



# Is Folau for real?

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As the debate about the termination of Israel Folau's employment contract rages on and continues to divide public opinion, many of us eagerly await the outcome of Folau's legal proceedings. We are living in a time where opinions can be communicated to millions in a millisecond with the hit of a button across diverse platforms.

The extent to which an employer can control the publication of an employee's opinion on matters unrelated to their employment is just one of the complex issues raised in the Folau case. Questions about whether laws are necessary to protect people from discrimination based on religious beliefs versus existing protections from prosecution for expressing religious beliefs is another matter which requires careful consideration.

Folau's recent posts, which ultimately led to his sacking, came as no real surprise. As a fundamentalist Christian, Folau had previously expressed his religious views in 2017 and 2018

in relation to homosexuality on both Twitter and Instagram. On those occasions, Rugby Australia elected not to sanction Folau, and Folau responded by writing that he believed in inclusion and rejected any assertions of being homophobic. Folau went 'quiet' for a little while but it wasn't long before he took to Twitter and Instagram again to espouse his religious views. His now infamous Instagram post of a meme which warned "drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists..." that hell awaits them, was enough, rightly or wrongly, for Rugby Australia to take swift action. Rugby Australia immediately took steps condemning the post and within days announced a disciplinary hearing, which resulted in a finding that Folau had breached Rugby Australia's code of conduct. In May 2019, Rugby Australia terminated Folau's contract and effectively ended his otherwise brilliant playing career.

Folau was unable to bring an unfair dismissal claim due to exceeding the statutory high income threshold and instead commenced legal proceedings with the Fair Work Commission for breach of contract arguing that it was unlawful to terminate on the basis of religion. Rugby Australia will likely argue that Folau's breaches of its Code of Conduct permitted an early termination of his contract, and it's highly likely that Folau's contract expressly allowed termination in such circumstances, or in circumstances where he conducted himself publically in

a manner contrary to the terms of his employment.

While section 772 of the *Fair Work Act 2009* (Cth) makes it unlawful to discriminate on the basis of religion, it's arguable that the termination was a consequence of Folau's breach of the Code of Conduct and not his religious beliefs or the publication of the meme.

Without any express contractual provision, the law on the extent to which Folau's employer can control what Folau does privately (or says publically) is not definitive. How far should the law extend to allow employers to control their employees' private opinions? Employers can already take disciplinary action against employees who publish commentary that is detrimental to the employer's interests or reputation. Some would argue that that is sufficiently broad and that employees are already subject to overwhelming employer control.

The termination of Folau's contract has sparked a fierce debate about the right to express religious views, freedom of speech, and employers controlling how employees conduct themselves privately. In recent weeks, these issues have been compounded by Folau's fundraising efforts by first setting up a GoFundMe page to raise funds for his legal fees, which was shut down amidst public backlash. Fortunately for Folau, the Australian Christian Lobby came to his aid and have raised about \$2.2m through an online fundraiser. These fundraising efforts have made

Folau increasingly unpopular with the community. Challenging the lawfulness of his termination is one thing, expecting the public to pay for it is something else. Is Folau for real? Perhaps the more important question is why would anyone donate money towards a legal battle for a wealthy athlete? The result of which, if he is successful, will make him \$10m richer.

The outcome of this case will be of great importance as it may provide more clarity about the people's rights to express their religious beliefs which may lead to legislative reform in our anti-discrimination laws. Further, it's hoped that it will clarify the extent to which employers can restrict employees from sharing their opinions online. Until that decision is delivered, whether you represent an employer or employee, think about drafting a 'Folau clause' in your clients' employment contracts to cover potential issues identified by this case. ■

#### Contact Maria

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