

OUTSOURCEDLAW NEWSLETTER

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ISSUES COVERED:

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Social Media & Workplace Issues

Is this relevant to you?

Yes if you have staff

Can I monitor staff usage of sites such as Facebook?

Yes. A business can set rules as to staff usage of Facebook while at work using company equipment. To ensure there is no confusion as to what is appropriate usage by staff, it is advisable to have set rules in place such as in a Company Policy or in employment contracts. In NSW, businesses also have to comply with workplace surveillance laws before monitoring staff usage of Facebook.

Can I use information on sites such as Facebook when deciding whether to hire someone?

Yes. The information is public, so can be used. However care should be taken with regards to:

Privacy – Under Privacy laws, a candidate can gain access to information kept on file by businesses, which has been obtained from sites such as Facebook. Businesses should take care therefore that the information is relevant to the job application and will not for example, lead to a possible discrimination claim.

Discrimination – care should be taken that a decision whether or not to employ someone is not based on irrelevant information learnt through accessing a social media site. This could lead to a discrimination claim.

Breach of contract – Facebook’s terms prohibit use for commercial gain and collection of user information requires their consent. Potentially this could mean a business is in breach of Facebook’s terms through accessing it to gain information on staff or potential staff. To date however, no action has been commenced by Facebook in this regard.

Can I terminate a staff member due to their use of sites such as Facebook?

Yes if the usage is contrary to Company Policy or is in any event in breach of laws such as defamation, breach of copyright, sexual harassment laws, disclosure of confidential information etc. It needs to be clear that the staff member’s actions had some connection with work and to minimize the risk of an unfair dismissal claim, a clear policy on appropriate usage of such sites is recommended.

Unfair terms in Customer Contracts

Is this relevant to you?

Yes if you sell goods or services to consumers

What is the issue with ‘unfair’ terms in a customer contract?

Under the Competition and Consumer Act, terms contained within standard form customer contracts may be unenforceable if it is considered such terms are ‘unfair’.

What is ‘unfair’ was looked at recently with regards to a gym contract in the UK. It is useful to see what was held to be unfair:

- All 24 and 36 month minimum terms were held to be unfair
- 12 month minimum terms were unfair where the customer was given insufficient rights to terminate early. If a customer could suspend or cancel their membership in certain circumstances (eg due to health or financial reasons) without incurring charges, during the 12 month minimum term, then the 12 month minimum term was not unfair
- Payment of a fee for early termination was considered unfair where the fee was equal to the balance remaining owing for the minimum term because no allowance was made for accelerated payment
- Terms allowing termination by the gym for a minor breach by the customer (such as a few days late payment) were also considered unfair.

How does this relate to my business?

The test for assessing whether a consumer contract is unfair is very similar in Australia to that in the UK. If a business uses non-negotiated standard form customer contracts, some implications of this decision are:

- Care should be taken that any minimum terms in customer contracts are not for a period of time that is longer than a customer would usually use the business' goods or services for
- Provision should be made to enable a customer to terminate an arrangement before the end of the minimum term at no cost, in circumstances beyond the customer's control
- If fees are payable when a customer terminates a contract before the end of a minimum term, such fees should take into account any accelerated payments that may have been made.
- A business' right to terminate the arrangement should be in proportion to the breach by the customer. Termination for any breach by a customer, even where the breach is very minor, is not recommended.

When a resignation becomes a dismissal

Is this relevant to you?

Yes if you have staff

Background information

A recent case before Fair Work Australia (FWA) demonstrates that care needs to be taken when handling a change of duties and remuneration for an employee.

In this case, an employee was discussing changed duties with her employer due to her pregnancy. While discussions were held regarding a changed role which may have led to a decrease in salary, nothing was agreed with the employee. Following discussions, the employee was advised of a transfer to another department with a drop in salary and differing duties. While the employee expressed serious reservations about this new role, this was ignored by her employer and in fact her proposed salary was further reduced a few days later.

The employee wrote to the employer claiming that the change in role and significant drop in salary were unilaterally made by the employer and she considered herself dismissed. The employer responded by advising she could have her old job back, which the employee rejected.

Fair Work Australia's Decision

FWA found that the employee had been unfairly dismissed and the employer was ordered to pay \$25,821.00. This was because there had been no agreement as to the terms of any revised role or significant reduction in salary. When the employer decided to unilaterally introduce these changes it was likely that the employment relationship would end. The test as to whether there had been a dismissal was whether objectively the employer's conduct was such that the conclusion of the employment relationship was the probable result or that the employee's action in accepting the ending of the employment relationship was forced by the employer's conduct.

FWA also found that there had been no valid reason to dismiss the employee. There had been no performance or conduct issues. Also the employee's failure to accept the offer of reinstatement did not affect her unfair dismissal application, as by that stage the relationship with her employer was such that returning to her old role was not possible.

Implications for Business

- Dealing with changed duties and remuneration leading up to parental leave needs to be dealt with very carefully and unilateral changes to the employee's role and/or salary are not acceptable
- Any variations to an employee's role should be recorded in writing including the employee's agreement to such changes
- Unilateral changes to an employment contract by an employer, which leads the employee to resign, can be considered a termination by the employer for the purposes of the unfair dismissal regime.

Spam Act Prosecution

Is this relevant to you?

Yes if you send marketing/promotional offers via email, SMS, MMS or instant messaging

The Importance of Compliance with the Spam Act

The Spam Act regulates the sending of unsolicited messages via emails, SMS, MMS, instant messaging or the like. A failure to comply with this Act can result in hefty fines being imposed. By way of example, the Australian Communications & Media Authority (**ACMA**) recently fined a web design company \$11,000.00 for

sending unsolicited emails. The company had downloaded an email list from the internet and sent emails promoting its goods and services to persons on that list. No person on the list had consented to receiving marketing material from the company via email.

ACMA's penalties include issuing fines and an order to pay compensation to recipients. ACMA has the authority to order that penalties of up to \$1.1 million a day be imposed for repeat offenders.

What does compliance with the Spam Act require for marketing campaigns?

By way of a reminder, the Spam Act requires such messages to have the following features:

Consent-a message must be sent with the recipient's consent. Consent may be express or inferred from the recipient's conduct or an 'existing business or other relationship';

Identify-a message must contain clear and accurate information about the person or organization that authorized the sending of the message; and

Unsubscribe-a message must contain a 'functional unsubscribe' facility to allow the recipient to opt out from receiving any further messages from the organization.

Should you have any queries regarding any of the above, please contact kerry-ann.aitken@outsourcedlaw.com.au