



ISSUE

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a regular newsletter for clients of  
mcphail gibson & zwart ltd

## Client Services:

- General advice in relation to all employee-related issues
- Resolving Personal Grievances and Workplace Disputes
- Employment Agreements - drafting and negotiation
- Employment Relations Authority/Employment Court and Mediation Representation
- Employment Relations Strategies
- Training
- Monthly newsletter

## Facebook: When Freedom and Folly Collide

A recent Employment Relations Authority (“**Authority**”) Case, **Turner v Wairarapa District Health Board** is an important reminder that social media posts can cause widespread issues, affect reputations and even ruin careers.

### Background

Amanda Turner was employed by Wairarapa District Health Board (“**WDHB**”) as a registered community palliative care nurse. In March 2021, WDHB became aware of a concern raised with a local aged care facility involving a number of Ms Turner’s Facebook posts. At around the same time, another individual provided WDHB with extracts of Ms Turner’s posts that contained disparaging and generalised comments about the religious affiliation of certain New Zealanders. It later transpired that this individual was one of Ms Turner’s co-workers.

Unfortunately the decision does not set out the detail of the posts beyond noting that they involved anti-vaccination information/advice (one post described the only available vaccine at the time as a “*murderous vaccine*”), criticism of government actions to protect the community from Covid, and comparative religious issues. The posts were shared with approximately 200 people. Ms Turner was linked to WDHB in the posts and at least two other recipients of the posts were WDHB nurses. There was concern that Ms Turner’s posts was potentially impacting WDHB staff’s vaccine uptake.

### Suspension

WDHB proposed to suspend Ms Turner and tried to arrange a meeting to hear her views on the proposed suspension. However, Ms Turner’s representative emailed WDHB,

advising that Ms Turner did not agree to be suspended and that the meeting should be postponed until further details on the allegations were provided. This meeting did not eventuate, and Ms Turner was placed on suspension without being given an opportunity to meet with WDHB.

### First Meeting

WDHB later held a meeting with Ms Turner to discuss the allegations against her. During this meeting, Ms Turner questioned the source of the Facebook posts. WDHB refused to disclose the source of the posts.

Ms Turner argued during the meeting that the posts were private and conducted with “*likeminded people*”. She said she was “*gobsmacked*” that the posts were at issue and attempted to justify her position. When asked whether she saw the posts as being inappropriate, Ms Turner acknowledged that some people might be offended by them, but she was entitled to express her opinion. WDHB noted that it would examine matters from the perspective of Ms Turner’s professional obligations and the WDHB Code of Conduct and would come back with a preliminary decision.

### Preliminary Decision

WDHB wrote to Ms Turner with its preliminary view that her behaviour was inappropriate and represented a serious breach of both the NZ Nursing Council and WDHB’s Codes of Conduct and professional standards. WDHB could not be confident that Ms Turner could “*maintain expected standards of professional behaviours without having [her] personal view and values bringing the DHB into further disrepute.*” WDHB proposed to dismiss Ms Turner without notice.

## Disclaimer:

This newsletter is not intended as legal advice but is intended to alert you to current issues of interest. If you require further information or advice regarding matters covered or any other employment law matters, please contact **Dean Kilpatrick, Jane Taylor, Deborah Hendry or Jane Jarman.**

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## Second Meeting

During this meeting, Ms Turner's representative confirmed that Ms Turner had nothing further to add regarding the content of her Facebook posts. Ms Turner's representative instead sought clarification of how WDHB had obtained the Facebook posts. WDHB again refused to identify who had disclosed the posts. Ms Turner's representative also challenged WDHB's conclusion that people had been affected by the posts and claimed that WDHB should investigate further. Ms Turner's representative reiterated that Ms Turner was entitled to express her personal views.

## Outcome

The decision-maker at WDHB noted that he:

*[Had] seen no insight from [Ms Turner] that as an employee of the DHB and a regulated healthcare professional the posts were entirely inappropriate, and that these would bring the DHB and nursing profession into disrepute.*

Ms Turner had destroyed WDHB's trust and confidence in the employment relationship and she was dismissed without notice for serious misconduct.

## Employment Relations Authority

Ms Turner raised a personal grievance and the matter went to the Authority. She argued:

- The suspension was unjustified and she had been disadvantaged by not being able to comment on the proposal to suspend;
- WDHB breached her privacy;
- WDHB had discriminated against her;
- She was entitled to express her personal opinions.

The Authority noted that not meeting with Ms Turner prior to suspending her was inconsistent with WDHB's policy. However, despite not attending a meeting, Ms Turner's then representative had emailed WDHB and communicated Ms Turner's view on the proposal to suspend, prior to the decision being made. The Authority ultimately decided that the reasons for suspending Ms Turner were appropriate. Further, the failure to meet was a minor procedural defect and did not result in Ms Turner being treated unfairly, mainly because it was highly unlikely Ms Turner would have been able to persuade WDHB not to suspend her in the circumstances.

Ordinarily, not disclosing the source of a complaint can be a procedural issue that may give rise to a personal grievance. However, the Authority found that this was not relevant as Ms Turner had admitted that she made the posts. The Authority found that in the circumstances, non-disclosure of the source of the complaint was appropriate.

The Authority also found that Ms Turner "*chose a belligerent approach*" and took no immediate steps to address WDHB's concerns or delete the posts. Ms Turner also failed to acknowledge that her position and standing in the community made her postings on the vaccine inappropriate. This goes to show that an employee's attitude during the process and their response to any allegations can go a long way to either help or harm their case. It even appeared from evidence that if Ms Turner had taken a different, more conciliatory approach, WDHB may have decided not to dismiss her.

Ultimately the Authority found that WDHB had complied with its employment obligations, despite some minor procedural defects, and Ms Turner had not been unjustifiably disadvantaged, unjustifiably dismissed or discriminated against.

Further, Ms Turner disclosed during the hearing that she was awaiting a New Zealand Nursing Council disciplinary tribunal hearing related to this matter. She also confirmed that because of her stance on one of the issues in her social media posts, she had not been able to find another nursing position.

A few points to take away from this case:

- Conduct outside of the workplace, including social media posts, can be the subject of disciplinary proceedings if there is the potential to bring the employer into disrepute. Such conduct can also demonstrate that an employee has lost the attributes essential for a particular job.
- Defects in an employer's procedure are not necessarily fatal to a case if the defects are minor and do not result in the employee being disadvantaged.
- The right to freedom of expression does not necessarily give one freedom from the consequences of what they express.