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## LinkedIn and unfair dismissal

*Bradford Pedley v PMS Pty Ltd T/A peckvonhartel* [2013] FWC 4282

On 2 July 2013 the Fair Work Commission (FWC) dealt with an application for unfair dismissal involving an employee who was terminated for serious misconduct involving a posting on their LinkedIn profile.

The applicant was employed by the respondent as a Senior Interior Designer for almost two years. On the day prior to termination, the applicant sent a group email via LinkedIn which incorporated clients, colleagues and friends. The email made it clear that the applicant had been operating a part time interior design business outside of his employment, detailed a number of recent jobs conducted by his business, indicated that he was seeking to expand his business to a “full time design practice” over the ensuing year and sought the recipients’ support for his business. The following morning, in a phone call with his manager, the applicant’s employment was terminated summarily as a result of the circulated email on the grounds of serious misconduct.

The applicant gave evidence that the respondent was aware that he had always carried out private work on his own behalf, which was known and tolerated by the respondent (which was conceded by them in evidence). He asserted that the private work was not in competition with the respondent as the jobs were not of sufficient size. The applicant’s assertions that the email did not go to clients but merely to colleagues was demonstrably incorrect. The applicant denied proceeding deceitfully as another employee of the respondent was a recipient of the email. In cross examination however, the applicant conceded that he was one of the respondent’s most senior designers, he was to some extent the respondent’s “face”; and that his contract of employment prevented him from undertaking work or providing advice or services in competition with the respondent.

In deciding the matter, the FWC determined that the email sent to both clients and contacts noting an expansion of his private

interests and seeking their support breached the applicant’s fundamental employment obligations to the respondent. The FWC did not accept that the respondent had waived any right to object to the applicant soliciting increased private work based on prior acquiescence to him doing so. It was held that the email went beyond what the respondent had previously permitted. Accordingly, the respondent had a valid reason for the dismissal.

Although there was very limited opportunity given to respond to the reason for dismissal, the FWC found that the brief telephone exchange was sufficient as “*any explanation he may have given to the directors for his actions is unlikely to have had an impact on their decision.*”

In relation to the availability of a support person, the FWC simply noted that the respondent did not refuse to allow the applicant to have support from another person whilst on the telephone and that it was available to him to have whoever he wished with him to listen in. The FWC otherwise noted that it was satisfied that the applicant’s conduct breached a number of clauses of his employment contract.

In determining that the termination was not harsh, unjust or unreasonable, Commissioner Deegan at paragraph 58 commented:

*“I do not accept the premise that an employee has a higher obligation not to solicit clients of his employer for his own business after he has ceased his employment than during that employment.”*

Further, having regard to regulation 1.07 of the *Fair Works Regulations 2009* (Cth), the Commissioner was satisfied that the applicant’s conduct constituted “*serious misconduct*” in that it was behaviour “*inconsistent with the continuation of his contract of employment.*”

Although this decision amounted to a “win” for the employer, the case draws attention to potential issues arising in the employment of employees with a strong LinkedIn presence and an unrestricted intermingling of contacts from private and workplace relationships.

Potential issues include:

- Would a former employee soliciting for work generally through an “all contacts” or industry group posting on LinkedIn where the posting can be seen by clients of the former employee (either seeing the post as a contact or as a fellow LinkedIn group member) constitute a misuse of confidential information, a breach of a restraint of trade / non-solicitation clause or general breach of contract?
- Would an email in the above case / circumstance that went to LinkedIn contacts other than the employer’s clients have similarly constituted serious misconduct for being behaviour “*inconsistent with the continuation of his contract of employment*”.

- Who has ownership of the employee’s LinkedIn profile – the employer or the employee (or how do you divide ownership of contacts)?
- Where the employee’s contacts setting is set to “private”, how can an employer (or former employer) monitor whether contractual restraints and confidential information preclusions are being complied with?
- What contacts or postings in a LinkedIn group forum would constitute a breach of a non-solicitation clause?

Employers accordingly need to take great care in drafting, implementing and enforcing social media policies where LinkedIn is seen as a strong part of the business’ social media marketing strategy.

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### Dealing with Difficult and Troublesome Employees

Carter Newell Special Counsel Stephen Hughes will be presenting at the upcoming Legalwise CPD program – *Workplace Law: Addressing your Concerns*.

Stephen will explore the following topics:

- Summary dismissal: What is serious enough? What notices need to be given?
- Dealing with recalcitrant employees
- Performance management to avoid harassment, bullying and workers’ compensation claims: What is appropriate behaviour?
- Conducting workplace investigations of bad behaviour

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SEMINARS

**When:** Friday 04 September 2013

**Where:** Mercure Hotel, Brisbane

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**Seminar Code:** 139Q08

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