

## “Get out of my space!”

### Activities on social networking sites CAN lead to the termination of employment

June 2009

by Clayton Payne, Senior Associate and Nadine Domalewski, Solicitor

With millions of worldwide users of Facebook alone, it is no wonder that social networking sites like Facebook, Twitter and Myspace have received a lot of media attention in recent months.

A great deal of this attention has focused on the discipline of employees, often leading to the termination of employment, who have made postings on these sites that are derogatory or critical of their employers or their employment.

Can this conduct actually give rise to a breach of the employment contract and the right for an employer to terminate an employee's employment?

Few written employment contracts (or employment policies for that matter), contain provisions relating to the use of social networking sites by employees. If there are no express terms covering how employees should conduct themselves on such sites, it might be argued that employers cannot rely on adverse postings concerning an employee's employment, as a valid basis on which to terminate their employment. This might particularly be the case if the postings were made outside of work hours and not utilising systems or hardware belonging to the employer.

By way of contrast, what might be said if an employee's posting was derogatory of, or critical of, an employer. For example, what if the posting said something as simple as “My boss is an idiot” or “My job sucks”? Such comments could indeed provide a basis for termination, particularly if they breach an implied obligation of mutual trust and confidence or the fiduciary relationship between employer and employee. Surely if the comments go to the heart of the employment relationship, then they could be relied upon to substantiate a termination of the employment. Depending on what is said and in what context, the conduct could even go so far as amounting to a malicious or injurious falsehood, calculated to injure an employer in respect of their business, or misleading conduct under the *Trade Practices Act 1974* (Cth).

#### Obligation of mutual trust and confidence

In recent years, the common law in Australia has recognised that an obligation of mutual trust and confidence, as between employer and employee, is an implied term within employment contracts.

#### In brief

§ Employers need to carefully consider the information posted on social networking sites by employees, before using as grounds for termination of employment.

by Cameron Jorss, Partner

But what does this mean? It means that the courts recognise that there is a term implied in employment contracts to the effect neither party will, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee<sup>1</sup>.

Such an implied term was recognised in the United Kingdom in the leading case of *Malik v Bank of Credit and Commerce International SA*<sup>2</sup>. In this case the House of Lords regarded the “... emergence of the implied obligation of mutual trust and confidence as a sound development” and as a basis for a claim for breach of contract.

In Australia the NSW Court of Appeal in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney*<sup>3</sup> accepted that the implied duty, as well as the implied duty of good faith, existed in employment contracts.

Similarly, in *McDonald v State of South Australia*<sup>4</sup>, the South Australian Supreme Court also held that the obligation of mutual trust and confidence could be implied into an employment contract. In this decision, the court held that the implied obligation was breached by an employer when it forced an employee to act in a role he was not qualified for, and for which it provided no support, and harassed and bullied the employee.

Noting that acceptance of the implied obligation, why would it be that an employer could not use the knowledge of a derogatory comment made about it or its officers, for example, that was calculated or likely to destroy or seriously damage the relationship of confidence and trust, to terminate the employment relationship? Obviously, clear evidence of the making of such a statement should be obtained before the employer acts. Whether such a detrimental comment is made in a pub, at a meeting, or as part of a “status update” on Facebook, should make no difference.

#### Who will read my comments?

Social networking sites appear at first glance to be private forums where one can have conversations with one's friends in confidence. However, quite easily, these conversations can come within the knowledge of work colleagues or employers and can enter the public domain.

One such example reported in media<sup>5</sup> involved an employee working for a government agency who posted her Facebook status as “saying no to working for sh\*tty Government Departments”. The employee did not name the department or any individuals in her posting, however the employee's employment was terminated when a colleague saw the posting and reported it to her supervisor.

Many would argue that the conduct of the relevant government department as employer in these circumstances

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was possibly harsh and out of proportion to the employee's conduct. However, one can see that, depending upon its context, the comment could be seen as likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Certainly this would be the argument of the employer.

On the other hand, the employee might argue that the comment was not about the department in which she worked. On that basis, if the employer was to rely on the employee's conduct to substantiate a termination of the employment, it might need to point to the employee breaching one of its policies or protocols, for example, directing employees as to the manner in which they are to use social networking sites.

Telstra has reportedly implemented such guidelines directing its employees as how to they are to conduct themselves on social networking sites, with non-compliance resulting in disciplinary action.<sup>6</sup> Guidelines such as these will allow employers a greater reign and basis upon which to terminate an employee's employment, if their conduct on social networking sites reflects negatively upon the employer.

It is important to note that the implied obligation of trust and confidence applies to both employers and employees. That is, an employee could also rely upon a breach by the employer to terminate the employment relationship. For example, an employee could terminate an employment relationship if an employer, through its officers for instance, made comments seriously disparaging of the employee.

Accordingly, employees and employers alike should be conscious of who will have access to their publications on social networking sites and the possible consequences of those publications.

## Termination?

The termination of employment by employers in relation to conduct on social networking sites is obviously a question of fact and degree, a distinction that is yet to be adjudicated by the courts in Australia. Each case must be specifically considered in light of its own facts and circumstances surrounding the conduct. For example, an employer may be wise not to terminate the employment of an employee if a derogatory comment was made by the employee at a union meeting, as opposed to making it on a social networking forum. Such an action could sound in a claim of victimisation.

A further consideration to take into account is that, as of 1 January 2010, the Rudd Government's "National Employment Standards" (NES) will come into play. A component of the NES includes an increased entitlement of employees to receive redundancy payments. The ease by which some employers may be able to dismiss their employees through their activities on social networking sites, may become an attractive outlet for employers to avoid the payment of redundancy entitlements. Such a move may give employees further ammunition to bring unlawful termination or statutory unfair dismissal claims.

## Conclusion

Although adverse comments made by employees on social networking sites can provide sufficient ammunition for an employer to end the employment relationship, care must be taken in this process.

A breach of the implied obligation of mutual trust and confidence is only one element to be considered in the context of terminating employment contracts on the basis of posts on social networking sites. Employers should take great care, and would be well advised to seek professional advice before deciding to terminate an employee's employment in these circumstances. To take the wrong course of action, could lead to the employer having to defend claims of unfair dismissal or the unlawful termination of employment.

<sup>1</sup> *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666

<sup>2</sup> [1998] AC 20.

<sup>3</sup> [2008] NSWCA 217.

<sup>4</sup> [2008] SASC 134.

<sup>5</sup> "Social not-working: Facebook snitches cost jobs", Asher Moses, Sydney Morning Herald, 8 April 2009.

<sup>6</sup> "Telstra cracks down on Twitter, Facebook mischief", Nic MacBean, posted 20 April 2009.

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