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**ARE SOCIAL MEDIA POLICIES NECESSARY? ANALYSING
COMPANY POLICY AND ITS IMPORTANCE IN THE
REGULATION AND DISMISSAL OF EMPLOYEES**

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ARE SOCIAL MEDIA POLICIES NECESSARY? ANALYSING COMPANY POLICY AND ITS IMPORTANCE IN THE REGULATION AND DISMISSAL OF EMPLOYEES

Adrian Faelli¹

Table of Contents

I INTRODUCTION	4
II SOCIAL MEDIA AND COMPANY POLICY IN CONTEXT	5
A Social Media	5
B Company Policy.....	6
III CONFLICTING CASE LAW REGARDING COMPANY POLICIES	6
A Support of a Social Media Policy	6
B Unacceptable Conduct	7
C Dismissal for Not Agreeing to Terms.....	8
IV CASE LAW PRINCIPLES AND INTERACTION WITH SUBSTANTIVE DUTIES	9
A Duty of Loyalty and Fidelity	9
B Other Duties.....	10
V BROADER THEMES: THE CONSTANT ENCROACHMENT ON THE PRIVATE LIVES OF EMPLOYEES BY EMPLOYERS AND FREEDOM OF SPEECH.....	11
A Employers' Intrusion into Private Lives of Employees.....	11
B Freedom of Speech?	11
VI EVALUATION AND POSSIBLE SOLUTIONS	12
VII CONCLUSIONS	13
BIBLIOGRAPHY	14
A Articles/Books/Reports.....	14
B Cases	15
C Legislation	15
D Other	15

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I INTRODUCTION

Amongst the many idiosyncrasies and challenges inherent in the Australian employer–employee relationship, social media and networking are amongst the most important and misunderstood. How employers can and should regulate their employees’ actions on social media platforms is increasingly becoming an area of some confusion. Developing a robust social media company policy is often touted as the most effective way of regulating employee online behaviour, as well as giving the employer ample justification in the event that social media use warrants the dismissal of the employee.² Despite this, conflicting case law from the Fair Work Commission (‘FWC’) and the courts suggest that a social media policy may only be a formality for some corporations, with company policy not always determinative nor definitive in unfair dismissal cases.

This paper seeks to challenge the assertion that company policy is the only means by which employers can control their employees’ in and out-of-work social media actions. It will do so by first contextualising social media and company policy within employment law. Although social media is no longer a new phenomenon, some employers and employees are still uncertain about their rights and obligations in relation to it. Secondly, this paper will examine the disparate case law in relation to companies maintaining a social media policy, seeking to show that whilst company policy has its place, it is not always a completely effective means of regulating employee behaviour. Although many cases are fact-specific in nature, this paper will seek to draw on the principles on offer from the relevant case law. An analysis of employment obligations (such as implied contractual duties) will also be undertaken in order to display how unique social media is in its interactions with this substantive law, when compared to any other medium. Thirdly, an analysis of the broader discussion in regards to employers’ ever-expanding reach into employees’ private lives will be broached, in order to discuss the merits and the reach of company regulation and dismissal. Finally, an evaluation of the current approach of employers and some possible solutions will be offered in order to address some of the issues raised by the cases to date.

² Michael Byrnes, *Employee Connects on LinkedIn, Gets Disconnected from Job* (15 August 2013) Clayton Utz <http://www.claytonutz.com/publications/edition/15_august_2013/20130815/employee_connects_on_linkedin_gets_disconnected_from_job.page>; Gareth Jolly and Shirley Wong, ‘Social Media and Employment Law’ (2014) *Governance Directions* 169, 170; John Renda, ‘The Fair Work Commission’s Changing Views of Social Media’ (2014) 20(2) *Employment Law Bulletin* 28, 30; Shomaice Zowghi, ‘Fair Work Commission Decision — Does Unfriending a Colleague on Facebook Constitute Bullying?’ (2015) 21(9) *Employment Law Bulletin* 115, 116.

II SOCIAL MEDIA AND COMPANY POLICY IN CONTEXT

A Social Media

Before delving into the relevant case law (which generally arises in the context of employee dismissal) it is first prudent to outline the issues raised by social media in an employment law context. When we talk about ‘social media’ we are generally referring to ubiquitous websites and services such as Facebook, Twitter, LinkedIn and Instagram, as well as chat sites and even email services such as Gmail.³ By their very nature, these services have a substantial user-base⁴ and can be accessed out-of-hours by employees, thereby transcending the traditional employer–employee relationship. Social media presents distinct challenges for the employer–employee relationship due to its immediacy,⁵ as well as its disconnected nature, with some employees not consciously aware that what they say online is often ‘given the same weight as talking face to face or over the phone’.⁶

This paper will not focus on every single instance in which social media may become relevant to employment: rather, the case law examined will serve to highlight some of the instances in which social media and employment cross paths (i.e. venting work-related frustration, private inter-employee communication and misusing social media for personal gain).⁷ It should also be noted that the actual relevance of the social media use can manifest itself in different ways: whether it be through posts comprising misconduct, posts providing evidence of misconduct and even posts providing further evidence at unfair dismissal claims.⁸

If we accept and assume that some level of employer control over what employees post on these sites is necessary to protect valuable goodwill and financial interests,⁹ then the question becomes, how should employers go about protecting themselves and how far should they go?

³ Denis Ellickson and Meg Atkinson, ‘When Can Your Employer “Unlike You?” — Just Cause for Dismissal and Social Media’ in *Special Lectures 2012: Employment Law and the New Workplace in the Social Media Age* (Law Society of Upper Canada, 2012) 259; see also Louise Thornthwaite, ‘Social Media, Unfair Dismissal and the Regulation of Employees’ Conduct Outside Work’ (2013) 26 *Australian Journal of Labour Law* 164, 166.

⁴ More than half of the Australian population on some of these services: Thornthwaite, above n 2.

⁵ *Ibid* 169.

⁶ Felicity Ogilvie, ‘Unfriending’ on Facebook can Amount to Bullying, *Fair Work Commission Says* (25 September 2015) ABC News <<http://www.abc.net.au/news/2015-09-25/fair-work-commission-finds-unfriending-on-facebook-can-bullying/6805484>>.

⁷ Thornthwaite, above n 2, 166–7; Byrnes, above n 1.

⁸ Jolly and Wong, above n 1, 170.

⁹ Thornthwaite, above n 2, 170–1; Paul Ragg, ‘Free Speech Rights at Work: Resolving the Differences between Practice and Liberal Principle’ (2015) 44(1) *Industrial Law Journal* 1, 2.

B Company Policy

Academic writers and legal practitioners have advocated the need for corporations to establish a clear company policy in relation to social media.¹⁰ Despite this, what specific terms should be included in any such policy is a source of some confusion. Vague and open-ended statements such as the Commonwealth Bank's 'if you engage in inappropriate conduct (on social media) it may still have an impact on your employment',¹¹ as well as a UK example in *BWB v Smith*¹² — 'any action[s] on the internet which embarrass or discredit BWB',¹³ display a tendency for employers to write catch-all phrases (in order to provide justification in the event of dismissal), rather than educating their employees in regards to social media via their company policy.

Although these examples may seem open-ended and brief, academics and practitioners do caution against this. For example, Macinnis states that social media policies should be kept concise in order to avoid confusion and ensure obligations are clear to employees (with the implication that unambiguous terms in a company policy may form part of an employment contract).¹⁴ Arguably, this approach aids employers and their ability to enforce policy, as ambiguous terms can create issues such as employer overreach, with consequences including terms that are unenforceable by the employer, or even lead to unfair dismissal claims¹⁵ that challenge the company's social media policy.

III CONFLICTING CASE LAW REGARDING COMPANY POLICIES

Clearly company policy has a role to play in regulating social media use by employees, however the current body of case law alludes to a more nuanced view of policy being necessary.

A Support of a Social Media Policy

The case of *Linfox Australia Pty Ltd v Stutsel*¹⁶ (later on appeal: *Linfox Australia Pty Ltd v Fair Work Commission*)¹⁷ is frequently cited as a seminal case regarding the need for

¹⁰ Byrnes, above n 1; Jolly and Wong, above n 1; Renda, above n 1; Zowghi, above n 1.

¹¹ Thornthwaite, above n 2, 169.

¹² [2014] UKEATS/0004/15/SM.

¹³ Gareth Edwards, 'Social Media — Be Careful What You Post' (2015) *HR Roundup* 42.

¹⁴ Angus Macinnis, 'No Social Media Policy? "Not Sufficient", says Fair Work Australia' (2012) *Keeping Good Companies* 42, 43.

¹⁵ *Fair Work Act 2009* (Cth) s 394.

¹⁶ [2012] FWAFB 7097.

companies to have in place social media policies.¹⁸ The case involved a truck driver for Linfox and his dismissal for ‘disparaging remarks about other employees ... on Facebook’.¹⁹ The most oft quoted passage from this series of cases comes from Commissioner Roberts in the original unfair dismissal claim:

The Company relies on its induction training and relevant handbook ... to ground its action against Mr Stutsel. In the current electronic age, this is *not sufficient* and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies. Linfox did not.²⁰

Whilst this passage seems to affirm such calls for a social media policy, other issues in this case ensure that it is not as clear-cut as it first appears. For instance, other factors such as Stutsel’s ignorance in regards to the privacy and availability of his posts on Facebook, as well as his age, seemed to excuse his actions to an extent, with the Commission ordering the reinstatement of his employment.²¹ It begs the question: even if Linfox had a relevant social media policy in place at the time, would it have been enough to overcome such mitigating characteristics and circumstances? As Burns argues, however, recent decisions have ‘shown a gradual trend away from placing weight upon evidence of an appellant’s lack of awareness of social media or a right to free speech’.²² As such, the *Linfox* series of decisions are authority for the suggestion that employers should have social media policies in place, although each case will turn on its own facts²³ and, as will be shown, a social media policy is not always a requirement.

B Unacceptable Conduct

The FWC has entertained cases in which the dismissal of an employee was found to be lawful, largely due to the employee’s egregious breaches of acceptable standards, but interestingly, also in the absence of social media policies. The case of *Little v Credit Corp Group Ltd*²⁴ is indicative of an employee’s out-of-work social media use leading to their direct dismissal. The employee in this case made several sexist, racist and homophobic

¹⁷ [2013] FCAFC 157 (13 December 2013) (*‘Linfox’*).

¹⁸ Paul Burns, *Misusing Social Media — Where can Employers Draw the Line?* (15 January 2014) Herbert Smith Freehills <<http://www.herbertsmithfreehills.com/insights/legal-briefings/misusing-social-media-where-can-employers-draw-the-line>>.

¹⁹ Natalie van der Waarden, *Understanding Employment Law: Concepts and Cases* (Butterworths, 3rd ed, 2014), 167.

²⁰ *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 844, [87] (emphasis added).

²¹ *Ibid* [100].

²² Burns, above n 17.

²³ *Ibid*.

²⁴ [2013] FWC 9642.

Facebook posts about fellow employees, with the posts in some cases visible to customers of his employer.²⁵ Although his employer tried to rely on its ‘Employee Handbook and Code of Conduct’²⁶ as grounds for dismissal, much the same as in *Linfox*,²⁷ the Commission was still able to reach a different result in this case. The Commission stated that:

Even if the respondent had no policies ... directly addressing the appellant’s actions, it would be of no consequence. One hardly needs written policies or codes of conduct to understand and appreciate that ... (such comments) ... were grossly offensive and disgusting and were more than likely to cause hurt and humiliation.²⁸

Therefore, *Little*²⁹ may be interpreted as authority for the proposition that some grossly unacceptable actions on social media will not need a social media policy to justify dismissal.³⁰ It is arguable then that whilst a social media policy is advisable, the cases analysed so far point to the particular eccentricities of each case bearing more weight on the outcome than the existence or otherwise of a detailed company policy.

C Dismissal for Not Agreeing to Terms

The final case examined in this section relating to social media policy and unfair dismissal is unique in that it does not involve the misuse of social media — rather it is an affirmation of an employer’s right to protect their various interests. The case of *Pearson v Linfox Australia Pty Ltd*³¹ involved the refusal of an employee to attend social media training and to sign the company’s social media policy due to his firm belief that his employer ‘cannot tell (him) what to do or say outside of work’.³² This case raises several issues, not least of which are interesting theoretical points about the role of the employer in the employees’ private life, a topic that will be discussed later in this piece. As a result of his refusal to sign the policy, the employee was dismissed, a course of action endorsed as lawful by the FWC during unfair dismissal hearings.³³

²⁵ *Little v Credit Corp Group* [2013] FWC 9642 (*‘Little’*) in Paul Harpur, *Employment Law* (Butterworths, 2015) 61.

²⁶ *Ibid* [2].

²⁷ *Linfox* [2013] FCAFC 157 (13 December 2013).

²⁸ *Little* [2013] FWC 9642, [69].

²⁹ *Ibid*.

³⁰ Andrew Bland and Sarah Waterhouse, ‘Social Media and Unfair Dismissal’ (2013) 19(1) *Employment Law Bulletin* 6, 8.

³¹ [2014] FWC 446.

³² *Ibid* [15]; Harpur, above n 24.

³³ [2014] FWC 446 [15] (*‘Pearson’*).

According to the Commission, asking the employee to sign the policy was a lawful direction and a 'legitimate exercise in acting to protect the reputation and security of a business'.³⁴ This affirms a company's right to put such policies in place, but crucially it does not affirm their necessity. Harpur contends that failing to have a social media policy in place can limit the action that can be taken against an employee if they misuse social media, resulting in a loss (whether it be reputational, financial or of goodwill) for the company.³⁵ It is questionable how definitive this statement is, however, as the cases examined so far support the argument that the specific facts of each case, in addition to implied contractual duties, will allow employers to lawfully dismiss employees. Perhaps a more accurate summation may be that a social media policy can expedite the process of dismissal and serve as a notice to the employee, rather than it being fatal to an employer's ability to lawfully dismiss an employee if they do not have one in place.

IV CASE LAW PRINCIPLES AND INTERACTION WITH SUBSTANTIVE DUTIES

Although it may go without saying, it should still be noted that social media misuse itself is generally not grounds for employee dismissal: rather, it is the substantive law regarding express contractual stipulations, as well as implied duties that are at issue in such circumstances.³⁶ In this section, several cases of social media use and dismissal will be analysed against the backdrop of implied contractual duties, to highlight the fact that regardless of company policy providing justification for dismissal, express and implied contractual duties will generally cover many of the most serious cases.

A Duty of Loyalty and Fidelity

The implied contractual duty of loyalty and fidelity to one's employer is a constant theme throughout all employment relationships³⁷ and can form the backdrop for dismissal in some circumstances. A prime example of this is the case of *Bradford Pedley v IPMS Pty Ltd*,³⁸ in which an employee utilised the professional networking services of LinkedIn in order to solicit clients of his then employer, thereby diverting business to his own personal design firm.³⁹ Where there is a clear indication that the employee will no longer serve the employer's

³⁴ Ibid [46].

³⁵ Harpur, above n 24, 76.

³⁶ Thornthwaite, above n 2, 170.

³⁷ Ronald McCallum, *Employer Controls Over Private Life* (University of New South Wales Press, 2000) 18.

³⁸ [2013] FWC 4282 ('Bradford').

³⁹ Byrnes, above n 1.

interests, as in this case, then a dismissal will be warranted providing there is ‘clear justification’ to support such a view.⁴⁰

The *Bradford*⁴¹ case further serves to support the argument that there are certain forms of online behaviour that are unacceptable and incompatible with an ongoing employment relationship. It was agreed prior to signing the employment contract that Bradford would be allowed to continue his own private business, although not in competition with his employer.⁴² Despite this, the email he sent to current clients of his employer via LinkedIn⁴³ was an example of a breach of his implied obligations of loyalty and fidelity to his employer. As such, it is unclear that a social media policy would have added anything at all in such a circumstance. What makes this particular case notable is the way in which professional networking services, such as LinkedIn, make solicitation of an employer’s clients in this manner much more immediate and obvious than in the past.⁴⁴

B Other Duties

Employees also owe other duties, such as the duty to follow all lawful and reasonable directions with care and diligence.⁴⁵ The breach of this duty was highlighted within a social media context in the *Pearson*⁴⁶ case, with the employee refusing to sign the company’s social media policy.

There are also implied duties that are contested in Australian law. One such example is the duty of mutual trust and confidence, a UK-recognised duty that serves to protect employers and employees alike from intrusions into their personal lives (which may include social media).⁴⁷ Some academics such as McCallum previously believed that this duty ‘represents the law in this country,’⁴⁸ however Thornthwaite contended that the High Court had not ‘definitively ruled’ on this matter.⁴⁹ Clarification on this point came in the 2014 case of

⁴⁰ Ibid.

⁴¹ *Bradford* [2013] FWC 4282.

⁴² Ibid [8].

⁴³ Ibid [6].

⁴⁴ Kristin Gamble, ‘The Web we Weave — Legal Implications of Social Networking’ (2009) *Keeping Good Companies* 549, 550; Peter Wright and Dean Schubert, ‘Solicitation or “Staying Connected”? How to Protect your Client Base in an Online Space’ (2015) 6 *WR* 21.

⁴⁵ McCallum, above n 36.

⁴⁶ *Pearson* [2014] FWC 446.

⁴⁷ Thornthwaite, above n 2, 172.

⁴⁸ McCallum, above n 36, 18–19.

⁴⁹ Thornthwaite, above n 2, 172.

Commonwealth Bank of Australia v Barker,⁵⁰ in which the High Court unanimously ruled that Australian contracts of employment do not automatically include an implied duty of mutual trust and confidence. This seemingly settles the issue (for now) of whether an implied duty of trust and confidence could substantively impact on an employees' social media use.

V BROADER THEMES: THE CONSTANT ENCROACHMENT ON THE PRIVATE LIVES OF EMPLOYEES BY EMPLOYERS AND FREEDOM OF SPEECH

A Employers' Intrusion into Private Lives of Employees

Although social media use in the workplace and its potential ramifications have been explored in this paper, it is worth mentioning that this is one issue taking place against the backdrop of the broader issue of employers encroaching on the private lives of employees.⁵¹ This paper has focused on company policy as a means of regulating and dismissing employees regarding their social media use, and as such will not delve too deeply into this greater issue. Despite this, it is crucial to note that historically, the employment relationship has been characterised as a master–servant relationship.⁵² Although the nature of this relationship has changed dramatically throughout the 20th Century, with forty-hour-plus working weeks becoming the norm and a work–life balance becoming a major priority, there is some suggestion and evidence that the balance is once again tipping back towards that of the master–servant era,⁵³ with an increased blurring of the work/life distinction. Social media use represents yet another intrusion into employee private life and time, with sites such as Facebook and LinkedIn ‘blurring the boundaries between private life and work’.⁵⁴ Employees have limited protection against this intrusion, with their own discretion and commonsense when posting revealing details online their only real recourse.

B Freedom of Speech?

A proposed right to freedom of speech and expression has been advocated for in several unfair dismissal claims involving social media — most notably in *Pearson*⁵⁵ — but is yet to

⁵⁰ (2014) 253 CLR 169.

⁵¹ Thornthwaite, above n 2, 164.

⁵² Ibid 165.

⁵³ McCallum, above n 36, 5, 8.

⁵⁴ Thornthwaite, above n 2, 164.

⁵⁵ *Pearson* [2014] FWC 446.

be endorsed in Australian law.⁵⁶ As a point of comparison, Ragg notes how the UK is grappling with employees' 'free speech rights and legitimate employer interests'.⁵⁷ This type of struggle has not been emulated in Australia, with the FWC and the courts repeatedly refusing to recognise any sort of implied right of free speech and expression.⁵⁸

The closest thing Australia has to a right to free speech is an implied right of political communication; a right that Neville J made clear in *Banerji v Bowles*⁵⁹ exists merely as a limit on legislative power and not a personal right.⁶⁰ As such, Australian employees must be aware at all times that anything they say on social media may be used as evidence against them by their employer.⁶¹ This was made abundantly clear in the case of *Fitzgerald v Smith*,⁶² where the Commissioner stated that 'it would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from the consequences'.⁶³

VI EVALUATION AND POSSIBLE SOLUTIONS

Throughout this paper, the idea of social media use being regulated purely through individual company policy has been questioned. That is not to say that there is no merit in a detailed social media policy: rather, it is just one approach that can and should be built upon. Another approach that employers can consider is education. Gamble argues that employers can counter some of the risks associated with social media if they take positive steps to change workplace culture, in addition to educating their employees about the potential ramifications of their social media use for their own employment and the employers' business itself.⁶⁴

A further potential complement to establishing a social media policy is the recognition of new implied contractual duties. As McCallum explains, implied terms 'are not static and may be added to or modified by the judges', citing the UK case of *Malik* as an example of this process.⁶⁵ In support of the ideas discussed regarding employer overreach in employee private lives, some basic protections concerning the right of employees to express political views

⁵⁶ Ronald McCallum and Andrew Stewart, 'Employee Loyalty in Australia' (1999) 20 *Comparative Labour Law and Policy Journal* 155, 163.

⁵⁷ Ragg, above n 8.

⁵⁸ McCallum and Stewart, above n 54.

⁵⁹ [2013] FCAA 1052 (*'Banerji'*).

⁶⁰ Burns, above n 17.

⁶¹ Thornthwaite above n 2, 165, 168, 176.

⁶² [2010] FWA 7358.

⁶³ *Ibid* [52].

⁶⁴ Gamble, above n 43, 550.

⁶⁵ McCallum, above n 36, 20.

could potentially be fertile ground for a new implied right, similar to those rejected arguments regarding freedom of political communication in *Pearson*⁶⁶ and *Banerji*.⁶⁷ There are very good reasons why employers should be able to protect their interests via the regulation of employees' social media actions — however — employees do need a clearer understanding of what they can or cannot say, lest they be completely silenced and their online personalities stifled.⁶⁸

VII CONCLUSIONS

The regulation and dismissal of employees for the use (or misuse) of social media remains a lively and ever-evolving topic in employment law. Social media represents a novel way for employees to engage with one another and for employers to do business. Company policy is often stressed as the primary means by which employers can set their behavioural expectations, as well as provide justification in the event of an employees' dismissal. Despite this, case law from the FWC and the courts suggests that whilst maintaining a social media policy is recommended, its relevance at this stage is still questionable. This is due to the highly fact-specific analysis undertaken at unfair dismissal claims, as well as the presence of implied contractual duties and rights. The ever-expanding reach by employers into the private lives of employees is yet another broader issue that influences social media use and employer policies. Ultimately, social media policies and the right for employers to protect their interests are irrefutably important. In acknowledging this, it is equally important that other methods such as the education of employees and the recognition of new implied duties are accepted as possible means to further clarify the somewhat confusing *status quo*.

⁶⁶ [2014] FWC 446.

⁶⁷ [2013] FCAA 1052.

⁶⁸ Thornthwaite, above n 2, 165.

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