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Swearing in the Workplace

By Joseph Kelly, Solicitor, Kelly Workplace Lawyers

Few Australians would be surprised to learn that larrikinism, as a prevalent feature of our general culture, can make its way into our work environment. In appreciating this ethos, the Fair Work Commission has generally been inclined to interpret swearing, mockery and other similar intimations towards an employer as being of a lighthearted and inoffensive nature.[1] But just as a joke can turn sour, it can equally demonstrate insult and insubordination. Previous cases illustrate that the line between a good joke and an unacceptable insult is not always an easy distinction to make; a distinction that is often determined on the subjective interpretation of the decision maker. The latest decision of *Louise Nesbitt v Dragon Mountain Gold Limited [2015]*[2] is one such case and comes as a blunt reminder that the courts are not adverse to taking a hard line on employees.

Ms Nesbitt, an employee of a small business, sent a text message to who she thought was another employee, warning him to "remember . . . [Mr Gardner] is a complete d-ck . . . we know this already so please try your best not to tell him that regardless of how much you might feel the need." In actual fact, the text was mistakenly sent to her boss, Mr Gardner. Having realised this error, Ms Nesbit sent an apology text to her boss, pleading for him to delete the last message without reading it and explaining that her 'sense of humour is to exaggerate, but it was not how she felt'.[3] When her boss read the text message, she was subsequently dismissed for gross misconduct.

Although Ms Nesbitt's language was uncouth, similar or even more vulgar language has, in the past, been treated by the FWC with less severity. In *Cronin v Choice Homes [2013]* for example,[4] an email that contained a mock resume of the employer with 'excessive masturbation' listed under 'hobbies and interests' had been sent by an

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[1] *Louise Nesbitt v Dragon Mountain Gold Limited [2015] FWC at 65*
[2] *Louise Nesbitt v Dragon Mountain Gold Limited [2015] FWC*
[3] *Louise Nesbitt v Dragon Mountain Gold Limited [2015] FWC from 23*
[4] *Mr Paul Cronin v Choice Homes (Qld) Pty Ltd [2013] FWC*

employee around the office. Although referring to the employer as a 'wanker'[5] was 'offensive' and constituted misconduct by Commission standards, it was interpreted in light of the culture of the workplace. Emails between employees and employer involving sexually explicit material, rascist jokes and offensive videos was of such an amount that the Commission concluded that no subject matter was apparently off limits at Choice Homes. As a consequence, no recipient of the mock resume could have taken it as anything other than jest in the same vein as had been previously condoned. Terminating the employment of the sender was unfair because it imposed an arbitrary standard within an already accepted culture and, in that regard, was a comparatively excessive response. Similarly in *Smith v Aussie Waste Management [2015] FWC*, a truck driver was dismissed for suggesting, *"you dribble shit, you always dribble fucking shit"* in the midst of a heated conversation.[6] Despite the fact that the conduct was accepted to be intolerable in a work environment, the Commission opinioned that it was not "sufficiently insubordinate" to establish a serious reason for dismissal.

However, the courts have more recently drawn a distinction between "everyday" or commonplace swearing that may be acceptable because the work environment condones it and swearing that targets an individual in 'malicious' fashion. The latter situation arose in *Rikihana v Mermaid Marine Vessel Operations [2014] FWC,* where a wharf worker was found to have been fairly dismissed for calling the wharf leader a "cock" and "dick". Commissioner Williams found that although swearing could not be a surprising feature of dock worker vocabulary, insubordination was borne by fact that the employee was specifically and "aggressively targeting another person". The fact that Mermaid had evidence in the past of a culture of offensive swearing did not aid the employee because Mermaid had since introduced a new behavioural standard.

So while calling your boss a 'complete dick' may seem clearly offensive and incompatible with continued employment to most, the courts are not automatically as discerning.

It can also be the case that even where the attitude and manner displayed by the employee cannot of itself justify dismissal, the content of the actual words spoken by the employee can. One recent example is where an employee, having been angered by a previous verbal altercation with a manager, told his boss that " I don't want to work with that snotty nose prick anyway and I will look for another job". Magistrate Garnett found that it was not relevant that the exchange may be considered offensive because, at the time the employee uttered those words, the employment relationship had ended.[7] It was therefore unnecessary to determine whether the employment relationship was irreparable by way of offensive language, as it had already been terminated.

The FWC has also considered that the insubordination displayed by offensive language must be discounted where the employer has provided an environment conducive to swearing. An interesting situation arose in *Keenan v Leighton Boral Amey Joint Venture [2015]* FWC where an employer who had supplied free alcohol at a staff Christmas party could not dismiss a drunk employee who had told them to 'fuck off'. Vice President Hatcher found that it would not be be fitting, in the name of fairness, of an employer to set the standards of a function to then dismiss an employee for acting in a certain way. That is "*If alcohol is supplied in such a manner it becomes*

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[5] *Mr Paul Cronin v Choice Homes (Qld) Pty Ltd [2013] FWC at 25*
[6] *Smith v Aussie Waste Management [2015] FWC at 31*
[7] *Parker v Cetel Communications Pty Ltd [2013]*

entirely predictable that some individuals will consume an excessive amount and behave inappropriately."

In a similar vein, the most recent case of *Mr Thomas Vernham v Jayco [2015] FWC,* illustrates that an employer cannot look to statements made in isolation; it must be aware of any surrounding circumstances that may operate to mitigate against the veracity of the statements. Mr Vernham sent emails to collegues implying that he was planning physical violence against staff members. These threats were taken more seriously upon receiving an anonymous call suggesting that Vernham was going to kill Jayco staff and commit suicide.[8] On these facts, Jayco considered there to be a sufficient level of threat to dismiss him. Commissioner Cribb disagreed. It was her opinion that Mr Vernham was suffering a great deal of stress and deteriorated mental state at the time the statements were made. Therefore, *"there was a direct casual link between his mental state at the time he sent the emails and his decision to send the emails…..[and] it is apparent that the company was aware, at the time Mr Vernham sent the emails, that he was not in a good mental state."* It was thus incumbent on Jayco to take this into account as a mitigating factor, rather than taking his threats on face value and jumping to conclusions without perusing the medical evidence available to them.

The FWC will therefore take into account the circumstances of the inappropriate statement, and whether the employer themselves had improved the probability of such behavior occurring, or making an omission in considering circumstances that may have mitigated against the seriousness of the statement.

More complicated still is the situation where a comment of the employee has serious propensity to affect the reputation or image of the company or business because a number of persons have had access to the disparagement. In *Fitzgerald v Escape Hair Design [2010],* for example, comments were posted on Facebook insinuating that the employer was not paying wages correctly. It was found that although the comments were illustrative of insubordination which existed until the comments were removed, it had been limited to Facebook friends only, a maximum of 10 customers were potentially exposed to the comments and there was no identification of the business specifically.

In these situations, it seems that the Commission will be more inclined to focus on the exposure of the comments, any limitations on accessing the comments and the specificity and severity of allegations made in determining whether the employer can establish the conduct has a sufficient connection to employment.[9] That is, the comments take on economic considerations.

What the sum of these previous cases shows is that it is largely indiscernible as to how the FWC will exercise their discretion in deciding whether the employee/employer relationship is salvageable. A high level of vulgarity may actually tip the scales in favour of it being a joke. The employer must also expect such language where they have provided the environment and the proportionality of the punishment will depend on what culture the workplace has been allowed to adopt. Where there is a clear intention from the employee that the employment relationship is over, then the court will often give efficacy to that intention.

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[8] *Mr Thomas Vernham v Jayco [2015] FWC* at 37

[9] *Rose v Telstra [1998] AIRC*

It was in this framework that the most recent case of Nesbitt was decided. The FWC in this case placed great importance on the literal words used. In this vein, Ms Nesbitt claimed that the use of the word 'complete' mitigated against the seriousness of term 'dick' on the basis that the recipient was a young worker and that young people use the word 'complete' often when electing to use a humorous tone. Commissioner Cloghan disagreed. It was his opinion that the word 'dick' is derogatory, and the word 'complete' conveys that the person is a dick "without exception".

The decision was also made in light of the small business code, which permits dismissal without notice when the employer believes on reasonable grounds that the conduct is sufficiently serious to justify immediate dismissal. The standard of conduct thus requires objective facts that provide the conduct with the requisite seriousness; an onus placed on the employer.[10] It was therefore relevant that the past behavior between Ms Nesbitt and Mr Gardner be considered, for the text came at the end of a culmination of events that had already eroded the relationship.[11] Evidence of feelings of dissatisfaction with her role, feelings of being ignored and a disdain for her relocation procedure meant that the FWC was far less inclined to believe the text from Ms Nesbitt was of a light-hearted nature.[12] Rather it could be characterised as a spiteful comment that reflected her true appreciation of the broken relationship. Commissioner Cloghan also considered that the fact that Ms Nesbitt was the only employee meant that the preservation of trust and confidence was absolutely necessary. Mr Gardner was therefore justified in holding a belief that the assertion was serious enough to warrant dismissal.

Perhaps the most important lesson gleaned from the reasoning of Nesbitt is that the FWC has propensity to adopt a very literal interpretation when considering the words used; giving them their natural meaning, which may or may not accord with the common use of the insult.

What is important for employees to take away from this body of case law is that the current legal framework requires that a dismissal for conduct must have 'valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees'. If this standard is not satisfied, the dismissal will be characterised as harsh, unjust or unreasonable. It is largely within the discretion of the FWC as to what constitutes a valid reason and as to what other matters may be considered as is demonstrated by case law. As an employee, one should of course be mindful to refrain from making comments that may be regarded as offensive. If a slip up occurs, there is now a stronger possibility that the comment may provide a 'valid reason' for dismissal or reprimand. The common indicia that will be applied will likely include:

- the context in which the comments were made, the culture of the workplace and the literal or common usage of the words actually used;
- the level of trust and confidence expected of the employee given their position within the business or company (appreciating that it may be higher for small businesses);
- the record of the employee, their length of service and previous work within the company; and
- the status of the relationship between employee and employer.

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[10] *Pinawin v Domingo [2012] FWAFB, at 24*
[11] *Louise Nesbitt v Dragon Mountain Gold Limited [2015] FWC at 64*
[12] *Louise Nesbitt v Dragon Mountain Gold Limited [2015] FWC at 65*

About the author

Joseph Kelly has had extensive experience in commercial litigation and workplace law, having advised employers and employees on all issues relating to industrial relations and employment law. Joseph has advised industry bodies, unions, employers and government and continues to run training and information seminars for legal practitioners. Joseph is currently the Principal of Kelly Workplace Lawyers. [web: www.kwlawyers.com.au]

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