

Beware of Social Media Posts

In a previous newsletter, we discussed situations where an employee can justifiably be disciplined for behaviour outside of work. Specifically, the employer must determine whether a link exists between the conduct and the employment, whether the conduct could bring the employer into disrepute, and whether the conduct destroys the trust and confidence in the employment relationship.

When it comes to social media, a recent Employment Court case sheds further light on what an employee can and cannot do.

Turner v Te Whatu Ora [2023] NZEmpC 158

Ms Turner was a registered palliative care nurse at an aged care facility. She was dismissed in April 2021 as a result of her Facebook posts which, broadly, contained anti-vaccination and anti-Muslim content. The Court said they were not considered or balanced discussions and involved strongly worded, and often derogatory, statements or allegations against individuals and groups.

Such posts were considered contrary to the employer's interests. In particular, the posts were made at a time when her employer was very actively and openly involved in work to support and deliver the Government's vaccination programme and there were genuine fears about COVID-19 again entering the community. Residential care facilities were seen as particularly vulnerable.

Furthermore, 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 others with significant health issues.

In respect of Ms Turner's comments regarding Muslims, these ran counter to both the employer's and the Nursing Council's code of conduct. In particular, the Nursing Council's code of conduct principles include respecting the dignity and individuality of health consumers, respecting the cultural needs and values of health customers, and maintaining public trust and confidence in the nursing profession. The code stipulates that registered nurses are not to impose their political, religious and cultural beliefs on consumers.

But her Facebook was private and only accessible to Facebook friends?

Although Ms Turner's Facebook posts were only accessible to her approximately 86 Facebook friends, the Court considered that social media posts undertaken in the employee's free time, and containing personal opinions, are not automatically protected from employment consequences. Sharing such opinions with 86 Facebook friends is significant enough to mean the comments made were not truly private, particularly given that some of those friends were her colleagues. The Court also noted that even if she had sent the material to only a few other employees or professional contacts, disciplinary action would have been open to the employer.

Importantly, Ms Turner's employer had a Code of Conduct and social media policy which was clear both about its expectations, and the consequences for failing to adhere to those expectations. Its expectations included not undertaking actions that could cause damage to the employer's reputation, or which might cause it to be linked to derogatory, racist, or other offensive comments. The employer was entitled to rely on such policies.

Ms Turner was, or should have been, aware from the Code of Conduct and social media policy, that Facebook posts, even to a closed group, could be the subject of an employment investigation and potential disciplinary action.

What about freedom of expression pursuant to the Bill of Rights Act 1990

Ms Turner argued that she had rights to freedom of thought, conscience and religion, and to freedom of expression, under sections 13 and 14 of the Bill of Rights Act 1990.

Beware of social media posts (Continued)

The Bill of Rights Act applies to acts done by the legislative, executive or judicial branches of the Government, or any person or body in the performance of any public function, power or duty. It therefore applies to some of Te Whatu Ora's actions. However, the Employment Court's view was that the Bill of Rights Act does not apply to employment decisions, even if made by public entities or entities operating in the public sector that happen to perform a public function. According to the Court, employment does not involve the performance of any public function, power or duty and is therefore more properly governed by the principles of general private law.

The Court then went on to say that even if the Bill of Rights Act had applied, rights are subject to such reasonable limits as can be demonstrably justified in a free and democratic society. As such, it cannot protect everything an employee might say, particularly if such comments are contrary to the interests and actions of the employer.

Conclusion

It is clear from this case that social media posts by employees in their private capacity, even to a relatively small number of people, can provide a link to their employment if those posts are clearly contrary to the interests or values of their employer. An employee's social media posts also have the potential to bring their employer into disrepute and to destroy the trust and confidence in the employment relationship. Where this occurs, justified dismissals can result.

Want to know more?

If you have any questions about the case or the topics discussed in this article, please contact our specialist [Employment Team](#).