July 2019

Offensive language within the workplace: when does it cross the line?

Profanities in the workplace; acceptable always, never, or only in times of deep exasperation? Does swearing in the workplace give an employer enough grounds to terminate an employee? As an employment lawyer it's relatively common for me to hear of circumstances where employees have been reprimanded for their choice of language within the workplace - although as with all legal matters, every situation is different and must be approached as such.

An employee who swears will not always give an employer grounds for termination. With this said, swearing coupled with the additional ingredients of intimidating, aggressive or threatening conduct or actions towards another employee may be a risk to the health and safety of that employee, or indeed constitute a breach of either workplace harassment policies or a code of conduct.

These types of scenarios will see employers better placed to defend a decision surrounding the dismissal of an offending employee.

Using abusive language towards a manager

In the case of Aiono-Yandall v Linfox [2014] FWC 1649, Mr Aiono-Yandall ('Mr AY') was employed as a full-time store person. Linfox management held a toolbox meeting with all warehouse staff to discuss the proper use of a forklift, and Mr AY was seen operating the forklift contrary to management instruction.

When Mr AY's Supervisor tried to discuss the issue, Mr AY became abusive, shouting and yelling "This is f -ing bull---. This is f-ing crap. F-- You!". When he left the meeting room he slammed the door so hard that he cracked the wall, before throwing his water bottle at the wall causing further damage. Mr AY then left the work premises - and was certified unfit for work by his doctor for over month.

An investigation was conducted on Mr AY's return to work, and a disciplinary meeting was subsequently held to discuss the allegations of misconduct:

- Failure to adhere to a lawful and reasonable management instruction;
- Engaging in threatening and abusive behaviour towards members of management; and
- Wilfully damaging company property.

Mr AY admitted that he was aware of the instruction regarding the use of the high reach forklift but denied that he had failed to follow the instruction. He admitted that he had yelled, sworn and had become offensive during the meeting, but claimed that he was justified in doing so, as swearing was commonplace throughout the business.

Linfox terminated Mr AY's employment summarily, taking into account a final written warning that it had issued to Mr AY in November 2012 for similar conduct.

Offensive language within the workplace: when does it cross the line? cont.

The Commission did not accept that *"...the workforce commonly communicated in the tone and manner in which [Mr AY] interacted with his supervisors at the meeting in the boardroom..."*. Further,

> *"[Mr AY's] conduct on 11 June 2013 was of a serious kind. [Mr AY] had been previously warned about his conduct and the manner of his communications within the workplace, particularly to supervisors. [Mr AY's] conduct warranted dismissal because it undermined the principles of cooperation and mutual respect necessary for a productive workplace. It was also conduct that posed a potential safety risk, to [Mr AY] personally as well as others."*

Using abusive language towards a colleague

In the case of Bashir v Alex Perry [2019] FWC 2041, iconic Australian fashion designer Alex Perry successfully defended an unfair dismissal claim brought by Mr Bashir, a Custom-Made Pattern Maker/Sample Machinist.

Mr Bashir was a longstanding employee with over 5 years of service, but his employment record was far from exemplary:

- In May 2016, a colleague made a comment about Mr Bashir's workmanship. A heated argument followed, and turned into a screaming match where Mr Bashir made threats of sexual assault and said "Hit me, hit me, do it, I'll f - ing sue you!"
- In early September 2018, Mr Bashir said he would "f -ing slap" a colleague after the Production Manager asked him to take extra care when working on a garment; and

A few days following the above incident, Mr Bashir raised his voice at a colleague and manager when the manager tried to discuss the poor-quality samples he had created for the Spring/Summer collection.
Mr Bashir became aggressive, hitting the sample rack, pointing his finger and getting into the personal space of the manager.

When his manager handed him a written warning he scrunched it up and threw it across the room, saying "I'm not signing this. Who are you? You are nothing!".

At a meeting to discuss his conduct, Mr Bashir failed to provide any reasonable justification for his behaviour, nor did he apologise or show any contrition.

He was terminated for serious misconduct on grounds that his conduct posed a significant and imminent risk to the health and safety of staff.

The Commission was satisfied that the serious misconduct alleged against Mr Bashir was proven on the balance of probabilities. "On at least three occasions, [Mr Bashir] used offensive, aggressive, threatening and intimidating language towards female staff and in addition was rude, offensive and dismissive of his manager", all of which constituted valid reasons for termination.

Offensive language within the workplace: when does it cross the line? cont.

Key takeaway

What these two cases demonstrate is that a one-off swear word which slips off the lips (especially if it is just used as a linguistic intensifier and not personally directed) will not justify termination. With this said, personally-directed abuse combined with threats of physical violence are quite likely to.

It is important for employers to have well-defined policies which outline the standards of conduct expected of employees within the workplace. Similarly, in the event of a breach, disciplinary action should be taken and applied consistently across the business.

If swearing becomes part and parcel of workplace culture, it will likely be difficult to discipline an individual employee for swearing, as the culture would've been viewed as an accepted standard of behaviour, and it would be unfair to pick on one employee without something more than the accepted standard of behaviour.

If you have a query relating to any of the information in this article, or you would like to speak with someone in Coleman Greig's Employment Law team with regard to your own matter, please don't hesitate to get in touch today:

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Out of Work Employee Conduct vs Internal Codes of Conduct: The Cases of Israel Folau and Jack de Belin

Recent cases involving Jack de Belin (St. George Dragons, NRL) and Israel Folau (Waratahs, Rugby Australia) have cast some interesting light on some of the issues that arise when an employer finds an employee engaging in out-of-work hours conduct that infringes on a code of conduct, and wants to enforce the code or policy.

Although the de Belin and Folau cases primarily involve issues between the player and the organisation running the sport (rather than the direct employer), they do illustrate questions that can arise when an employee's out-of-work conduct (or alleged conduct) conflicts with the organisation's values, policies and codes of conduct. Similarly, the cases have sparked a vigorous debate over whether the regulation of out-of-work conduct is over-reach by employers, especially if it raises questions of conflicting values.

These matters have lead us to ask: to what extent can an employee's personal rights be qualified by the contractual obligations owed by them to their employer and the employer's lawful and reasonable directions, as part of the employment deal?

The Folau case

Rugby Australia's Code of Conduct prescribed standards for all involved in Rugby, including the requirement to:

> *"Treat everyone equally, fairly and with dignity regardless of gender or gender identity, sexual orientation, ethnicity, cultural or religious background, age or disability. Any form of bullying, harassment or discrimination has no place in Rugby."*

The Code also provided for appropriate use of social media, including requiring participants to avoid using social media as a means to breach any of the provisions of the Code.

While the full details of the network of contracts between Folau, his club and Rugby Australia are not public, it appears that he was bound by that network of contracts to comply with the Code of Conduct, even though there was apparently no express contractual provision specifically regarding his social media use.

There had been previous incidents of social media posting by Folau which Rugby Australia regarded as a breach of its Code of Conduct, particularly concerning respect for the LGBT community. Rugby Australia accordingly issued warnings to Folau in relation to such posts in 2018.

As many readers will be aware, early in 2019, Folau posted on Instagram that hell awaited drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists, idolaters. Rugby Australia subsequently stood Folau down for breaching the Code, with the issue going before an independent panel, which concluded that his posts did in fact involve a "high level breach" of the Code.

A further hearing concluded that his conduct had constituted a breach serious enough to warrant termination of his 4-year contract (worth $4m). It must be noted that the process did give Folau extensive opportunity to respond to Rugby Australia's concerns and allegations.

As Folau's posts arise from his sincerely held religious beliefs, these events have brought with them debates over freedom of religious speech. Whilst Fair Work Commission proceedings to challenge the termination (citing it as an instance of religious discrimination) are on foot, the outcome thus far supports the view that while Folau has rights to express his opinions as a private individual, he cannot do so when that may have ramifications for his employer, and he has contracted with the employer not to contravene the Code of Conduct.

Folau had agreed to comply with the Code as part of his employment arrangements, and is thus unable to disregard it without consequence.

Out of Work Employee Conduct vs Internal Codes of Conduct: The Cases of Israel Folau and Jack de Belin cont.

The de Belin case

The highly publicised matter involving Jack de Belin has been running in parallel with the Folau case, but has completely different origins. de Belin was suspended from playing in the NRL competition while charges of a serious sexual assault were outstanding against him. Again, the network of contracts between the League, the Dragons and de Belin included a commitment to comply with the NRL's policies which may change from time to time.

The Federal Court noted that de Belin had licensed his name, photograph, image, reputation and identity to the NRL, and had agreed to abide by the NRL rules as amended from time to time, which included a requirement that players maintain a reputation for high standards of personal conduct, including a reputation for respect for women.

Faced with very serious sexual assault allegations against de Belin, and in accordance with its right to change the rules as it thought fit, the NRL adopted a new rule which provided for players facing serious charges of that nature to be stood down from playing, while the charge was before the court. This decision was made within the context of what has been dubbed the NRL's "summer from hell" - a name given to the 2018/2019 off-season which saw an excessive level of player misbehaviour.

It is accepted by all involved that de Belin has pleaded not guilty and will be defending the charges, as well as the fact that no conclusion was being made about whether he was guilty of the offence that he had been charged with.

de Belin challenged the way that the altered policy applied to him in the Federal Court, with his legal team taking the argument that the new rule was both an unreasonable restraint of trade and a restriction on his right to work. The court subsequently concluded that the rule was reasonable, as there had been ample grounds to justify the NRL changing the rules as it did, based on the overall interest in the reputation of the sport, and its exposure to losses of various kinds arising from the Australian public's disapproval of de Belin continuing to play while facing such serious charges.

The Federal Court noted that the NRL was not in a position to assess whether the charges had substance, nor attempt to come to a rational conclusion on this by conducting an investigation, which would undoubtedly receive a lot of publicity and be a contempt of court while criminal proceedings were pending.

Justice Perry found that the position was akin to an employer suspending an employee during an investigation, and only for as long as would be necessary for the investigation to be completed. While being prevented from playing competition games would present serious disadvantages to de Belin, he could continue to train and otherwise go about his business with his club, and his pay ($545,000pa) would continue, so the disadvantages did not outweigh the NRL's reasonable interest in taking steps to protect its reputation and avoid financial disadvantages.

What do these cases show?

Both of these matters illustrate the propositions, which apply to all employers and employees, that:

- Employers are entitled to require employees to comply with reasonable and lawful directions; and
- Employees who are contractually obliged to comply with policies, including policies as changed by the employer from time to time, are bound to follow those policies, even if that involves some restrictions on out-of-work conduct.

Out of Work Employee Conduct vs Internal Codes of Conduct: The Cases of Israel Folau and Jack de Belin cont.

The Folau case seems likely to test these ideas further, within both the Fair Work Commission and the public arena, where the issue of Folau's contractual obligations has been caught up in the debate surrounding protection of religious freedoms.

Numerous high-profile Australian politicians have weighed in on the religious freedom debate in recent months:

Barnaby Joyce: *"You can't bring people's faith beliefs into a contract ... Your own views on who god is, where god is or whether there's a god should remain your own personal views and not part of any contractual obligation."*

John Howard agreed: *"...the question of the reasonable expression of a religious view should never be part of an employment contract - it has nothing to do with it."*

Attorney General Christian Porter, contemplating legislation on religious freedoms, has taken quite a different view:

> *"It is intolerable that the state might intervene in private contracts ...People enter into employment contracts of their own volition all the time, and contracts of a number of types with a number of terms. ...What I would say is that we're not necessarily in the business in government of trying to prevent individuals privately contracting the terms of their employment in a fair and balanced and reasonable way with their employer in a range circumstances."*

To similar effect, Fr Frank Brennan: *"[the Folau situation] is a distraction from issues of religious freedom - it is a contractual dispute."*

Clearly this is an issue with some way to go. Apart from these high-level issues, if you have a situation involving an employee engaging in problematic out-of-work conduct, what you can do will depend very much on the facts in any given situation, and issues of reasonableness, fairness, and whether the policy was properly communicated.

In this type of case, questions must be asked and answered in relation to whether the relevant provisions of a code of conduct or policy were a lawful and reasonable direction, and whether it is fair to enforce that direction.

If you have a query regarding any of the information in this piece, or you would like to speak with someone in Coleman Greig's Employment Law team in relation to workplace policies, contracts, the relationship between them, and changes to either, please don't hesitate to get in touch today:

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Australia's Immigration Policy: What can Australian Businesses Expect?

Australia's immigration intake was an unsurprisingly hot topic throughout the recent election campaign period, and now that Scott Morrison's Coalition government has emerged victorious, the Australian public has been left asking the question: "what should we expect Australia's immigration policy to look like?".

Since March, Scott Morrison has been proposing to reduce Australia's annual permanent migration cap from 190,000 to 160,000, and it seems that the cap is likely to remain at this level for at least the next 3 years. To clarify - the permanent migration numbers to which this cap refers include permanent visas such as skilled working visas, as well as permanent visas for family members, partners, refugees and investors.

The rationale for the reduced cap has been that a reduction in permanent migration, together with both stronger incentives for migrants to settle in regional Australia and stricter requirements for temporary skilled visas, will help to ease congestion within the capital cities.

However, annual permanent migration was at 162,000 last year, so reducing the permanent migration cap to 160,000 may not make a real difference to congestion levels. It seems that from a congestion perspective, it is actually migrants on temporary visas (including temporary skilled workers, visitors and students) who are the primary contributors to population growth within Australia's capital cities.

This of course leads us to ask whether, if temporary skilled workers are contributing more to congestion than permanent migrants, businesses should expect the Coalition to further tighten its policy on employer sponsored temporary skilled workers in an effort to ease congestion.

When the 457 visa was overhauled in March 2018 and replaced with the Temporary Skill Shortage (subclass 482) ("TSS") visa, there was resistance from the business community, which held concerns (and still does) that changes to the employer sponsored skilled migration scheme would damage Australian businesses who relied on overseas skilled migration. It therefore seems unlikely that the Coalition government will be making any major changes to the current temporary skilled migration scheme.

Although some people may be concerned that skilled migration has the very high potential to lead to a decrease in jobs available to Australians, this concern is often misplaced when the skilled migration scheme is used for genuine skill shortages. For example, the recent NSW infrastructure projects have required tunnelling and construction skills that have not been required in NSW in the previous 50 years, so the NSW labour force simply does not have an extensive pool of labour to draw upon with the necessary skills and expertise. Many other businesses face the same type of skills shortages.

Although many businesses rely on temporary skilled visas (rather than permanent skilled visas, which are being reduced to a cap of 160,000), if the option of converting temporary to permanent migration is removed as an option for many skilled migrants, migrating to Australia only temporarily becomes unattractive. Therefore, reducing the permanent migration intake could have an impact on temporary skilled visas as well, due to the fact that skilled migrants may believe that their chance of obtaining permanent residency has been reduced as a result of the dual effect of increased complexities in obtaining a visa (either temporary or permanent), and the reduced chances of transitioning to permanent visas, as a result of the apparent reduction to the permanent migration cap.

Australia's Immigration Policy: What can Australian Businesses Expect? cont.

In fact, since the TSS visa was introduced in March 2018, there has been a 28.4% drop in the number of TSS visa applications, and as a result of more stringent requirements, there has been a 26% drop in the number of TSS/457 visas granted by the Department of Home Affairs, compared to the same period in the previous year. This means that less people are applying for the TSS visa, as compared with the preceding 457 visa scheme, and similarly that less applicants are getting their TSS visas approved. The cost of applying for a visa has also increased, as more employers turn to migration agents and lawyers to assist with navigating the visa requirements.

Key Takeaway

The Coalition's migration policy involves increased incentives for immigrants to settle in regional Australia, as well as tightened requirements for temporary skilled visas and a reduced cap on permanent migration.

The effect of these policies may be that it will become increasingly difficult for businesses to obtain skilled migrants, either on a temporary or permanent basis. On the other hand, tightening the requirements could make it easier for employers to get TSS visas approved, if the system is now set up in a way that attracts genuine skill shortage applications.

If you have a query relating to any of the information in this piece, or you would like to speak with a Registered Migration Agent and Employment Lawyer with regard to your own Business Migration matter, please don't hesitate to get in touch with Coleman Greig's Workplace team today:

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Employment Law Update

Employment Law Changes for the 2019-20 New Financial Year

We are about to step into a new financial year, which means that numerous reference points relevant to employment law will alter due to annual indexation and changes to the law.

Below are some of the most important changes set to apply from 1 July 2019:

Salary Cap for Unfair Dismissal

$148,700.

This is up from the previous $145,400. Employees earning more than $148,700 base salary per annum, and who are not covered by an award, cannot claim unfair dismissal. Base salary does not include 9.5% superannuation and at-risk remuneration, but does include the value of other guaranteed monetary or non-monetary benefits.

Filing fee for dismissals, general protections and anti-bullying applications

$73.20, up from $71.90.

Compensation Limit for dismissals

$74,350, up from $72,700.

National Minimum Wage

$740.80 per week, up from $719.20 per week - or $19.49 per hour, up from $18.93 per hour.

Superannuation Guarantee Percentage

9.5%.

Maximum Super Contribution Base

$55,270 per quarter, or $221,080 per annum, earnings above which are not subject to compulsory contributions.

Redundancy Tax Concessions

In a genuine redundancy payment, $10,638 plus $5,320 for each year of completed service is tax free.

Employment Termination Payment cap

$210,000.

For more information, please see: Applying the ETP caps (ATO).

Employment Law Changes for the 2019-20 New Financial Year cont.

Fair Work Information Statement

This document must be given to all employees on commencement of employment. It is crucial for employers to view the updated version for 2019-2020.

NB. The 2019-20FY Information Statement has not been made available as of this article's publication date, but will be accessible via the above link from 1 July 2019.

Point for attention

Beware of paying less than the National Minimum Wage to any employee not covered by any age or disability-related percentage rate.

If you would like to speak with someone in Coleman Greig's Employment Law team in relation to any of the above information, please don't hesitate to get in touch today:

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