

ALERT

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SOCIAL MEDIA SACKING: DISMISSAL OF SBS REPORTER FOR OFFENSIVE TWEETS GIVES RISE TO GENERAL PROTECTIONS CLAIM

In a highly publicised case, the SBS recently dismissed one of its sports presenters, Scott McIntyre, for a number of highly controversial tweets he made on Anzac Day. Mr McIntyre has now initiated legal proceedings against SBS challenging the lawfulness of the dismissal. The case serves as a timely reminder for employers of the need to be careful when considering dismissing employees for social media activity outside of work hours.

Background

Mr McIntyre had a total of approximately 30,000 followers on his personal Twitter account. At around 5pm on Anzac Day, McIntyre tweeted a number of highly controversial comments about the Anzacs to his followers, including the following:

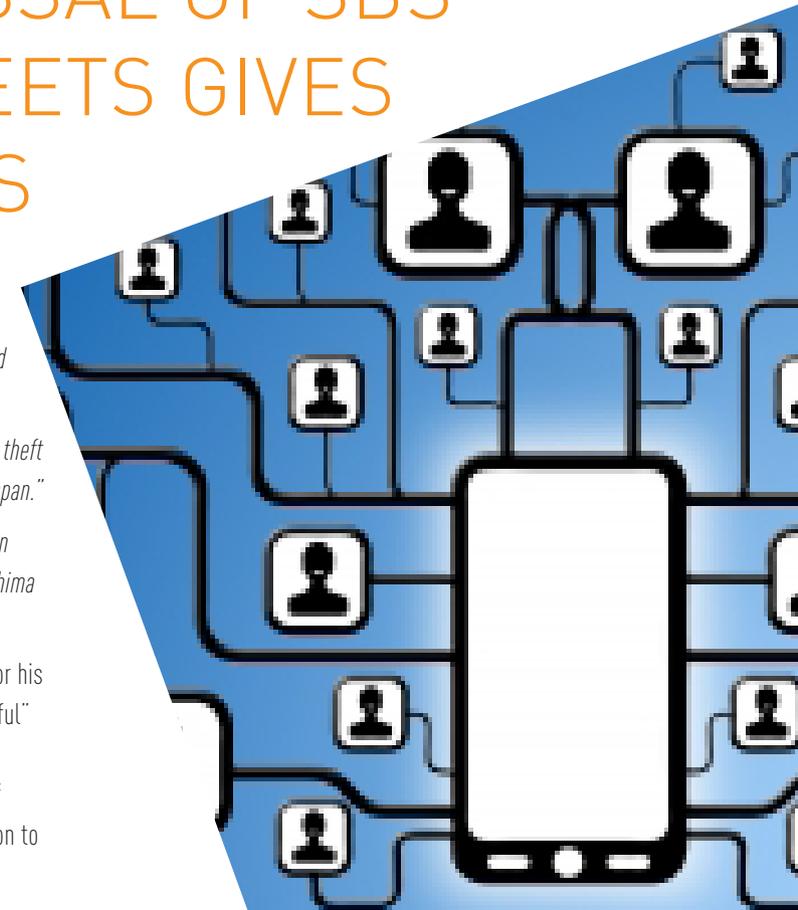
"Wonder if the poorly-read, largely white, nationalist drinkers and

gamblers pause today to consider the horror that all mankind suffered.";

"Remembering the summary execution, widespread rape and theft committed by these 'brave' Anzacs in Egypt, Palestine and Japan."

"Not forgetting that the largest single-day terrorist attacks in history were committed by this nation & their allies in Hiroshima & Nagasaki".

The following day, SBS moved swiftly to dismiss Mr McIntyre for his tweets which it considered to be "inappropriate and disrespectful" and which it said did not "reflect the views of the network". According to SBS, Mr McIntyre's actions breached SBS' Code of Conduct and social media policy, and caused his "on-air position to become untenable".



General protections claim

Mr McIntyre has now lodged a general protections claim against SBS with the Fair Work Commission alleging that his employment was unlawfully terminated for expressing a political opinion. This claim is yet to be determined.

In summary, the general protection provisions of the *Fair Work Act* 2009 (Cth) (**FW Act**) prohibit an employer from taking "adverse action" against an employee, including dismissal, for certain prohibited reasons, including but not limited to the employee's age, race, gender, religion, pregnancy, and political opinion.

There is a reverse onus of proof for general protection claims such that it will be presumed the employer acted for a prohibited reason unless the employer can show otherwise.

The key sanctions available against an employer for breaching the general protection provisions of the FW Act include a pecuniary penalty of an amount up to \$51,000 per breach, compensation for any damage suffered as a result of the breach, and reinstatement of employment.

Implications for employers

In summary, it was established in the seminal case of *Rose v Telstra Corporation* [1998] AIRC 1592 that an employer may lawfully dismiss an employee for out-of-hours conduct where the conduct:

1. is objectively viewed to cause damage to the employment relationship;
2. damages the employer's interests; or
3. is incompatible with the employee's duties as an employee.

It is clear that SBS formed the view that Mr McIntyre's tweets not only breached its Code of Conduct and social media policy, but they were so offensive and inappropriate that they were incompatible with Mr McIntyre remaining an employee. This was regardless of the fact that Ms McIntyre made the comments from his own personal Twitter account outside of work hours.

However, a dismissal for out of hours conduct cannot contravene the general protection provisions of the FW Act.

It remains to be seen whether Mr McIntyre's tweets will be considered by the Fair Work Commission to constitute "political opinion" for the purposes of the FW Act, or simply personal views held by Mr McIntyre about Australia's military history. If the latter, his general protections claim will almost certainly fail.

In any event, this case highlights the importance for employers of having up-to-date social media policies which clearly set out the types of social media conduct which will be considered acceptable and unacceptable both during and outside of work hours, as well as the consequences of not complying with the policy. Such policies, and any action taken pursuant to them, must also be consistent with applicable legislation, including the general protection provisions of the FW Act.

If the policies are appropriately drafted, they should help reduce the risk of employees making inappropriate comments on social media which are harmful to employers, and may be relied upon by employers to support any discipline action taken for unacceptable social media activity, including dismissal.

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