



Social Media & Unfair Dismissal

An update on recent decisions

26 July 2011

Patricia Ryan, Practice Manager, EI Legal

About Us

- Part of The EI Group
- An experienced team of workplace lawyers dedicated to providing workplace relations advice and legal representation in employment law and industrial law matters
- Our services include:
 - Industrial Relations
 - Enterprise Agreement Making
 - Equal Employment Opportunity and Anti Discrimination
 - Terminations and Adverse Action
 - Staying Compliant
 - Legal Advice and Representation

About the Presenter

- Patricia Ryan – Practice Manager of EI Legal
- Solicitor with over thirty years post admission experience
- Qualifications in Human Resource management and Industrial Relations

Topics Covered

- What is Social Media?
- Unfair dismissal cases arising out of terminations for use of social media
- Steps employers can take
- Other potential legal risks



What is Social Media?

- Social media includes text, audio, video, and images that enable people to communicate easily via the internet, in order to share information and resources
- Includes: social networking, wikis, and social picture & video sharing

Social Media and the Employment Relationship

- The use of social media has grown enormously in recent years
- In some cases, employees are using the sites to air their gripes about their boss or fellow employees
- Some of these actions have resulted in termination

Dismissal

- *Fitzgerald v Dianna Smith T/A Escape Hair Design* [2010] FWA 735



The Post

“Xmas “bonus” alongside a job warning, followed by no holiday pay!!! Whooooooo! The Hairdressing Industry rocks man! AWESOME!!”

Conduct Out of Hours

- *Rose v Telstra* [1998] IRCommA 1592 (unreported)
- Established that conduct outside of work hours could be used as a valid dismissal if:
 - It is likely to cause damage to the employment relationship;
 - It causes damage to the employer's interests; and
 - Otherwise incompatible with employee duties

Conduct Out of Hours

- An employer may take action on any employee misconduct after hours on social media outlets as long as:
 - The conduct is connected with the relationship of the employer; and
 - The conduct has serious implications for the employer

What Type of Conduct?

- Conduct may include:
 - Any conduct which harms or damages the company's reputation or business interests;
 - Breaches confidentiality;
 - Harasses/bullies other employees

What Fair Work Said

“A Facebook posting, while initially undertaken outside working hours, does not stop once work recommences. It remains on Facebook until removed, for anyone with permission to access the site to see. A Facebook posting comes within the scope of a Rose v Telstra consideration but may go further. It would be foolish of employees to think that they may say as they wish on their Facebook page with total immunity from any consequences”

What the Tribunal Considered

- Express Terms and Implied Terms in a contract of employment

Express Terms

- An example would be a term requiring an employee to abide by the employer's social media policy

Implied Terms

- An implied term is one “implied by law” and not expressly stated in the contract

Outcome of the Case

- Dismissal was unfair
- Applicant awarded \$2340.48

The Appeal

- *Dianna Smith T/A Escape Hair Design v Sally Anne Fitzgerald* [2011] FWAFFB 1422

Dismissal

- *Dover Ray v Real Insurance Pty Ltd* [2010] FWA 8544

Decision

- “The blog identified Ms Dover Ray by photograph and name. It contained a date of 24 April 2009 and referred to the investigation she had just been through. For reasons to which I have already alluded it was about her workplace experience. Therefore it would have been clear to anyone who knew her that she was referring to her employment with Real. The blog may not have named Real, but it cannot be described as non identifying to anyone who knew Ms Dover-Ray”

Decision

- “The blog is, in effect, an attack on the integrity and management of Real. The criticism of corruption is of such a nature and degree that it cannot be brushed aside”

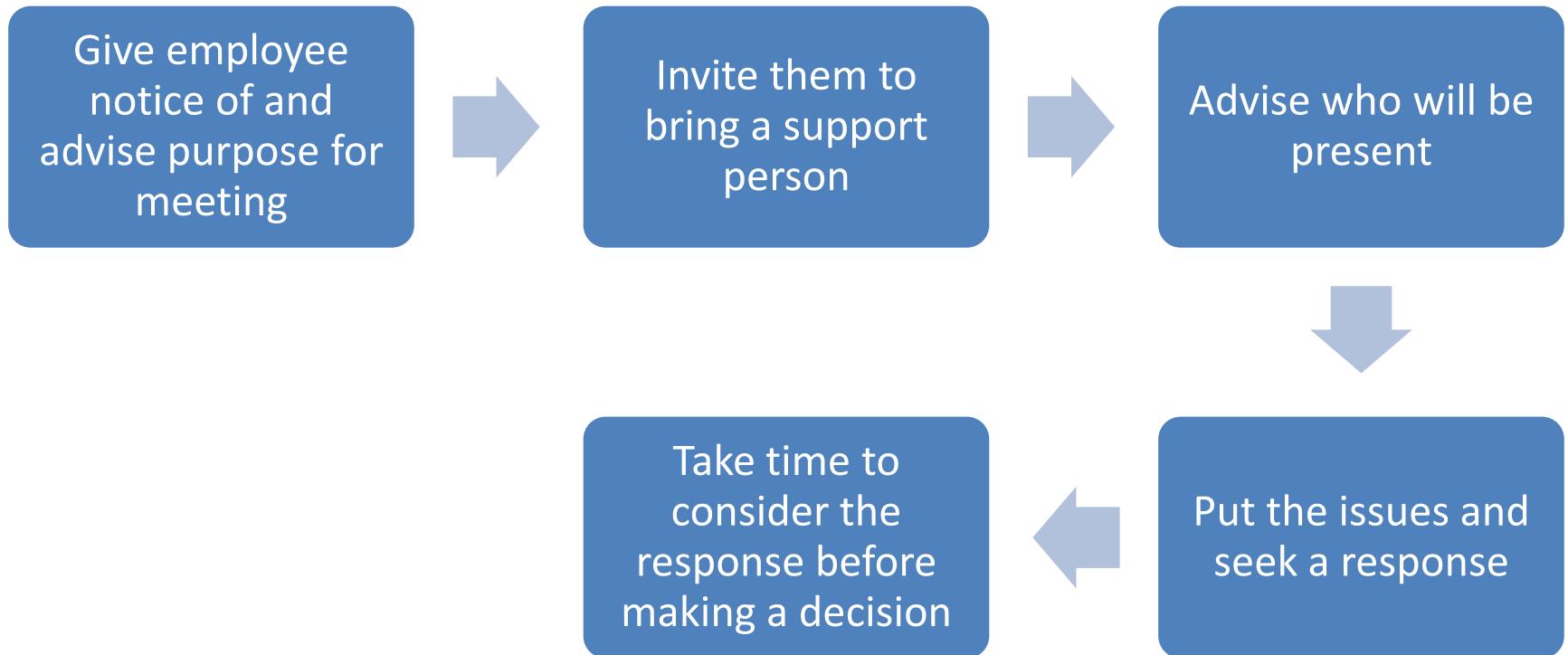
Decision

- *Dekort v Johns River Tavern Pty Limited T/A Blacksmiths Inn Tavern* [2010] FWA 3389

Procedural Fairness

- Regardless of the serious nature of the conduct, it is important to maintain procedural fairness when dismissing an employee due to conduct using social media

Procedural Fairness



Lessons to be Learned

- Have a clear policy about the use of social media
- Ensure employees are aware of consequences
- Review employment contracts
- Investigate breaches

Lessons to be Learned

- If considering dismissal remember that the usual rules regarding substantive and procedural fairness apply
- Consider whether actual damage was or could be caused to the business
- Look at whether dismissal harsh, unjust or unreasonable

Questions?



Developing a Policy

- Set out a clear statement of the businesses expectations
- Define what behaviour is inappropriate
- Set out what action will be taken in the event of a breach

Developing a Policy

- List limitations or restrictions
- Be aware of legislative requirements on workplace surveillance
- Clearly describe what constitutes the 'misuse' of social media
- Explicitly prohibit the use of any company logos or company names on social media sites

Developing a Policy

- Consider prohibiting any use of social media sites for employees, unless the person's job requires it
- Training and awareness; and
- Refer to other policies

Other Legal Issues in Brief

- Harassment and discrimination
- Surveillance
- Recruitment

Questions?



Contact Us

www.theeigroup.com.au

Email: info@eilegal.com.au

