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IRSSA INC. TRADING AS
AUSTRALIAN LABOUR & EMPLOYMENT RELATIONS ASSOCIATION SA

DECEMBER 2019 NEWSLETTER

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Note: The views of the contributors are not necessarily those of ALERA SA

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PRESIDENT'S MESSAGE

Dear Members

Another Year Bites the Dust

As the last ALERA SA newsletter for 2019 is published, I take the opportunity to thank our committee members for their support and to wish ALERA SA members a restful break.

May your last matters mop up quickly and may you all get a chance to recharge for whatever 2020 brings. The ALERA SA committee will continue to run informative and relevant seminars and provide a networking forum for the sharing of ideas and views.

See yawl in the fullness.

Glen Seidel, President – ALERA SA

IZZY RIGHT OR IZZY WRONG?

By John Love, Partner, EMA Legal

In May 2019, Rugby Australia terminated the employment of fundamentalist born again Christian NSW Waratahs and Wallabies player 'Israel' Folau for breach of its Code of Conduct following two social media posts.

Rugby Australia's decision divided the nation and became the year's biggest "culture war", with those on the political and religious Right outraged that Folau had been discriminated against on the grounds of religious expression, while those on the Left (religious and atheist), who usually fight for the rights of employees to speak their mind, have either defended Rugby Australia's decision or remained silent.

BACKGROUND

In 2017, Rugby Australia raised concerns with Folau about his use of social media, after he posted comments that he did not support same-sex marriage. In 2018, Rugby Australia issued a formal warning to Folau after he posted that God's plan for homosexuals was "*HELL…UNLESS THEY REPENT OF THEIR SINS AND TURN TO GOD*".

Folau later told the media that he effectively offered the Rugby Australia CEO his resignation if she felt the situation had become untenable. Folau did not resign and on 10 April 2019 he posted two posts, one on Twitter and the other on Instagram that hell awaits "*drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolators*."

Following the posts, Rugby Australia issued Folau with a notice of intention to terminate his employment contract for breach of its Code of Conduct.

Before an independent Code of Conduct Tribunal, Folau conceded his behavior was in breach of previous warnings issued, in breach of the Code of Conduct, had the potential to damage Rugby Australia's relationship with its sponsors, and would offend members of the LGBTIQ+ community.

On 17 May 2019, the Tribunal determined that his conduct breached the Code and the termination of his employment justified.

Rather than appealing this decision, Folau issued proceedings under s772 of the *Fair Work Act 2009* (Cth) (**the Act**), alleging that he was dismissed because of his religion.

THE CLAIM

Folau issued the proceedings in the Federal Circuit Court against Rugby Australia Limited and the Waratahs Rugby Pty Ltd, listing three causes of action:

- Breach of contract
- Restraint of trade
- Unlawful termination

Folau sought damages, penalties, an apology, reinstatement, an order for economic loss, declaration the Tribunal's decision was void, an injunction preventing the Respondent's giving effect to the Tribunal's decision and declaration that the Respondent had breached section 772 of the Act.

Rugby Australia and Rugby NSW denied the dismissal amounted to breach of contract, restraint of trade or unlawful termination. While the matter settled for an undisclosed amount, had the matter proceeded to trial, the Respondents would have had the burden of convincing the Court that Folau's religion and political opinions were not one of the reasons for his dismissal, and would have likely relied on decisions such as *CFMEU v BHP Coal Pty Ltd* [2014] HCA 41 and *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FCA 1201 where the Court disaggregated misconduct from prohibited reasons for dismissal.

The Hight Court's recent decision in *Comcare v Michaela Banerji* [2019] HCA 23 would also have likely been relied on by the Respondents as it highlighted the High Court has little sympathy for employees expressing controversial views inconsistent with the well-known and agreed values of their employer.

REACTION TO THE CLAIM

The reactions to this matter, more than anything else, have highlighted the hypocrisy in the positions adopted by Folau's supporters and detractors.

We have seen those on the political Left/Progressives, who normally rally against employers that dismiss employees for publicly expressive their personal views, defending Rugby Australia's decision and the rights of employers to dismiss their employees.

In comparison, those on the political Right/Conservatives, who normally support an employer's rights to dismiss, becoming champions of free speech for employee and workers' rights against capricious dismissal. Those on the political Right/Conservatives holding such a view clearly did not hold the same passion for free speech when SBS soccer journalist, Scott McIntyre, was dismissed for making a controversial tweet about Anzac Day.

Apart from leaving us all confused, this hypocrisy has now left us with the Morrison Government's widely criticised Religious Discrimination Bill.

Despite the Act already prohibiting religious discrimination, the Morrison Government used the Folau matter to reignite calls for religious protections following the 2017 same-sex marriage debate and Liberal MP Philip Ruddock's review of religious freedoms.

The Morrison Government introduced the Religious Discrimination Bill for consultation on 29 August 2019, which has been fraught with controversy since its release. Its introduction appears to be drafted as a direct response to Folau's dismissal.

The Morrison Government announced 11 changes to the draft Bill on 11 December 2019, following significant criticism.

While the future of the Religious Discrimination Bill is unclear, Folau's dismissal does give rise to important questions, in particular how religious rights should be balanced against other important rights.

Folau was not the first sportsperson to receive criticism for taking a political stand for expressing unpopular personal views and is unlikely to be the last.

Federal Court reminds employers about the risks of unintended representations to 'Christmas Casuals' for purposes of an unfair dismissal claim

By Kylie Dunn and Lachlan Chuong, DMAW Lawyers Pty Ltd

The *Fair Work Act 2009* (Cth) (**FW Act**) provides that a period of casual employment may count towards an employee's qualifying period of employment for unfair dismissal purposes if the following requirements are satisfied:

- the casual was employed on a regular and systematic basis; and
- they had a reasonable expectation of continuing employment on a regular and systematic basis.

The recent decision of the Federal Court in *Bronze Hospitality Pty Ltd v Hansson (No 2)* [2019] FCA 1680 sheds lights on when these requirements will be met in situations where an employee becomes permanent after an initial period of casual employment.

Facts

Bronze Hospitality Pty Ltd (**Bronze**) is in the business of supplying labour to a restaurant, the Harbour Terrace Bar and Grill. Bronze initially employed the Plaintiff, Ms Hansson, as a "Christmas Casual" for two months and subsequently offered her a full-time position. Four months later Bronze terminated Ms Hansson's employment. An unfair dismissal claimed ensued.

Bronze sought to defend the claim on the basis that her full-time employment was for less than 6 months and

therefore she did not satisfy the minimum qualifying period of service and was not eligible to bring the claim. Bronze argued that her period of casual employment should not be counted because the requirements in the FW Act were not satisfied.

Outcome

Regarding the first criterium, the Federal Court considered that Ms Hansson was employed on a regular and systematic basis from the commencement of her employment as a Christmas casual. From the beginning she worked 5 or 6 shifts each week. The fact that those shifts were of differing lengths and had differing starting and finishing times did not alter the Court's view that her casual employment was regular and systematic.

Regarding the second criterium, the Court determined that from the commencement of her casual employment Ms Hansson held a reasonable expectation of continuing employment on a regular and systematic basis. The Court relied on the following evidence in particular:

- she was asked by Bronze to be the "reliable" employee; and
- she was told that Christmas was Bronze's busiest period.

Accordingly, Ms Hansson's two-month period of casual employment counted towards her qualifying period of service (meaning that her overall period of employment was 6 months) and she was eligible to bring an unfair dismissal claim against Bronze.

Lessons for employers

This case illustrates the risks arising from unintended promises or representations made to casual employees regarding the continuity of their employment. In order to minimise the possibility that a period of casual employment will give rise to unfair dismissal liability, employers should:

- take care to avoid making any comments with respect to a casual's future employment prospects; and
- have in place a well drafted casual employment contract to expressly limit or refute any expectation of ongoing employment.

SCENES FROM THE "IZZY RIGHT OR IZZY WRONG" ALERA SA SEMINAR

Presented by John Love, Partner EMA Legal