB's reputation, or which might cause it to be linked to derogatory, racist, or other offensive comments. On that basis, Ms Turner was, or should have been, aware that posts made on Facebook, even to a closed group, could be the subject of an employment investigation and potential disciplinary action.

The Court further said that Ms Turner's anti-vaccination posts ran counter to the interests and actions of her employer in circumstances where:

- The anti-vaccination posts were posted at a time when WDHB was *actively and openly involved in work to support and deliver the Government's vaccination programme. There were genuine fears that COVID-19 would again enter the community* and aged residential care facilities were seen as particularly vulnerable.
- *Ms Turner was a respected medical professional, whose views could have influenced fellow employees and other people with whom she interacted.* This included *those who worked in the sector of the community in which Ms Turner worked, caring for vulnerable elderly people and other people with significant health issues.*

Ms Turner's anti-Muslim posts were also found to be offensive and to have run counter to the principles and requirements of WDHB, as contained in the DHB's Code of Conduct. The Court also considered that Ms Turner's posts ran counter to the Nursing Council of New Zealand's Code of Conduct. Overall, the posts were not respectful of Muslim New Zealanders and making those comments could have harmed the reputation of WDHB.

For these key reasons the Court found that WDHB's decision to dismiss Ms Turner was one that was open to a fair and reasonable employer in the circumstances and, ultimately, justifiable.

Summary

Overall, *Turner* demonstrates that dismissing an employee for their social media use will need to be approached on a case-by-case basis, and with careful consideration of the particular circumstances.

Other key takeaways from *Turner* employers should keep in mind are:

- If an employee makes comments (whether on social media or not) that might bring the employer into disrepute and / or damage the relationship of trust and confidence, the employer may have grounds to take disciplinary action
- Social media posts made in an employee's own time, and which express their personal opinions, may not be protected from employment consequences. NZBORA and the right to free speech does not necessarily protect employees in these instances
- Context is critical. Whether or not an employee's actions on social media are sufficiently connected to their employment will require careful consideration of the nature of the actions and their potential impacts, as well as the nature of the employee's role
- It may be enough that an employee's actions undermine, or are inconsistent with, the function of the employer's business or organisation. This may be particularly relevant where the employer's business or organisation performs a public function and / or provides specific services
- Employers should have policies in place that set clear behavioural standards and expectations when it comes to social media usage. This may include a specific social media policy and / or code of conduct

The line between work life and one's personal life has become increasingly blurred with the increase of social media use and, there's little shared on social media that remains truly 'private'. It's worthwhile checking that your organisation's social media policy protects you from the unintended consequences of a rogue employee and the potential reputational damage that can bring

Whether it's a stress test of what your organisation already has in place, or drafting a policy from scratch, any one of our team can help. **Get in touch**

Wynn Williams Auckland
Level 25, Vero Centre, 48 Shortland Street, Auckland
1010, New Zealand. PO Box 2401, Shortland Street,
Auckland 1140.
+64 9 300 2600
email@wynnwilliams.co.nz

Wynn Williams Christchurch
Level 5, Wynn Williams House, 47 Hereford Street,
Christchurch 8013, New Zealand. PO Box 4341, DX
WX11179, Christchurch 8140.
+64 3 379 7622
email@wynnwilliams.co.nz

Wynn Williams Queenstown
Level 2, Te Nuku Building, 43 Ballarat Street,
Queenstown 9300, New Zealand. PO Box 323,
Queenstown 9348.
+64 3 379 7622
email@wynnwilliams.co.nz