Social media and the workplace - employees take care

We live in an age characterised by a rise in the use of social media – Twitter, Facebook, Instagram, LinkedIn, snapchat and the like. With that rise has come a large increase in the number of cases involving employees making comments about their employers "online" – to some extent there is no longer a divide between the personal life of employees and work.

Most employees generally consider they have a "right to privacy". However, savvy employers in the current age have policies which allow access to computers being used by employees. In January 2016, the European Court of Human Rights held that an employer who read personal instant messages posted by an employee using technology of the business, did not violate the employee's right to privacy.

Protecting the reputation of an employer

Employers increasingly want to protect their image and reputation. For that reason, employers consider comments made by employees as a reflection on the values and culture of their business. As a result, employees can often find themselves being severely reprimanded, including having their employment terminated because of inappropriate comments on social media. In the United States, an employee who posted that a dinner for a customer had been "spoilt" when the customer had a heart attack, found herself out of a job.

The key link is the employee's employment and potential reputational harm to the employer, and, if the employer is not named, whether the employer can be reasonably identified. Employees therefore need to consider that if the employer is not actually identified by name, it is still possible to be "caught out". This is because invariably, many employees have co-workers who are Facebook "friends", some of whom may not be "real" friends and may seize the opportunity of reporting any negative comments back to the employer.

What are the ramifications?

The outcome of any proceedings taken by employees terminated in these situations on the basis that the dismissal was "unfair" will depend on the circumstances and facts of each case. Not all comments made by employees will be considered to warrant dismissal. Some decisions include:

- an employee who failed to sign an acknowledgment of reading and understanding an employer's social media policy was held to have not been unfairly dismissed;
- an employee who posted comments about two of his supervisors on his Facebook profile which his employer considered were racially derogatory and sexually discriminating and resulted in termination were held to be not derogatory (the employer was particularly criticised for failing to have a social media policy); and
- a human resources manager who sent a private message on Facebook to the estranged wife of her principal was found to have been unfairly dismissed.

In circumstances where employees consider that a termination was "unfair", consideration should also be given to the remedy being sought. Reinstatement is one option. However, in many circumstances this will not be practical.

In a decision from early 2016, an employer who terminated an employee who was on leave and posted disgruntled messages about her employer on her Facebook page (restricted to viewing by "friends" only and her employer was not named) was found not to have presented sufficient evidence to justify the employee's termination. However, the Fair Work Commission found that it would be impractical for the employee to return to work in a collegiate environment and rather than ordering reinstatement of her, awarded compensation.

Conclusion

It is essential that employees carefully consider the posting of any comments about an employer on any social media sites which may be negative and could be considered defamatory.

If you or someone you know wants more information or needs help or advice, please contact us on (03) 9600 0162 or email info@lordlaw.com.au.