Special Feature – Alleged Religious Discrimination in Australian Employment (Andrew Thorburn and Israel Folau)

The resignation of Andrew Thorburn as Essendon Football Club's chief executive within 24 hours after being appointed because of his links to City on a Hill church condemning homosexuality and abortion has re-ignited the religious discrimination debate in Australia. You may recall a similar issue was polarising the nation when Israel Folau was sacked a couple of years ago.

Folau is a rugby player who played for the Australian National team, the 'Wallabies'. He is also a devout Christian and posted a "*Warning*" online that drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolators must "*repent*" and that "*Hell Awaits You*".

Folau likes to quote from the Bible but, although he is covered in tattoos, he is silent on Leviticus 19:28 which says; "*You shall not… **tattoo** any marks on you: I am the Lord.*" But let us leave hypocrisy aside for the moment.

Folau was employed by the Australian Rugby Board and subject to their Code of Conduct which says that in part players should "*treat everyone equally, fairly and with dignity regardless of …sexual orientation… Any form of bullying, harassment or discrimination has no place in rugby.*"

He was first suspended and ultimately sacked because of his inappropriate conduct in breach of the employer's Code of Conduct.

Sections 351 and 772 of the *Fair Work Act 2009* (the Act) prohibit an employer from discriminating against or terminating an employee's employment because of religion. Folau sued the Australian Rugby Board alleging that the Act protects him from sacking because of his religion and that protection should extent to expressing his religious beliefs. This is a test case in which the Court will need to determine whether the word "religion" should be interpreted to include protection for an employee expressing his religious views.

Section 772 states *"An employer must not terminate an employee's employment for … participation in trade union activities … or, … religion, …"*

The Australian High Court, in the matter of *Board of Bendigo Regional Institute of Technical Education v Barclay (2012) HCA 32,* dealt with an allegation that an employer took adverse action against an employee in breach of the Act. I've done a quick comparison between the High Court decision in the *Barclay* caseand Folau's matter and the similarities can briefly be summarised as follows:

- Barclay case - Sections 346 & 772 of the Act prohibit an Employer from taking adverse action against or terminating an Employee's employment because of Union activities.
- Folau case – Sections 351 & 772 of the Act prohibit an Employer from discriminating against or terminating an Employee's employment because of religion.
- Barclay, acting as Union rep, sent an inappropriate email to Union members in breach of the Employer's Code of Conduct which could damage its reputation.

- Folau, expressing his religious views, made homophobic public statements in breach of the Employer's Code of Conduct which could damage its reputation.
- Barclay was suspended and asked to show cause why he should not face disciplinary action because of his inappropriate conduct.
- Folau was suspended and asked to show cause why he should not be sacked because of his inappropriate conduct.
- Barclay argued he was carrying out Union activities and protected by s.346 of the Act.
- Folau argued that he was expressing his religious views and protected by s.772 of the Act.
- Barclay case - the Bendigo Board gave evidence that they took action because of his inappropriate conduct in breach of their Code of Conduct damaging their reputation and would have taken the same action against any person irrespective of whether they are a member of a Union.
- Folau case - the Australian Rugby Board said they took action because of his inappropriate conduct in breach of their Code of Conduct damaging their reputation and would have taken the same action against any player irrespective of religion.

Amongst other things, the High Court in the Barclay case confirmed that:

- The question of why an Employer took action is a question of fact (at 41).
- It has never been the case that an Employer was prevented by Federal Industrial legislation from taking prejudicial action against an Employee who happened to be a Union member (at 108). The same would apply to a person who happened to be a member of a particular religion.
- When looking to identify the reasons "*because*" a decision was made, the test is not an objective or subjective test, but merely whether the action was taken because of a proscribed reason (at 129).
- In assessing the evidence as to whether the onus upon the Employer is discharged, the reliability and weight of such evidence must be balanced against evidence adduced by the Employee (at 127).
- The "*unconscious*" state of mind of the decision maker is not relevant (at 134).

The High Court of Australia in Canberra [Image credit: Wikimedia Commons]

The High Court in the Barclay case confirmed that the employer's action was not in breach of the Act because, the employer took the action because of his conduct, which was inappropriate and in breach of the employer's Code of Conduct, not because of his Union activities, although his inappropriate conduct formed part of his Union activities.

Note that, unlike other countries such as the USA, there is no personal right to free speech in the Australian Constitution.

It appears to me that a fundamental question was whether Folau's expressed religious views, were a form of anti-gay hate speech and inappropriate conduct in breach of the employer's Code of Conduct. Folau supporters argue that all public expressions of religious views from the Bible should be allowed because he was simply expressing his religious views. In my view, that is not a particularly convincing argument. If that were correct, it would mean that all followers of Judaism and Christians alike should be allowed to publicly call for:

- Homosexuals be put to death (found in Leviticus 20:13)
- Employees be stoned to death for working on the Sabbath (found in Exodus 31:14)

to name but two examples.

Such public advocating of violence would constitute 'hate speech' which is not only inappropriate conduct in breach of an employer's Code of Conduct, it would also be in breach of Australian law, irrespective of whether it is sanctioned in the Bible.

Some parts of the Abrahamic religions are not compatible with civilization and a modern democracy, unless their followers do serious 'cherry picking' by ignoring and/or rationalising the barbaric parts. I reckon the majority of reasonable Australians (religious or not) will agree that there is a difference between freedom of religion (as in being free to believe and to worship free from coercion) and an alleged freedom to publicly advocate bigotry and homophobia.

Employees should be reminded that there is no freedom of expression in the Australian Constitution, there is only an implied freedom of political communication and even such a constitutionally entrenched freedom has limits. When a Government employee was sacked for Tweets criticising the Government in breach of the Public Service Code of Conduct, the High Court (as recent as August 2019) ruled that provisions of the Public Service Act do "*not impose an unjustified burden*" on the constitutionally implied freedom of political communication for those working in government roles. This implied freedom is not a personal right to free speech (Comcare v Banerji [2019] HCA 23).

The Act and other legislation, not only make it unlawful to discriminate against a person based on religion, but also make it unlawful to discriminate based on sexual orientation. Every employer's Code of Conduct should therefore prohibit the advocating of homophobic conduct. Such conduct is inappropriate, in breach of an employer's Code of Conduct and something which could bring the reputation of an employer in disrepute. An employer is accordingly not only entitled, but obliged to discipline employees for such conduct and these High Court decisions should be seen as "cautionary messages" to employees.

The outcome of alleged religious discrimination litigation will always depend upon the evidence to be presented in each case but in my opinion, if the High Court decision in the Barclay case is used as a guide, the sacking of Folau was not because of religion but because of his inappropriate conduct in breach of the employer's Code of Conduct. If the matter proceeded to trial, we could have received clarity on these issues from the High Court but, the Folau matter was settled out of Court.

In contrast to the Folau sacking, the Thorburn resignation was not a result of views he himself had expressed publicly, but because he holds a position in the City on a Hill church and the church held sermons likening abortion to concentration camps and claimed that "*practicing homosexuality is a sin*".

The Essendon players have the right to be free from homophobic vilification and the Club had a duty of care to ensure it takes all reasonable practicable steps to safeguard the health and safety of LGBTQI players. The assertion that it was Thorburn's faith that made him unsuitable for the role at the Club is misconceived in my view. It was holding a senior position in an organisation (the church) with such views that made him unsuitable. In my opinion, the sacking of a person who associates with, and who does not renounce such bigotry and homophobia, is not unlawful religious discrimination, it's the employer's duty to prevent homophobic vilification.

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