



Welcome to Edition 17, where I look at:

- Worker sacked because of an anti-Muslim e-mail causes the Full Bench to examine freedom of expression in Australia.
- Employers who do not attend "unfair dismissal" hearings can expect the maximum penalty.
- FWO view on underpayments.

Thiess worker sacked for anti-Muslim e-mail loses job and appeal¹

This matter is examined in the context on how the courts interpret "free speech".

The crux of this case involves an e-mail sent as an "editorial" of a 60 minutes show in relation to Muslim activities.

The content of the email message, after it was brought to the attention of the Mine's management by one of the recipients, caused an investigation and disciplinary process to be initiated (although the contents of the attachment appeared to escape the attention of management at this point). This led to Mr Anderson being dismissed later the same day. The Deputy President then stated the following overall conclusions concerning the valid reason consideration:

"Australia is a free country. Australians are free to practice the religion of their choice and to hold whatever views they wish to hold. There is no single religion that has a monopoly on perpetrating acts that members of the community view as violent and evil. Regrettably there are people who use their freedom to disseminate information that incites violence and intolerance against others. Mr Anderson is free to hold whatever views he wishes to hold, however misinformed they might be. He is free to receive and disseminate material expressing those views, provided that he does not break any law in doing so. What Mr Anderson is not free to do is to receive and disseminate such material on Thiess' electronic information systems while he is on Thiess' time. The email Mr Anderson received and forwarded incites intolerance and vilifies others on the basis of their religious belief. It had the potential to offend others and caused offence to at least one person, who reported it to a more senior manager. The email had real potential to damage Thiess' reputation in Australia and internationally. Thiess has policies and procedures that prohibit the sending of such emails and has taken reasonable steps to promulgate those policies in the workplace. It is no answer to the allegation of misconduct that the images forwarded by Mr Anderson are seen on television and other forms of media. Thiess is entitled to maintain a workplace where such material is not disseminated on its computer systems. I am satisfied and find that in all of the circumstances there was a valid reason for Mr Anderson's dismissal."

Even outside the workplace, the recognition of freedom of expression by the Constitution and the common law is significantly constrained, as was explained by the Federal Court (Bromberg J) in *Eatock v Bolt*:

"The non-absolute and qualified nature of the implied freedom of political communication has been expressly stated by the High Court on many occasions. That freedom is not absolute; "It is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution". There are

¹ Ronald Anderson v Thiess Pty Ltd [2015] FWCFB 478 (C2014/6722). JUSTICE ROSS, PRESIDENT VICE PRESIDENT HATCHER COMMISSIONER SIMPSON. Appeal against decision [PR555663](#) and order [PR555664](#) of Deputy President Asbury at Brisbane on 19 September 2014 in matter number U2013/11148.

many examples of the High Court finding that laws which intrude upon free political discourse are nevertheless constitutionally valid because those laws reasonably serve a countervailing public purpose..."

"The right of freedom of expression at common law is, by definition, qualified by those exceptions otherwise provided by law. The law of defamation imposes significant limitations on freedom of expression. Other laws imposing limitations include laws dealing with blasphemy, contempt of court and of Parliament, confidential information, the torts of negligent misstatement, deceit and injurious falsehood. Further, a wide range of legislative provisions dealing with obscenity, public order, copyright, censorship and consumer protection place restrictions on the exercise of the right to freedom of expression. These laws recognise that there are legitimate countervailing interests which require the imposition of limitations upon freedom of expression."

In the employment context, the express terms of the employment contract, employer policies incorporated into or authorised by the employment contract, and the employer's lawful and reasonable directions may also operate to impose significant constraints upon an employee's freedom of expression. ... first, that it is well established that it is lawful and reasonable for an employer to require an employee to comply with policies and directions which control the nature of communications over the employer's electronic communications system, and second, that objectively inappropriate and offensive communications by an employee in the workplace may, depending on the circumstances, constitute a valid reason for dismissal.

Mr Anderson was cross-examined by Thiess concerning whether the email was inappropriate or offensive as follows:

"MS BRATTEY: And you do not think that that is inappropriate or would cause offence?---Not to any reasonable Muslim. That would cause offence to the people who are trying to do it and don't want to be found out and up till now one of the guys who was on an invalid pension in Sydney is now over there in Iraq butchering people. Now, you said - - -?---That's what this was talking about and it's happening. MrAnderson, you sent that type of email on Thiess' system. Now, you've said to me earlier, you know, we need to treat people with dignity and respect?---Yes. That email could cause offence?---To who? Who is that going to offend? Well, Mr Anderson, it has caused offence because it was raised in Thiess? ---Well, if I said to you that there was a Catholic guy, a priest, a Catholic priest who was molesting children and I spoke out about it and you're a Catholic, are you offended by that? Again, Mr Anderson, I asked you a question?---No, are you offended by it?"

THE DEPUTY PRESIDENT: Did it occur to you in all of your taking offence at this, Mr Anderson, did it occur to you that this company deals with people of Muslim faith who might have taken offence at it or that other colleagues and people that you work with who may be of the Muslim faith could take offence at it? And did you ever express regret for the fact that you may have offended somebody with this email?

MR ANDERSON: I have yet to hear who I've offended.

THE DEPUTY PRESIDENT: Okay, but the answer to my question is no?

MR ANDERSON: I'm not - say it again. Ask it again.

THE DEPUTY PRESIDENT: Did you at any point say, "If I have offended someone I'm sorry. I should not have sent an offensive email"? Did you ever say that?

MR ANDERSON: No, I've never said that to anybody because nobody has asked me.

THE DEPUTY PRESIDENT: All right.

MR ANDERSON: Who should I say it to?

THE DEPUTY PRESIDENT: All right.

MR ANDERSON: And I certainly wouldn't say that you know I regret if it's a Muslim wants to cut my head off. I'm certainly not going to be you know apologising to him. He wants to kill me and my children and whoever else.

THE DEPUTY PRESIDENT: Mr Anderson, what I'm saying to you is if Thiess was of the view, which they expressed to you according to the notes of these discussions that they Muslim people working for them and Muslim customers and they work in Indonesia and that somebody could have taken offence at this email, did it occur to you to express regret for the fact you could have offended people rather than just simply saying, "Oh gee, if I'd known I was going to get the sack I wouldn't have sent it."

MR ANDERSON: If I had offended some Muslim who was a rational normal person of course I wouldn't want to offend them but I have no qualms whatever about offending someone who wants to cut my head off."

Turn up for FWC matters or suffer the consequences

There have been a number of recent cases where unfair dismissal has been lodged and the employer has failed to appear. Having no evidence from the "employer's side", the FWC has no choice but to accept the story of the ex-employee "unchallenged. The maximum penalty for an unfair dismissal is 26 weeks.

Matter 1²

- A 4th year apprentice who had been employed for 12 months and had previous warnings for lateness and absences.
- He allegedly advised his employer beforehand that he to have major dental treatment.
- On return to work the employee was sacked.
- The employee subsequently lodged an Unfair Dismissal claim.
- Employer failed to appear, despite being made aware of the proceedings.
- Awarded maximum under FWA – 26 weeks.
- Appeal by employer. Appeal lost. Employer to pay 26 weeks and most likely costs.

Matter 2³

- Employee terminated by email for alleged actions involving company property, company car and general performance issues.
- No submissions filed or appearance by the employer despite many attempts at contact.
- Evidence of applicant accepted. Found no valid reason for dismissal. No warning or discussion prior to termination email. Employee not notified of reason for dismissal or given opportunity to respond.

² Hume Investments (ACT) Pty Limited T/A Alpha Fresh Foods v Peter Preston (C2014/5774) [2014] FWC 8572. SENIOR DEPUTY PRESIDENT HARRISON, DEPUTY PRESIDENT SAMS, COMMISSIONER CAMBRIDGE. *Appeal against decision [2014] FWC 4903 of Deputy President Smith at Melbourne on 25 July 2014 in matter number U2014/3693.*

³ Harpur v Angel Touch Bathrooms P/L. U2014/6942. [2014] FWC 9293. Lawrence DP.

- Employer ordered to pay employer \$16,250.

Matter 3⁴

- Employer did not appear at hearing despite multiple notifications by both email and telephone.
- Applicant has made reasonable attempts to mitigate loss.
- Commission found more likely than not that the applicant would have continued in employment with the respondent for prolonged period had he not been unfairly dismissed.
- Compensation in amount of statutory cap (26 weeks) to be paid to applicant.

Fair Work inspectors identify underpayments at thousands of businesses nationally each year and resolve the vast majority by working co-operatively with employers, guiding them through the back-payment process and assisting them to put systems in place to ensure they pay their staff correctly in future.



However, if employers refuse to co-operate, Fair Work inspectors will consider compliance action, including issuing Compliance Notices, which lawfully require employers to take prompt action.

The Fair Work Ombudsman is willing to initiate legal proceedings where Compliance Notices are subsequently ignored and the Agency believes it is in the public interest to do so. Maximum penalties of \$5100 per breach for a person and \$25,500 per breach for a company (plus the underpayment and usually interest). **Source: FWO Media release.**

Until next time...

Greg Reiffel

(including Greg Reiffel HR & IR Consulting)

	<p>Remember, I am currently searching for contract (under my own ABN) or permanent opportunities. I would be grateful for any leads you may have ☺ I also would greatly appreciate if you could pass this newsletter on to your business contacts</p>	 <p>Greg Reiffel HR & IR Consulting</p>
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⁴ Luppino v Labour Barn P/L; Delitalia Market Grocer U2014/3805 [2015] FWC 572 Lawler VP