



Précis Paper

The Israel Folau case against Rugby Australia

A discussion of the case brought by Israel Folau against Rugby Australia, after he was sacked for social media posts which were seen as discriminatory and offensive, and the questions it is likely to raise around unfair dismissal, religious freedom and freedom of speech in Australia.

Discussion Includes

- Folau's possible grounds of appeal
- The meaning of high-level code of conduct breach
- Other options and avenue of appeal available
- Prospects of Folau's potential claim based on the religious discrimination
- Other grounds on which Folau could be in trouble for his comments
- Right to free speech/freedom of expression
- Implications of this case in sporting industry

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1. In this edition of BenchTV, Giuseppe Carabetta (Senior Lecturer & Researcher in Employment Law, University of Sydney Business School) and Julia Park (Solicitor, AR Conolly and Company Lawyers) discuss the Supreme Court case brought by Israel Folau against Rugby Australia, after he was sacked for social media posts which were seen as discriminatory and offensive, and the questions it is likely to raise around unfair dismissal, religious freedom and freedom of speech in Australia.
2. Israel Folau's multi-million dollar contract with Rugby Australia was terminated after made controversial statements on his Instagram, saying that hell awaits homosexuals and others, statements based on his religious beliefs.
3. He had the option to appeal, however he chose not to, saying that an appeal through Rugby Australia's internal channels was not a viable option
4. Israel Folau will now most likely take the case to the Supreme Court or the Federal Court.
5. If the case were taken to the Supreme Court, it would be a civil action and it would be for a breach of contract. He would be questioning whether the termination by Rugby Australia was actually lawful under the contract, which includes the code of conduct.
6. He has been found to have committed a high-level code of conduct breach. As a result of this finding, the internal panel affirmed the original recommendation, which was to terminate.
7. The code of conduct refers to a number of things, but most relevantly in this instance, it refers to Rugby Australia's values and it sets out to preserve the integrity of Rugby competitions, and it requires players to comply with these values. This includes an inclusion policy which says, in broad terms, that a player is not allowed to discriminate, harass or insult anybody on the basis of, amongst other things, their sexuality, or their religious background.
8. While it may appear that in this instance Folau's religious views are being discriminated against, it is to be remembered that the obligations are his.
9. The code of conduct has provisions covering how players behave both on and off the field. These are, like many codes of conduct in Australian professional sport, couched in very broad terms.
10. It states that players must not use social media inappropriately, but does not explain this in any great detail. It can be understood that if the list were to begin a list of what is excluded, it is inevitable that such a list would inevitably exclude certain things also, therefore keeping it non-specific is understandable.
11. The code of conduct also requires that players to not bring the game of rugby into disrepute or discredit.

12. The code is clear that it requires players to behave in this way both on and off the field, and that Rugby Australia has a set of values which players must subscribe to.
13. One example of something which would bring the game into disrepute which the code explicitly refers to is a criminal conviction. However, it does not go beyond that example.
14. The Rugby Union Player's Association say that they want to do a full review. On the issue of religion, they want to get more detail into either the code or into individual contracts themselves so that players have more certainty in respect of these obligations.
15. Folau may pursue an appeal under the *Fair Work Act 2009 (Cth)*. In that case there would have to be a presumption that the employer made their decision on that basis, however the employer can rebut that presumption by pointing to a legitimate reason for termination of his contract. This may be why Rugby Australia have been very careful to make the distinction that this is a breach of the code of conduct and have even said that this is a breach of contract issue. The argument would be that they would have treated any other player in this sort of situation in the same way. If they can do that, their argument will be legally sound.
16. It would be difficult for Folau to argue that he was a victim of religious discrimination.
17. Australia does not have a strict right to free speech. However, the real issue may well be whether there is a freedom of contract. The case is reflective of an employer who sees these players as, in a sense, 24-hour brand ambassadors, and is trying to control these player's lives outside of the workplace, and in their personal lives. The issue in this case is whether some can actually contract away their freedom and whether you can have such an obligation under the code of conduct, or another policy.
18. There is at present a case before the High Court concerning a public servant whose contract was terminated due to posts on Twitter. In the case, the issue is freedom of political expression, however it may give some guidelines with regards to the freedom of contract issue.

BIOGRAPHY

Giuseppe Carabetta

Senior Lecturer & Researcher in Employment Law, University of Sydney Business School

Giuseppe Carabetta's research expertise lies in the field of employment law, particularly, public sector employment law. He is recognised as the principal Australian scholar in police employment law. He has been invited to consult with a range of professional audiences in relation to his research including a national Workplace Relations Committee of Inquiry and various consultative meetings with federal Workplace Relations Ministers.

Giuseppe has received a multitude of teaching awards at the National, University and Faculty levels, including two Australian Learning and Teaching Council awards and two Vice-Chancellor's Awards for Outstanding Teaching. He recently received an international Senior Fellowship Award from the Higher Education Academy, United Kingdom, in recognition of his exceptional teaching.

Giuseppe is actively involved in the field of sports law. He has facilitated workshops for professional sporting organisations including the national Rugby Union Players Association. He has also moderated various industry panel discussions including the Data Privacy, Marketing, Research and the Consumer Leaders Forum for the Association of Market and Social Research Organisation.

Giuseppe is a regular visiting scholar at The University of Bologna, Italy. He is also an Honorary Fellow of St Andrew's College within the University of Sydney.

Julia Park

Solicitor, AR Conolly and Company Lawyers, Sydney

Julia graduated from the University of Sydney with a double degree in Law and Commerce. Julia's career in law started in 2009 at A R Conolly & Company followed by various litigation work in commercial and personal injury. Julia tutored Business Law at the University of Sydney.

BIBLIOGRAPHY

Legislation

Fair Work Act 2009 (Cth)