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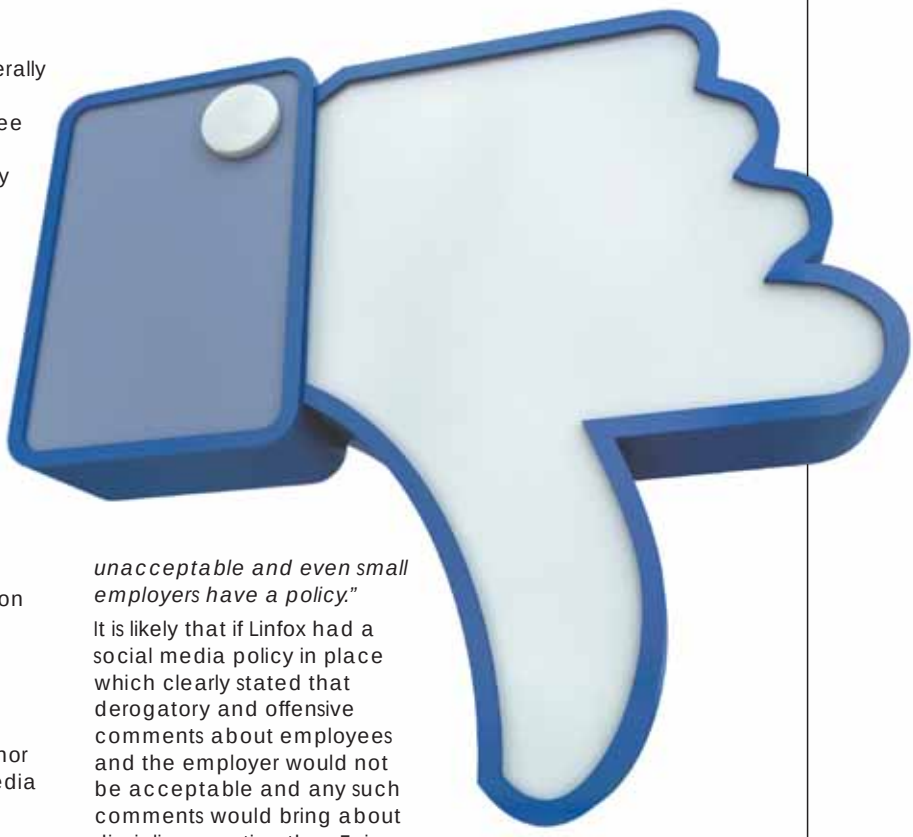
Social Media Policies are Critical for disciplinary action

JONATHAN MAMARIL

It has become well known generally in the workplace that negative comments made by an employee of their employer on Facebook, Twitter or other social media may give grounds for an employer to take disciplinary action, up to and including termination of employment.



In a recent full bench of Fair Work Australia decision, *Linfox Australia Pty Ltd v Stutsel* - [2012] FWAFB 7097, the full bench upheld the original decision and held that offensive and derogatory comments made by the employee (Stutsel) did not warrant serious misconduct and therefore dismissal.

Apart from the questions of fact regarding the actual comments made by Stutsel the full bench took into account:

- Stutsel was treated differently to other employees who also made derogatory and offensive remarks on Facebook;
- Stutsel's naivety regarding privacy settings on Facebook;
- Stutsel's otherwise unblemished 22 years of service;
- Linfox did not have a social media policy in place nor was there training regarding acceptable social media use.

For employers it is important to ensure when disciplining an employee for social media that there is an adequate social media policy to rely upon.

Importantly the full bench do not see the size of a business as an excuse for not having adequate social media policies in place saying: *"The Commissioner was very critical of this – and I'd have to agree – essentially saying that in this day and age not having a policy is pretty unacceptable and even small employers have a policy."*

It is likely that if Linfox had a social media policy in place which clearly stated that derogatory and offensive comments about employees and the employer would not be acceptable and any such comments would bring about disciplinary action then Fair Work Australia would have agreed that dismissal was warranted.

Apart from having an adequate policy in place it is also important to ensure that social media type breaches are treated equally for all employees and this may mean putting in place show cause processes and adhering to the principles of procedural fairness and natural justice.

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ARE YOU COVERED?

REBECCA CASTLEY

If you are a landlord of residential property, it is most important that you review your potential liability position. Ask yourself at least annually, or when your circumstances change: do you have appropriate and adequate property insurance cover to minimise your risk?

As a landlord, the risks faced are different from that of an owner-occupier. In addition to standard home and contents insurance, you would probably wish to obtain cover for malicious or intentional damage by tenants, theft by tenants, loss of rent and legal expenses in taking action against tenant.s

Your potential risk is also different to that of your tenant. For example, for public liability, a landlord (not a tenant) is generally responsible to third parties for loss arising from the dangerous condition of the premises such as an electrical fault or structural inadequacy of the home. A tenant, on the other hand, may be the subject of a public liability claim if his or her acts or omissions in their use of the home resulted in the loss or damage.

An area of insurance which can be misunderstood is for body corporate schemes. If your investment property is a unit or townhouse, you are certainly not "off the hook" in needing to effect your own insurances.

The body corporate has the primary duty to insure the common property and body corporate assets and, as a member of the body corporate, you benefit from that insurance. The "common property", however, is essentially that land in the scheme which is not a lot. Anything which may give rise to claim within your unit or townhouse will arguably be the owner's responsibility.

For example, if a person trips and injures himself on tiles which have been defectively laid within the unit or townhouse, the owner will potentially be liable to that person, not the body corporate.

As a minimum, you should ensure that you have contents insurance (including carpets, curtains, blinds and white goods) as well as public liability insurance within the unit or townhouse.

It is also worthwhile taking an interest in the insurances effected by the body corporate each year. Ask the body corporate manager for a copy of the certificate of currency and the product disclosure statement and/or policy terms. Consider whether the cover is adequate and check whether the policy includes appropriate add-ons, like machine breakdown and catastrophe cover.

Plan ahead today for what will hopefully not happen tomorrow!

DEAL DONE For Gaming Reform

ROSE LOCKE

A deadlock on pokies reform ended in October with the introduction of a package of three bills to parliament after months of uncertainty. The Australian Greens agreed to support the measures in return for a $1.5 million gambling research institute that would investigate other reform options such as $1 bet limits. Independent Andrew Wilkie, the driving force behind the gaming reforms said the reforms were "a modest start but a start nonetheless".

Earlier this year Prime Minister Gillard announced revised "watered-down" proposals to help address problem gambling, which effectively postpones the core measures previously proposed by Andrew Wilkie MP. The Federal Government has confirmed that it will not impose mandatory pre-commitment by 2014, as previously proposed, but instead will commence an evidence-building process to inform the best way forward with gambling reforms.

This evidence-building process will include a trial of pre-commitment technology, which is proposed to occur in the ACT. The ACT trial, which was scheduled to start in February, is now more likely to begin in June next year.

Other measures in the Federal Government bill include:

- By the end of 2013, pre-commitment technology must be available on any new electronic gaming machines ("EGMs") manufactured in, or imported to, Australia;
- By the end of 2016, all EGMs must be part of a State linked pre-commitment system and dynamic warnings and cost of play displays must feature on EGMs, with longer implementation timelines for smaller gaming venues;
- By 1 May 2013, a $250 per card, per day withdrawal limit from ATMs in gaming venues; and
- An enquiry by the Productivity Commission into the results of a proposed trial of voluntary pre-commitment.

The bill also imposes a "supervisory levy" on venues, regardless of size, which will be used to help fund national pokies reforms. The price however is yet to be decided and is not expected to be set until the legislation is passed. Treasurer Wayne Swan said the levy proposal is intended to cover the costs of the scheme.

It is apparent that gaming reform remains a live issue.

It is apparent that gaming reform remains a live issue. Whilst the hotel and club industries are offered some solace by the fact that the Federal Government now appears prepared to take a more sensible and evidence-based approach to gambling reform, this process will still have some impact on the hotel and club industries. Hotels and clubs, upon the passing of the bills, will have to implement the gaming reforms and it is hoped that the Government will continue to engage with gaming industry stakeholders in developing evidence-based policy. However, the very damaging effect of the previous proposed changes have been arrested.

THE REAL COST of a Newsagent's Will Kit

MICHAEL KLATT

Some years ago, our firm was successful in obtaining a Grant of Probate of an unsigned, undated, handwritten Will kit. This was the first in Queensland. Our firm was recently asked to represent potential beneficiaries under a document which was a newsagent's Will kit, which had been completed by a Willmaker, but neither signed nor dated.

The Public Trustee was acting as Administrator of the estate and submitted to the Court that the Will kit should not be admitted to Probate and that a previous properly executed Will made by the Willmaker should be admitted to Probate. The problem was that the Will kit made no provision for the Willmaker's youngest child, who was under the age of 18.

The circumstances surrounding the completion of the Will kit were not an issue. The Willmaker was a patient in the Prince Charles Hospital. His son bought a Will kit from a newsagent at his request and took it to him in hospital. In the son's presence, he wrote on the Will kit, but a nurse came to his bedside as he was writing on the document and he put the Will kit in a drawer beside his bed. The son did not see the document again until after the Willmaker died.

There was evidence that the Willmaker had told a number of people that he had left various property to his children. This was consistent with what was set out in the Will kit. There was also evidence, however, that he had had discussions subsequent to filling out that document about making provision for his youngest child, who was not a beneficiary under the Will kit.

The Public Trustee submitted that the Court could not be satisfied that the Will kit embodied the full expression of the Willmaker's testamentary wishes as it may be that it needed further revision or thought in respect of a provision for the youngest child. We submitted, however, that the document, on its face, was complete as all of the necessary elements for a valid Will were present, except that it had not been signed, dated or witnessed, but the Testator intended the document to be his Will.

> ... but a nurse came to his bedside as he was writing on the document and he put the Will kit in a drawer beside his bed.

The Court accepted our submissions and found the Will kit to be a valid Will, which therefore excluded the Willmaker's youngest child as a beneficiary.

It is a matter of considering whether, at the appropriate time that the document was created, the Willmaker intended the document to operate as a Will. If he or she did, then it is likely that the Court would accept the document as the person's last Will. That being the case, if a Willmaker wishes to change the terms of the document, they need to revoke the document and make a new Will. Unfortunately, this exercise has cost the estate thousands of dollars unnecessarily as a document, which could be a Will that is not properly executed, needs to be brought to the attention of the Court.

Snugglepot and Cuddlepie Free to Roam

RACHEL WILLMOTT

If you're like me, the outdoor areas of your home are a bit of a mess. There are pine needles covering your pavement, there are jacaranda flowers carpeting your stairs and there is dropped fruit all over your deck. You concede to yourself you are terribly lazy when it comes to cleaning up your yard and you would rather hire a handyman to make it all pretty again.

The last thing on your mind is the likelihood of your dear old Aunt slipping on the aforesaid pine needles / jacaranda flowers / dropped fruit and breaking her neck as she pops around for a cup of tea. Even further from your mind is whether your policy of public liability insurance provides sufficient indemnity in the event your Aunt decides to sue you for negligence.

Such were the facts in the Court of Appeal's decision in *Graham & Ors v Welch* [2012] QCA 282 delivered on 19 October 2012. On 27 November 2006 Mrs Welch suffered an injury at her niece's home as a result of slipping and falling on steps after stepping on a gumnut which had fallen from a gum tree in the garden. The gum tree had a branch arching over the steps. At trial, Mrs Welch proved her niece had been negligent by failing to provide safe access to her house by adequately pruning or removing the gum tree and judgement was given in her favour. The trial decision was appealed.

On appeal, Justice Atkinson found the Aunt was familiar with the steps having been at the house often and presumably had either experienced no danger in respect of the gumnuts or ought to have been aware of any danger that existed. The evidence led at trial suggested there were only a few gumnuts present at a time, as the paved steps were regularly cleaned. The Aunt's evidence was that she was aware of the presence of gumnuts on the steps.

Her Honour found it is common to find gumnuts on external steps in suburban residences, particularly those in a bushland setting. Her Honour observed *"gumnuts have been an everyday part of the consciousness of Australian children since May Gibbs wrote her tales of Snugglepot and Cuddlepie in* Gumnut Babies."

Justice Atkinson ultimately held it is not reasonable for Court decisions to require the removal of gumnut trees if an entrant to a residential home slips on a natural hazard which is readily apparent. The appeal was allowed.

This decision has relevance to homeowners who are lazy when it comes to outdoor maintenance, and homeowners who live in a bushland setting. The key point from this decision is that a homeowner need not take action to remove all risks from residential homes if the risks are naturally occurring, common and obvious, although what constitutes reasonable steps to reduce a risk will always be considered.

JOHN MULLINS
EDITORIAL

2012 is quickly coming to an end. The office will be closed from the 21st of December and reopening on the 2nd of January. The lawyers who you usually deal with will be available to assist you over that period should the need arise. That availability is made much easier these days because of tablets and smart phones.

We have recently upgraded our IT to ensure we have high speed access available to staff and in the event of a crisis, such as a flood, fire or other unforeseen event, we have remote access to our servers for consistency of client services.

To me the big story of 2012 is social media and how this is encroaching on all of our lives and privacy. Twitter and Facebook are household names, they have even become part of the lexicon. Society as a whole is struggling to come to grips with the benefits that this technology can bring and the damage that it can do.

With a smart phone everyone has a camera and within seconds photographs of anything and everything can be posted for the world to see. Everyone is apparently in need of being in touch. Next time you walk or drive down a city street, have a look at how many pedestrians are on the phone.

This massive cultural and social revolution has left the law behind. Even the powerful forces of Government are ignored by these famous technology companies. Recently the Communications Minister was announcing how pleased he was that Twitter and Facebook now had people in Australia who the Government can talk to when issues arise. Previously the Government was being ignored by these U.S based companies.

Australia needs to resolve the law around privacy and what constitutes a crime when it comes to comments made in social media. 2013 could be when this issue comes to a head after being on the boil in 2012. The problem is no one seems to have the answer at this stage.

We wish you a very happy Christmas. We value the relationship we have with you. We thank you for your support in 2012 and look forward to a prosperous 2013.

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