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Current Issues

RELIGION, POLITICS, AND JOB SECURITY

In recent times employee advocates have claimed a 'right to disconnect' so as to quarantine some private time from obligations to serve an employer,[1] but what about a right to preserve one's personal integrity in matters related to political, ideological, or religious commitments, notwithstanding pressure exerted by one's employer? Consider for example, the highly publicised resignation of Mr Andrew Thorburn, chief executive officer of the Essendon Football Club, in October 2022 when the club decided that his leadership role in the City on a Hill church was incompatible with his commitment to the club.[2] Or the refusal of several Pasifika members of the Manly Rugby League football team to wear a new uniform bearing rainbow coloured stripes designed to manifest the club's commitment to acceptance and support of the LGBTIQ+ community.[3] Or Rugby Australia's termination of Israel Folau's contract after his refusal to delete religiously-based views on homosexuality from social media.[4] These are but a few recent manifestations of a long-contested issue in Australian employment law. Where lies the boundary between employees' private lives and personal commitments, and their obligations to serve the interests of their employers?

Perhaps the earliest judicial statement on this question was made by Justice Higgins in *Australian Tramways Employees' Association v Brisbane Tramways Co Ltd*[5] when an employer objected to conductors wearing a badge denoting their union membership on the fob chains of their pocket watches. The employer clearly took exception to this ornament as a display of political commitment to a trade union, but argued the case on the basis of an alleged

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[1] Amy Dale, 'Do we deserve the right to disconnect?' *Law Society Journal* (online, 2 August 2021) https://lsj.com.au/articles/right-to-disconnect/.

[2] Emma Kemp, 'Andrew Thorburn resigns as Essendon CEO after one day over links to controversial church', *The Guardian* (online, 4 October 2022) https://www.theguardian.com/sport/2022/oct/04/andrew-thorburn-resigns-as-essendon-ceo-after-one-day-over-links-to-controversial-church.

[3] Tracey Holmes, 'The furore over the Manly Pride jersey has casuded confusion, but respect for all is key to moving forward' *ABC News* (online, 28 July 2022) https://www.abc.net.au/news/2022-07-28/respect-the-lesson-from-the-manly-pride-jersey-debacle/101276392.

[4] Sam Clench, 'One Unresolved Legal Question at the Heart of Israel Folau's Case', *News.com.au* (online, 25 June 2019) <https://www.news.com.au/sport/sports-life/one-unresolved-legal-question-at-the-heart-of-israel-folaus-case/news-story/387b057b25ab325d35ea494b9ed087b3>. Proceedings filed in the Federal Circuit Court of Australia were discontinued on 4 December 2019 when the matter settled: see Isileli 'Israel' Folau, 'Alleged Unlawful Termination of Employment', Application in *Isileli ('Israel') Folau v Rugby Australia & Anor*, MLG2486/2019, 31 July 2019; 'Rugby Australia and Israel Folau Settle Legal Dispute over Sacking', *ABC News* (online, 5 December 2019) <https://www.abc.net.au/news/2019-12-04/rugby-australia-israel-folau-mediation-settlement/11765866>.

[5] (1912) 6 CAR 35 ('*Tramways*').

'common law right' to dictate matters of employees' dress during their working hours. Justice Higgins rejected this as a 'quaint theory', and proposed instead a 'common law right' of employees to make their own decisions in matters not affecting their work.

> A servant has to obey lawful commands, not all commands. The servant does not commit a breach of duty if he refuses to attend a particular church, or to wear a certain maker's singlets. The common law right of an employee is a right to wear what he chooses, to act as he chooses, in matters not affecting his work.[6]

Of course, at the time this case was decided, employees who asserted a right to choose a religion or style of dress that was objectionable to their employer would risk dismissal upon notice: 'an employer may, by due notice, get rid of an employee who does not dress to his liking; but the employee is not guilty of a breach of duty in refusing'.[7] Today, an employer choosing to dismiss an employee without a valid reason relating to the employee's work performance would risk an application brought under statutory unfair dismissal laws,[8] or if the reason for objecting to the employee's behaviour fell within the range of reasons prohibited by antidiscrimination laws, the employer may face a claim brought under the General Protections provisions in the *Fair Work Act 2009* (Cth),[9] or under a state or federal antidiscrimination statute.[10] A successful claim under the *Fair Work Act* may result in an order of reinstatement of the employee, or failing that, an order for substantial compensation.[11] If the dismissal is found to breach the General Protections against adverse action, the employer may also be penalised for breach of a civil remedy provision.[12]

These apparent protections do not always vindicate an employee's claim to keep a job while expressing contrarian views. Several avenues of complaint are open to employees who

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[6] (1912) 6 CAR 35, 42.
[7] (1912) 6 CAR 35, 42. For recent confirmation of the employer's common law right to dismiss employees without any reason at all upon giving proper notice, see *Bartlett v ANZ Banking Group Ltd* [2016] NSWCA 30, [87], [106]-[107].
[8] See *Fair Work Act 2009* (Cth) Part 3-2. Note that unfair dismissal protections apply only to employees whose employment is covered by a modern award or enterprise agreement, or whose annual income falls below a high income threshold, presently set at $162,000 per annum: see *Fair Work Act 2009* (Cth) s 382.
[9] *Fair Work Act 2009* (Cth) Part 3-1. See also *Fair Work Act*, Part 6-4 for provisions extending protection from unlawful dismissal on discriminatory grounds to non-national system employees.
[10] *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Disability Discrimination Act 1992* (Cth); *Age Discrimination Act 2004* (Cth); *Anti-Discrimination Act 1977* (NSW); *Equal Opportunity Act 2010* (Vic); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Equal Opportunity Act 1984* (WA); *Anti-Discrimination Act 1998* (Tas); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act* (NT).
[11] *Fair Work Act 2009* (Cth) s 545
[12] *Fair Work Act 2009* (Cth) s 546.

are aggrieved by an employer's insistence that they toe a particular ideological line, but there are very few cases in which employees have succeeded.

Unfair dismissal under the *Fair Work Act*

The easiest avenue for complaint by an employee who has been dismissed for expressing personal views is an application to the Fair Work Commission under *Fair Work Act 2009* (Cth) s 390, for reinstatement or compensation for an unfair dismissal. The Fair Work Commission must weigh the relative interests of the parties to determine a 'fair go all round'.[13] On the whole, employees who have been dismissed for expressions of views that cause embarrassment to the employer have not succeeded, unless the employee has been willing to retract or delete the publication of their views.

In *Corry v Australian Council of Trade Unions*[14] a full bench of the Fair Work Commission affirmed a finding[15] that the employer was entitled to dismiss a union official who had posted his own political views on the union's intranet and on public social media sites. Mr Corry was a robust critic of what some might describe in insulting terms as 'woke' commitments to transgender rights and the Blak Lives Matter protests. He also posted support for protests against the Victorian government's COVID-19 lockdowns. Mr Corry claimed an entitlement to freely express these personal political views while keeping his job, but a full bench of the Fair Work Commission held that the ACTU was entitled to dismiss him for causing embarrassment to its own public commitment to certain values. Ultimately, the requirement for an employer to show a 'valid reason' for dismissal for the purposes of s 387(a) will be satisfied if the employer can show that the employee's behaviour 'damages the employer's interests' or 'is incompatible with the employee's duty as an employee'.[16] In these days when employers (including secular employers) maintain public commitments to certain values and principles as an important part of their 'brand', finding the connection between the employee's expression of ideological views and the employer's business interests is not difficult.

[13] *Fair Work Act 2009* (Cth) s 381(2).
[14] [2022] FWCFB 126.
[15] *Corry v Australian Council of Trade Unions T/A ACTU* [2022] FWC 288.
[16] See *Sydney Trains v Bobrenitsky* [2022] FWCFB 32, [140].

General Protections claims under the *Fair Work Act*, s 351

Among the General Protections for workplace rights in the *Fair Work Act* is a general provision purporting to protect employees and prospective employees from discrimination on the grounds of a range of factors, including religion and political opinion.[17] This protection is mirrored in s 772(1)(f) of the Act, to ensure that employees who are not covered by s 351 (for constitutional law reasons[18]) also enjoy protection from discrimination on these grounds.[19] Employees have occasionally sought to use these provisions to contest a dismissal following their expression of political or religious views.[20] Israel Folau commenced proceedings alleging discrimination of this nature, but his matter was settled prior to hearing, so it is difficult to gauge whether his claim would have been vindicated in court proceedings.[21]

Generally, General Protections claims (like unfair dismissal claims) are unsuccessful, because employers can generally characterise their reasons for dismissal in terms of the employee's unwillingness or inability to meet a requirement of their employment, such as compliance with a workplace conduct policy. In *Rumble v The Partnership trading as HWL Ebsworth Lawyers*,[22] a consultant was dismissed after making critical comments of the Australian Defence Force's failure to respond to an inquiry he had conducted into historical sexual assault allegations in the military. The law firm successfully defended the claim on the basis that its managing partner had taken the adverse action because Dr Rumble had breached a workplace policy requiring staff to avoid public criticism of the firm's clients. High Court authority confirms that it is the decision-maker's subjective reasons for taking adverse action that determines whether that conduct breaches the General Protections.[23] An employer who

[17] *Fair Work Act 2009* (Cth) s 351(1).
[18] Part 3-1 of the *Fair Work Act* depends for its constitutional validity on the corporations power in the *Constitution* s 51(xx), hence applies only to employees of 'national system employers' as defined in s 14. Part 6-4 is underpinned by the external affairs power because it gives effect to a number of International Labour Organisation Conventions, hence it applies to all employees.
[19] Section 772 has also been used by employees who are excluded from bringing a claim under s 351 because they are claiming protection for a characteristic that is not protected by discrimination laws in the State in which the conduct occurred. Section 351(2)(a) excludes claims related to conduct that would not be unlawful in the place in which that conduct occurred. The *Anti-Discrimination Act 1977* (NSW), for example, does not prohibit discrimination on the grounds of political opinion, so a claim brought under the *Fair Work Act* for adverse action based on political opinion would need to be pursued under s 772(1)(f) rather than s 351(1). See *Rumble v The Partnership trading as HWL Ebsworth Lawyers* [2019] FCA 1409, [143] (Perram J).
[20] See for example *McIntyre v Special Broadcasting Service* [2015] FWC 6768; *Cameron v Goldwind Australia Pty Ltd [*2019] FCCA 1541.
[21] Application in *Isilele ('Israel') Folau v Rugby Australia & Anor*, MLG2486/2019, 31 July 2019.
[22] [2019] FCA 1409, affirmed on appeal in *Rumble v The Partnership trading as HWL Ebsworth Lawyers* (2020) 275 FCR 423.
[23] See *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* (2012) 248 CLR 500; *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* (2014) 253 CLR 243.

can present a credible reason based on their own business interests, such as preserving reputation, or maintaining client or sponsor relationships, will avoid liability, even where on any objective measure their conduct was a response to the employee's exercise of a claimed liberty to express personal political or religious views. If the Folau matter had been litigated, it is very likely that Rugby Australia would have successfully defended the matter on the basis that it had terminated Folau's contract because he had breached the social media policy in his playing contract, and had done so in a manner which attracted opprobrium to Rugby Australia from an important section of its sponsorship and fan base.

Claims of an implied right to free speech

In some cases involving government employers, employees have claimed a right to be protected from dismissal on the basis of an implied constitutional right to freedom of political speech.[24] This claim was raised, unsuccessfully, before the High Court in *Comcare v Banerji*,[25] by a public servant who had posted anonymous criticisms of her employer's migration policies on social media. Her conduct was clearly of interest to her employer because her comments were directly antagonistic to the performance of her duties in implementing government policy. A less clear case was *Chief of Defence Force v Gaynor* ('*Gaynor*'),[26] concerning an Army Reservist who complained that his engagement had been terminated unlawfully after he posted comments on social media that were highly critical of the army's gender inclusive policies and its promotion of a transgender officer.[27] Gaynor based his claim on the ADF's alleged breach of his 'implied constitutional freedom of political communication'.[28]

At first instance it was found that Gaynor's comments had been made in a personal capacity as a private citizen, so that the ADF had no grounds to terminate his commission for breach of its regulations.[29] This decision was overturned, however, on that basis that the ADF was entitled to maintain discipline among all of its personnel, reservists included, and it was entitled to engage only persons of suitable character.[30] Gaynor's social media posts had demonstrated a 'lack of tolerance and respect for fellow officers', and his continuing refusal to

[24] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
[25] (2019) 267 CLR 373. See Kieran Pender, '*Comcare v Banerji*: Public Servants and Political Communication' (2019) 41(1) *Sydney Law Review* 131 for a detailed consideration of this case.
[26] (2017) 246 FCR 298 ('*Gaynor*'). The High Court refused leave to appeal from this decision: see *Gaynor v Chief of the Defence Force* [2017] HCATrans 162, [750] (Keane J).
[27] *Gaynor* (2017) 246 FCR 298, 302 [11].
[28] *Gaynor* (2017) 246 FCR 298, 300 [1] (Perram, Mortimer and Gleeson JJ).
[29] *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188, 255–6 [284], [279] (Buchanan J).
[30] *Gaynor* (2017) 246 FCR 298, 323 [108] (Perram, Mortimer and Gleeson JJ).

comply with directions to remove reference to his membership of the Australian Defence Forces from these postings warranted termination of his commission.[31]

Gaynor also claimed that as his comments were based on his religious commitments, the ADF had breached the *Australian Constitution* s 116, which provides that '[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'. The Full Bench roundly rejected this argument, stating 'an officer in the respondent's position cannot rely on his religious beliefs as an excuse for disobeying lawful orders and directions from his superiors, even if … it had been proven that those beliefs compelled or necessitated the conduct under question'.[32]

Religious Discrimination Legislation

In addition to the avenues discussed above, an employee aggrieved by being disciplined at work over a matter related to their expression of religious or political belief might also bring a complaint to a state body administering an anti-discrimination statute, depending upon whether the relevant state law protected that characteristic or not.[33] Presently, there is no federal statute expressly protecting citizens from discrimination on the grounds of religion or political belief. Some of the high profile disputes described above (and particularly the much-publicised Israel Folau matter) generated attempts to enact a federal Religious Discrimination Act, to provide more robust protection for employees who are disciplined for making 'statements of belief', however these attempts failed to garner widespread support.[34]

Arguably, even if federal religious discrimination legislation were passed it may not prevent workplace discipline of persons who express religious beliefs in a manner that jeopardises the interests of their employer. The employer's common law right to select staff whose commitments are compatible with progressing the employer's business interests is firmly embedded in our employment laws. Specific statutory protections (such as the General Protections against discrimination, and the entitlement to contest an unfair dismissal) have

[31] Ibid 324 [109]–[111].
[32] Ibid 326 [122].
[33] See the list of state enactments above n 10. See Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 295-307 for a detailed explanation of the attributes protected in each state jurisdiction.
[34] See Religious Discrimination Bill 2019 (Cth); Religious Discrimination (Consequential Amendments) Bill 2021 (Cth).

provided little practical constraint on the employer's prerogative to hire and fire whom they choose. Religious organisations are granted an express exemption from any constraint imposed by the *Fair Work Act* s 351, by an exemption for any action taken against a staff member in good faith, and 'to avoid injury to the religious susceptibilities of adherents of that religion or creed'.[35] Secular employers need not covet that exemption, because they effectively already enjoy protection from prosecution for any conduct which can be justified on the basis of their overriding entitlement to protect their own business reputations, preserve profitable relationships with their sponsors and clients, and maintain harmony in their workplaces.

Conclusion

In some respects, very little has changed in our law since Justice Higgins decided the *Tramways* case. Perhaps one of the most significant influences on the reach of the employer's prerogative to dictate which 'churches' (or ideologies) employees must tolerate, and which maker's singlets they must wear, is the contemporary focus on 'brand management', and the tendency for consumers to associate certain values and virtues with business names. Were he alive today, Justice Higgins may well find it strange that a footballer's employment should require anything more than sporting skill. Today, a footballer is also expected to be both a 'role model' who signals values chosen by the club, and a billboard, bearing the trademarks of sponsors on his singlet.

Technology today is also much to blame for breaking any boundary between work and private life. Were it not for social media, would anyone have remembered Pastor Guy Mason's 2013 sermon on abortion that prompted calls for Andrew Thorburn's resignation from Essendon? Social media exposes more of our personal lives to a vast audience of unforgiving strangers, who do not hesitate to bay for punishment if our values and beliefs do not align with their own. Rugby Australia was placed in an invidious position during the Folau saga by pressure brought by media commentators and sponsors. Likewise, Manly coach Des Hasler lost his job as a consequence of the contest over rainbow stripes on football jerseys. Church attendance and singlets will continue to challenge employers with difficult decisions, while ever the consuming public cares so much about these things.

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[35] *Fair Work Act 2009* (Cth) s 351(2)(c)(ii).