Dismissal for offensive Facebook posts upheld as justified by the Court

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By Iqra Khan, Solicitor, Kiely Thompson Caisley, a specialist employment law firm

In the recent judgment of *Turner* v *Te Whatu Ora Health New Zealand* [2023] NZEmpC 158, the Employment Court considered a challenge from a nurse who was dismissed from her job at the District Health Board (DHB) for posts she made on her Facebook page outside of work hours.

The Employment Court found that the dismissal was justified as the posts were in breach of the DHB and the Nursing Council of New Zealand's (NCNZ) Codes of Conduct. The Court reasoned that because the posts bought the DHB into disrepute and as Ms Turner had failed to acknowledge the matter, a decision to dismiss was what a fair and reasonable employer could have done.

Background

Ms Turner was a registered palliative care nurse working at an aged residential care facility with vulnerable elderly people and people with significant health issues. In 2021, an Associate Charge Nurse was visiting the facility when she was advised that Ms Turner had been posting anti-vaccine posts on her personal Facebook account.

The DHB became concerned as Ms Turner was a well-respected nurse whom others looked up to. The Facebook posts in question had caused the staff at the care facility to question whether they should be vaccinated against COVID-19.

The DHB was provided screenshots of the posts by a concerned nurse. Ms Turner had about 86 friends on Facebook when the issue was first raised. The posts in question were generally memes or strongly worded

statements or allegations against individuals or groups. Ms Turner questioned the safety of the COVID-19 vaccine. In another post she wrote in opposition to a Māori specific COVID-19 vaccine plan. There were also a substantial number of posts which made derogatory remarks about Muslims as well as particular Muslim individuals.

Ms Turner was advised by letter that an investigation was to take place as well as a possible suspension of employment due to alleged inappropriate behaviour. The letter advised Ms Turner that the reason for the proposed suspension was the serious nature of the allegations, in particular, the alleged racially inappropriate social media posts. Ms Turner was advised to provide her thoughts on the issues raised at a proposed meeting.

Ms Turner did not attend the proposed meeting as she was having difficulty in making arrangements for representation by her union. The DHB then advised her that it would be suspending her immediately as it was not appropriate (given the nature of the allegations) for her to be at work. The DHB reasoned that a suspension was required as it needed to ensure it protected the interests of and minimised the potential risks to Ms Turner and other staff and patients.

At the disciplinary meeting, Ms Turner defended her right to post her opinions on her own Facebook page and defended those opinions. Ms Turner did not understand the possible issue with her statements but said that “maybe” she would choose her words more carefully next time. She also pointed out that her comments were on her private Facebook page and that she was angry that someone would go onto her page and report what she had said.

The DHB pointed to its social media policy and the NCNZ’s Code of Conduct which set the expectation that registered nurses are not to impose their political, religious, or cultural beliefs on anyone. Registered nurses are also expected to maintain a high standard of professionalism and personal behaviour, including when they use social media and electronic forms of communication.

Following the meeting, the DHB issued a preliminary decision of summary dismissal. Given the responses received from Ms Turner, the information collected, the volume of posts, Ms Turner’s position and responsibilities and the consequences or potential consequences of her conduct, the DHB concluded that Ms Turner had engaged in serious misconduct and that her actions had seriously breached the DHB and NCNZ’s Code of Conduct.

Ms Turner was invited to comment on the proposed decision at the next meeting. Ms Turner objected to the DHB accessing her Facebook page. She also argued she had the right to voice her opinions.

Following that feedback, the DHB confirmed the decision to terminate Ms Turner’s employment due to serious misconduct. The decision-maker commented that Ms Turner continued to focus on the how and why of this matter was being raised, rather than on the substance of the matter. He said that Ms Turner showed no insight that, as an employee of the DHB and a regulated healthcare professional, the posts were entirely inappropriate and that they would bring the DHB and the nursing profession into disrepute.

Challenge to the Employment Court

The Court was asked to consider whether the DHB unjustifiably disadvantaged Ms Turner through its decision to suspend her and whether it unjustifiably dismissed her from her employment.

The Court was also asked to consider whether the DHB acted unjustifiably by seeking and then reviewing Ms Turner’s Facebook posts.

Ms Turner also argued amongst other things that obtaining her Facebook posts amounted to a breach of her privacy and she was being discriminated against for her religious and political beliefs.

Ms Turner referred to ss 13 and 14 of the New Zealand Bill of Rights Act 1990 (BORA) to assert her right to freedom of thought, conscience, religion and to freedom of expression.

The DHB argued that BORA did not apply as the DHB was not performing a public function when it dismissed Ms Turner. In any event, even if BORA did apply, all the rights contained under that Act are subject to such reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society.

The DHB submitted it was entitled to dismiss an employee for comments that would bring the DHB into disrepute or otherwise damage the trust and confidence the employer had.

Findings of the Court

Suspension

The Court held the suspension was valid. The process followed was fair and Ms Turner had been given an opportunity to respond even through there were some issues with Ms Turner obtaining representation. Moreover, the Court accepted that the issues raised were serious and that an investigation was required, which would involve other people, including other members of staff.

No Breach of Privacy

The Court stated that because Ms Turner worked at the DHB during a time where COVID-19 was a legitimate health concern, it was reasonable for the DHB to investigate this issue and seek information about the posts Ms Turner had published. In addition, there was nothing objectionable about the manner in which the DHB went about gathering the information from Facebook. The DHB was entitled to seek information about the posts on Ms Turner's Facebook page and to ask her colleague if she would provide them.

Comments on Facebook outside of work hours

The Court held that whilst Ms Turner had made the comments on Facebook outside her work time, it did not prevent the employer from disciplining her for those comments.

The Court stated that if the out of work conduct could negatively impact the employer by bringing it into disrepute or if the conduct otherwise damaged the trust and confidence the employer has in the employee, then those out of work actions can be subject to disciplinary action. The Court held that:

> "Social media posts, even if done in the employee's free time, and containing their personal opinions, are not automatically protected from possible employment consequences."

The Court considered that 86 Facebook friends was a significant number which indicated the comments made were not truly private as they could be readily accessed by other employees of the DHB. It was noted that even if these comments were sent directly to some employees, that would still be enough to concern the DHB.

Finally, the Court considered the relevant Code of Conduct documents and held that Ms Turner should have been aware that her posts on Facebook, even to a closed group, could be the subject of an investigation and disciplinary action.

BORA

The Court did not accept that BORA applies to employment decisions as employment does not involve "performance of any function, power or duty". The Court confirmed that employment matters are more properly governed by the principles of general private law.

However, irrespective of the finding above, the Court held that reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society apply to BORA rights. Even if BORA applied, those rights do not protect everything that an employee might say, particularly if it is contrary to the interests and actions of the employer. BORA could not be used as a shield to protect Ms Turner from the consequences of her own statements.

Outcome

The Court concluded that the decision to dismiss was justified. The statements that Ms Turner made on her Facebook page, both in respect of Muslims and in respect of the issue of vaccination, ran directly contrary to the interests of the DHB.

The specific socio-political climate in which the anti-vaccination posts were made was relevant for the Court's consideration. The Court gave weight to the fact the anti-vaccination posts were contrary to the interests of the employer which was rolling out the vaccine programme.

It also considered that because Ms Turner worked in an aged residential care facility and particularly with vulnerable adults, her personal opinions could easily influence others due to her profession.

Ms Turner's posts regarding Muslims were offensive and ran counter to the principles and requirements of the DHB as contained in the DHB's Code of Conduct.

The Court also observed that during the various interactions with the Ms Turner, it was apparent that she did not appreciate the issue the DHB had taken with her actions, or the gravity of the posts and she showed no regret for having posted them. Therefore, the employer was justified in determining that nothing in Ms Turner's comments mitigated her actions.

Comment

This case demonstrates that an employee can be required not to act in a manner contrary to the expectations of their employer outside of work hours. Personal activity on social media can be subject to investigation and disciplinary action if the activity in question brings the employer into disrepute and/or undermines trust and confidence.

In addition, reliance on the right to freedom of expression or freedom of thought will not prevent an employee from suffering disciplinary consequences for their actions if appropriate.

Finally, this case serves as good reminder for employers to update their code of conduct or policies to include the employer's expectations about conduct outside of work, including social media use.

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