EMPLOYMENT CONTRACTS AND ISRAEL FOLAU

Andrew S Kulikovsky [*]

ABSTRACT

Rugby Australia's termination of Israel Folau's playing contract for posting a paraphrase of Biblical verses that communicate the sinfulness of various behaviours including homosexuality, should concern all Australian workers, not just Christians and people of other religious faiths. This article examines the facts and circumstances of Folau's case, employee rights regarding freedom of religion, and the meaning and effect of terms of employee contracts, Codes of Conduct, and other corporate policy documents. The harshness of the penalty is also discussed, along with a brief discussion of the case law relating to the extent to which employers may control and regulate an employee's behaviour and their moral, political and religious expression.

I. INTRODUCTION

On 10 April 2019, Australian Rugby Union star and devout Christian, Israel Folau, posted a comment on Twitter paraphrasing 1 Corinthians 6:9-10. The comment stated that Hell awaited those who had committed one of a number of sins, including homosexuality, unless they were repentant.

Folau's comments were widely condemned in the media and by Rugby administrators and sponsors—though many others on talkback radio, letters to the editor, and in on-line feedback comments were supportive of his right to express his beliefs even if they disagreed with him.

[*] B.App.Sc.(Hons), LL.B., M.A. Independent writer and researcher

Nevertheless, on 17 May 2019 Rugby Australia terminated Folau's contract after finding him guilty of a High Level Breach of the player's Code of Conduct.

This article seeks to use the Israel Folau case to explore the nature of the employment contract, the incorporation of a Code of Conduct into its terms and conditions, and the effect it has on both the rights of the employee and employer.

II. THE FACTS

On 12 September 2017, the Australian Rugby Union publicly announced support for the 'Yes' campaign ahead of the forthcoming Australian Marriage Law Postal Survey. Folau responded by tweeting 'I love and respect all people for who they are and their opinions. But personally, I will not support gay marriage.'

On 4 April 2018, Folau sent out an Instagram message and an accompanying graphic relating to 'God's Plan.' One user responded with the question: 'What was God's plan for gay people?' Folau replied: 'HELL...unless they repent of their sins and turn to God.' As a consequence, Rugby Australia Chief executive Raelene Castle put out the following statement:

> Israel's comment reflects his personal religious beliefs, however it does not represent the view of Rugby Australia or NSW Rugby. We are aligned in our view that rugby is a game for all, regardless of sexuality, race, religion or gender, which is clearly articulated in rugby's inclusion policy. We understand that Israel's comment has upset a number of people and we will discuss the matter with him as soon as possible.[1]

However, Folau was not formally disciplined or sanctioned by the organisation at this time. Nevertheless, a spokesman for major sponsor Qantas said: 'We've made clear to Rugby Australia that we find the comments very disappointing,' and indicated that Qantas would considering pulling their sponsorship of the Wallabies if Folau or any other player made further 'homophobic' statements.[2]

---

[1] Raelene Castle, 'Wallabies Captain Defends Folau's Right to Opinion Amid Qantas Disappointment', *SBS News* (online), 6 April 2018 <https://www.sbs.com.au/news/wallabies-captain-defends-folau-s-right-to-opinion-amid-qantas-disappointment>.

[2] Jamie Pandaram, 'Qantas may review Wallabies sponsorship over Israel Folau's views on homosexuality', *The Australian* (online), 10 April 2018, <https://www.theaustralian.com.au/sport/rugby-union/qantas-disappointment-at-israel-folau-comments-on-homosexuality/news-story/d0410217fbc5a6daaac5ace32336b7e0>.

On 17 September 2018, Folau entered into lucrative contract with the Waratahs and Rugby Australia, reportedly worth around $4 million.

On 10 April 2019, Folau posted on Instagram an image reading 'WARNING Drunks, Homosexuals, Adulterers, Liars, Fornicators, Thieves, Atheists, Idolaters, HELL AWAITS YOU. REPENT! ONLY JESUS SAVES'—a loose paraphrase of 1 Corinthians 6:9-10 in the Bible. Following the image, Folau wrote: 'Those that are living in Sin will end up in Hell unless you repent. Jesus Christ loves you and is giving you time to turn away from your sin and come to him.'

Folau's message was immediately condemned on-line, in the media, and by sponsors, including major sponsor Qantas. Rugby Australia consequently issued a statement condemning Folau's comments and announcing its intention to terminate his playing contract:

> Whilst Israel is entitled to his religious beliefs, the way in which he has expressed these beliefs is inconsistent with the values of the sport. We want to make it clear that he does not speak for the game with his recent social media posts.
>
> Israel has failed to understand that the expectation of him as a Rugby Australia and NSW Waratahs employee is that he cannot share material on social media that condemns, vilifies or discriminates against people on the basis of their sexuality…
>
> As a code we have made it clear to Israel formally and repeatedly that any social media posts or commentary that is in any way disrespectful to people because of their sexuality will result in disciplinary action.
>
> In the absence of compelling mitigating factors, it is our intention to terminate his contract.[3]

However, the attack on Folau provoked an unexpected reaction: many Australians were unhappy with the way Folau was being attacked and victimised in the media over his beliefs. They flooded talkback radio with calls in support of the right of Folau to hold and express his faith, even if they did not agree with his views.

[3] Rugby Australia, 'Rugby Australia and NSW Rugby Union statement regarding Israel Folau' (Media Release, 11 April 2019) <https://australia.rugby/news/2019/04/11/rugby-australia-and-nsw-rugby-union-statement-regarding-israel-folau>.

Nevertheless, on 15 April 2019, after an internal hearing, the Rugby Australia Code of Conduct Tribunal found that 'Folau had committed a high-level breach of the Professional Players' Code of Conduct.'[4] A termination notice was subsequently sent to Folau.

In response, lawyers for Folau lodged a claim with the Fair Work Commission, arguing the sacking breached Section 772 of the Fair Work Act 2009 (Cth), a clause that deems it unlawful to terminate employment on the grounds of religion. Folau's statement of claim seeks $5m in lost earnings plus substantial damages and civil penalties, but could rise to as much as $10m when sponsorship deals and Rugby World Cup potential earnings were considered.

III. ISSUES AND QUESTIONS

Is Folau's termination a matter of free speech and/or freedom of religion? If so, how have his rights been infringed? Is it a simple breach of contract issue? If so, what are the terms and how have they been breeched? Was there procedural fairness in the investigations and hearings? Do Folau's actions warrant the termination of his contract? What role did Rugby Australia's sponsors play? Did they pressure or overtly influence the result of the process?

Rugby Australia has suggested that Folau's comments were condemning, vilifying and discriminating against people on the basis of their sexuality, and was therefore in violation of their Inclusion Policy, clause 1.6:

> Rugby…must continue to be a sport where players, officials, volunteers, supporters and administrators have the right and freedom to participate regardless of gender, sexual orientation, race or religion and without fear of exclusion. There is no place for homophobia or any form of discrimination in our game and our actions and words both on and off the field must reflect this.

Similarly, Folau was accused of breaching the Players' Code of Conduct, clause 1.3:

> Treat everyone equally, fairly and with dignity regardless of gender or gender identity, sexual orientation, ethnicity, cultural or religious background, age or disability. Any form of bullying, harassment or discrimination has no place in Rugby.

In addition, it was suggested he breached the Players' Code of Conduct, clause 1.8:

[4] Rugby Australia, 'Israel Folau issued breach notice' (Media Release, 15 April 2019) <https://australia.rugby/news/2019/04/15/israel-folau-issued-breach-notice>.

> Do not otherwise act in a way that may adversely affect or reflect on, or bring you, your team, club, Rugby Body or Rugby into disrepute or discredit. If you commit a criminal offence, this is likely to adversely reflect on you and your team, club, Rugby Body and Rugby.

But what does it mean to be homophobic or discriminatory? How does one bring himself, Rugby Australia, or the game of Rugby into disrepute? What tests are involved?

IV. FREEDOM OF SPEECH AND RELIGION

Many defenders of Folau have argued this is an issue of free speech. But this is a dubious argument. Folau has not been prevented from speaking his mind, or prosecuted for doing so. The only limitation is that he cannot share his views in a wide reaching public forum—such as social media—while being contracted to Rugby Australia. Given that the legal protection for free speech in Australia is very weak, an appeal on the basis of free speech is likely to fail.

Alternatively, an appeal could be made on the basis of freedom of religion. The law in this area is much stronger. Under the *Fair Work Act 2009* (Cth) s351 (1), it is expressly unlawful for an employer 'to take adverse action against a person who is an employee…of the employer because of the person's…religion…' The same prohibition extends to termination of employment (s772(1)(f)). In addition, Rugby Australia's own Inclusion Policy clause 1.6 states: 'Rugby…must continue to be a sport where players…have the right and freedom to participate regardless of…*religion* and without fear of exclusion.'

On the face of it, Rugby Australia appears to have discriminated against Israel Folau on the basis of his religion by terminating his contract as a result of him expressing his religious views—views that do not align with the views of Rugby Australia's management and its major sponsor Qantas. Moreover, there are no applicable defences that could justify Rugby Australia's actions. Rugby Australia have explicitly stated that Folau's playing contract was terminated as a result of his social media posts that expressed his religious beliefs regarding homosexuals.[5]

[5] Rugby Australia, above n 3.

Rugby Australia will most likely argue that their action against Folau was not motivated by antagonism to his religious beliefs, but because Folau breached his duty as an employee to obey a lawful, reasonable instruction from his employer. Moreover, given the repeated nature of the 'misconduct,' termination of his contract was justified. But demanding Folau not publicly express his religious beliefs on his own time is not a reasonable request. His beliefs have nothing to do with his obligations or ability to play rugby.

Rugby Australia may also argue that their concern was actually regarding what they consider to be the disrespectful manner in which his religious beliefs were expressed. However, this is a very subjective argument.

As demonstrated in the recent campaign to legalise same-sex marriage, whether or not they believe they were 'born this way,' homosexuals consider their sexual orientation as inseparable from their innate identity. Thus, same-sex marriage campaigners argued that prohibiting same-sex marriage is a denial of their fundamental human rights. Similarly, to suggest that homosexuals can change their orientation is a denial of their identity and biological reality.

But from Folau's Christian perspective, every human being is created in "the image of God" and is either male or female (Genesis 1:26). Man and woman were created for each other (Genesis 1:27; 2:21-24) and homosexuality was condemned (Leviticus 18:22; 20:13). Moreover, each person has free will and is accountable for their actions (1 Peter 4:5). Human beings are not pre-programmed robots enslaved by their genes.

Given the inseparable nature of their identity and sexuality, any expression of concern, criticism or disapproval homosexuality is likely to be considered disrespectful to homosexuals because, in their view, it is a direct personal attack.

Nevertheless, some Christian leaders have also expressed concern over the way Israel Folau expressed his beliefs. Again, their views are subjective. A more instructive approach would be to consider the way Jesus of Nazareth, the founder of Christianity expressed his criticisms and disapprovals:

> You belong to your father, the devil, and you want to carry out your father's desire. He was a murderer from the beginning, not holding to the truth, for there is no truth in him. When he lies, he speaks his native language, for he is a liar and the father of lies (John 8:44).
>
> Woe to you, teachers of the law and Pharisees, you hypocrites! You travel over land and sea to win a single convert, and when he becomes one, you make him twice as much a son of hell as you are. Woe to you, blind guides! You say, 'If anyone swears by the temple, it means nothing; but if anyone swears by the gold of the temple, he is bound by his oath.' You blind fools! (Matthew 23:15-17)
>
> Woe to you, teachers of the law and Pharisees, you hypocrites! You clean the outside of the cup and dish, but inside they are full of greed and self-indulgence (Matthew 23:25).
>
> Woe to you, teachers of the law and Pharisees, you hypocrites! You are like whitewashed tombs, which look beautiful on the outside but on the inside are full of dead men's bones and everything unclean. In the same way, on the outside you appear to people as righteous but on the inside you are full of hypocrisy and wickedness (Matthew 23:27-28).
>
> You snakes! You brood of vipers! How will you escape being condemned to hell? (Matthew 23:33)

Jesus was clearly not shy about using strong and harsh words to highlight unrighteous behaviour and the destiny of those who practise it. Israel Folau, as a devoted follower of Jesus, was simply imitating Jesus, his Lord, Saviour, and God.

V. TERMS OF THE CONTRACT

a. Defining the Contract Terms

When Rugby Australia first indicated it intended to terminate Folau's playing contract, many commentators assumed there was an explicit clause prohibiting Folau from posting such comments on social media. Although Folau's contract has not been made public, it now appears no such clause was inserted. Instead, Rugby Australia relied on the provisions of their Inclusion Policy and their Code of Conduct.

This raises the question of whether the terms of the Inclusion Policy and Code of Conduct actually form part of the playing contract that Folau signed up to on 17 April 2018.

As with any other contract, employment contracts may incorporate terns from other documents such as codes of conduct and organisational policies, provided the additional terms are (1) referenced in the primary contractual instrument; (2) provided to the person before their employment contract is formed; and (3) 'promissory' in nature i.e. the term

employs language indicating a promise to act rather than making a mere representation. Note also that any subsequent variations to the referenced instrument will not prevent it from being binding provided the modifications do not alter it to an extent that is capricious and unfair.[6]

In Folau's case, the above would mean his playing contract or letter of offer would have to explicitly refer to Rugby Australia's Inclusion Policy and Code of Conduct, and the text of these documents would have to have been supplied—or at least made accessible—to Folau before he signed on 17 April 2018. If Rugby Australia did not do this then there is a strong case that both the Inclusion Policy and Code of Conduct do not form part of his playing contract, and therefore the provisions in those instruments cannot be used to justify its termination.

b. Agreement to Terms

It is well established contract law that—for a contract to be complete—both parties must agree on the meaning of all the terms. As Dixon CJ and McTiernan, Williams, Fullagar and Taylor JJ explained, 'no contract is concluded until the parties negotiating are agreed on all the terms of their bargain—unless indeed the terms left outstanding are 'such as the law will supply.'[7]

Assuming the Inclusion Policy and Code of Conduct were validly incorporated into the terms of Folau's playing contract, was there agreement—a 'meeting of the minds'—between Rugby Australia and Israel Folau with respect to the meaning of clause 1.6 of the Inclusion Policy and clauses 1.3 and 1.8 of the Code of Conduct? Did Folau and Rugby Australia have the same view of what it means to be 'homophobic' and what constitutes discrimination? Did Folau and Rugby Australia have the same view of what it means to bring oneself, Rugby Australia or the game into disrepute?

Clearly, Rugby Australia's view is that Folau's comments were indeed homophobic and discriminatory, and therefore brought Rugby Australia and the game into disrepute. However, Folau does not see it that way. After private discussions with Folau, former Wallabies captain Nick Farr-Jones defended him, saying: 'From Israel's perspective he absolutely believes he's done nothing wrong. He believes that he's put those posts out in

[6] See *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 674.
[7] *Milne v Attorney-General (Tas)* (1956) 95 CLR 460, 473.

love to people hoping that they'll listen as a warning to the sinner, of the consequences of sin. I would say in a nutshell Israel loves the person, he hates the sin.'[8] He added that Rugby Australia did not make its social media guidelines clear to Folau, despite Rugby Australia claiming it had formally warned him. 'He was basically told do it in a non-offensive way. You can continue to communicate like this and communicate your faith, just do it in a respectful way.'

Note also that in a letter to the Rugby Australia Board of Directors dated 8 June 2019, Folau accused them of leaking details that were meant to be private and confidential and telling patent lies including that their 'expectations were made clear to [him] by Ms Castle.'[9] In response, Rugby Australia defended their actions but did not deny Folau's claims.

In light of the above, there is serious doubt whether Folau and Rugby Australia had at any time the same understanding of what Rugby Australia expected of him. This calls into question whether the playing contract was complete—or at least whether these particular terms are part of the contract—unless the law can supply the meaning of the terms.[10]

VI. HOMOPHOBIA AND DISCRIMINATION

Israel Folau's comments have been characterised by Rugby Australia as homophobic, and an instance of discrimination and vilification of people on the basis of their sexuality. But in what objective way are his comments homophobic? In what way do they discriminate or vilify?

Rugby Australia's Inclusion Policy defines "homophobia" as 'the irrational fear or hatred of, or aversion to, people who are homosexual (gay or lesbian), or who are perceived to be homosexual.' "Discrimination" is defined as 'treating someone less favourably than another person in the same or similar circumstances because of a particular characteristic.' To 'vilify' someone is to abuse and disparage them.

[8] Elias Visontay, 'Wallabies Legend Nick Farr-Jones Defends Israel Folau' *The Australian* (online), 8 May 2019 <https://www.theaustralian.com.au/sport/rugby-union/wallabies-legend-nick-farrjones-defends-israel-folau/news-story/d3f69ce39466505c3d1929855e494a58>.

[9] Letter from Israel Folau to Rugby Australia Board of Directors, 8 June 2019, <https://www.michaelsmithnews.com/2019/06/israel-folaus-letter-to-rugby-australia.html>.

[10] Whether the Law can provide the meanings of these terms is an objective question, answered by analysing the relevant legislation and/or case law.

Regarding "homophobia," the definition indicates that a person must express a fear of homosexual people that is "irrational" i.e. without any reasonable justification, or alternatively, express a hatred of homosexual people. But Folau, as a devout practicing Christian, has repeatedly made it clear that his views on homosexuality are not the result of prejudice or bigotry, but are based on his Christian morals. Moreover, there is no evidence that Folau has personally abused or disparaged homosexual people, or expressed any hatred or malice toward them. Nor has he treated homosexual people in a less favourable way, and no one has made any such complaints against him. Indeed, in the recent UK case of *Ngole v University of Sheffield*, the Court of Appeal pointed out that '[t]he mere expression of religious views about sin does not necessarily connote discrimination.'[11]

But Rugby Australia, the media, and many in the general public, hold to the common understanding of the term 'homophobia,' where any criticism of homosexuality or departure from total affirmation is, by definition, homophobic. As in Ngole, where the University apparently wanted to impose a blanket ban on Ngole expressing his religious views in any public forum, Rugby Australia's expectation was that Folau would cease making any public statements that were critical of homosexuality.

After Folau posted his response to the enquirer regarding God's plan for homosexuals on 4 April 2018, and long before his post on 10 April 2019 that led to the termination of his contract, Folau wrote a detailed explanation of his beliefs in *PlayersVoice*—an online publication he co-founded:

> Since my social media posts were publicised, it has been suggested that I am homophobic and bigoted and that I have a problem with gay people. This could not be further from the truth. I fronted the cover of the Star Observer magazine to show my support for the Bingham Cup, which is an international gay rugby competition for both men and women. I believe in inclusion. In my heart, I know I do not have any phobia towards anyone…I don't expect everyone to believe what I believe. That goes for teammates, friends and even family members, some of whom are gay.[12]

Folau went on to explain that he was motivated, not by hatred or bigotry, but by a genuine concern for all unrepentant sinners:

> I think of it this way: you see someone who is about to walk into a hole and have the chance to save him. He might be determined to maintain his course and doesn't want to hear what you have to say. But if you don't tell him the truth, as unpopular as it might

[11] *Ngole v University of Sheffield* [2019] EWCA Civ 1127, [115].
[12] Israel Folau, 'I'm a Sinner Too' *PlayersVoice*, 16 April 2018, <https://www.playersvoice.com.au/israel-folau-im-a-sinner-too/>.

> be, he is going to fall into that hole. What do you do? In this case, we are talking about sin as the Bible describes it, not just homosexuality, which I think has been lost on a lot of people…if you sin, which we all do, and do not repent and seek forgiveness, you will not inherit the kingdom of God.[13]

Nor can it be reasonably said that Folau was guilty of bullying or harassment. His comments were not directed at any particular person or specific group of persons. Indeed, Folau's comments did not exclusively refer to homosexuals but also mentioned drunks, adulterers, liars, fornicators, thieves, atheists, and idolaters—which more or less includes everyone. Moreover, it is absurd to think that merely expressing an opinion—even a very unpopular one—constitutes bullying or harassment.

Although Folau's views are unpopular and considered to be intolerant, that does not automatically make them 'homophobic' or 'hateful' nor does holding such views necessitate treating homosexual people negatively.

VII. BRINGING INTO DISREPUTE

Did Israel Folau breech clause 1.8 of the Code of Conduct by bringing himself, Rugby Australia, or the game into disrepute or discredit? It is important to note that, apart from a reference to criminal offences, the Code of Conduct does not define what types of conduct may be regarded as bringing oneself, Rugby Australia or the game into disrepute.

Major sponsor Qantas had expressed concerns over Folau's comments, making it clear to Rugby Australia that they considered his comments "very disappointing."[14] After Folau was found guilty of a high-level breach of the Code of Conduct on 15 May 2019, Qantas CEO Allan Joyce stated: 'We don't sponsor something to get involved in controversy. That's not part of the deal… We expect our partners to take the appropriate action. It's their issue, they have to deal with it.'[15]

---

[13] Ibid.

[14] Helen Davidson, 'Israel Folau's Anti-Gay Comments 'Very Disappointing,' Qantas Says' *The Guardian Online*, 6 April 2018, <https://www.theguardian.com/sport/2018/apr/06/israel-folaus-anti-gay-comments-very-disappointing-qantas>.

[15] Jemima Whyte, 'Israel Folau: Qantas Boss Backs Breach Verdict', *Australian Financial Review*, 9 May 2019 <https://www.afr.com/business/sport/israel-folau-qantas-boss-backs-breach-verdict-20190509-p51lou>. The notion that Qantas feared being associated with Folau's comments because they were supposedly 'homophobic' lacks any credibility when one considers that the airline has for some years partnered with Dubai-based Emirates Airlines, which is wholly owned by the Dubai government—a government that imprisons homosexuals, and in some cases, executes them.

Indeed, Rugby Australia Chief Raelene Castle, in evidence to the Tribunal hearing, stated:

> That evening, I telephoned Ms Vanessa Hudson, chief customer officer at Qantas, knowing that the post would be very concerning to Qantas. Only days earlier, Rugby AU had commenced contract renewal negotiations for Qantas' sponsorship of Rugby AU, the Wallabies and the men's and women's 7s teams. The post could not have come at a more sensitive time for Rugby AU's commercial team. I told Ms Hudson that Rugby AU was taking Mr Folau's post very seriously. I sent her a draft of the statement that Rugby AU planned to release the next day. Ms Hudson impressed on me that Qantas wished to see the matter resolved swiftly.[16]

Note that the sponsorship deal with Qantas constituted a very significant part of Rugby Australia's revenue. As former Wallabies coach Alan Jones has pointed out, Rugby Union in Australia is in a very bad way primarily due to Rugby Australia's poor management and incompetence.[17]

Because Folau's conduct had apparently jeopardised the lucrative sponsorship deal with their major sponsor, Qantas, one could argue that he had clearly brought Rugby Australia into disrepute. However, this is not the required legal test for determining whether particular conduct has brought an organisation into disrepute.

In *Kolodjashnij v Lion Nathan breweries*, a brewery employee was caught drink driving outside of work hours in contravention of the company's Responsible Drinking Policy. As a result, he was dismissed for bringing the company into disrepute. The Commissioner held that the termination was valid, stating:

> An employer is entitled to have policies designed to protect the interests of the business and a legitimate interest in ensuring that such policies are observed by the workforce…While not every policy adopted by an employer will necessarily be found to be reasonable, particularly in circumstances where that policy purports to constrain the activities of employees outside working hours, some such policies will have the necessary connection to the workplace to be upheld. Where the employer can make out a legitimate interest in the conduct of its employees outside work hours, a policy aimed at regulating that conduct and protecting the employer's legitimate interests will generally be found to be reasonable. A policy aimed at restraining employees from committing criminal offences outside work hours may not always be seen to be something that is a legitimate interest of the employer. A policy directed at restraining employees from engaging in criminal conduct which could have a deleterious impact on the employer's legitimate business interests has a sufficient nexus with the employment to be a reasonable imposition on an employee.

[16] As cited in Alan Jones, 'Folau's Rights Have Been Trampled in Rugby Australia's Haste To Do Sponsor's Bidding' *The Australian,* 7 June 2019, 32.
[17] Alan Jones, 'Rugby Family Has Lost All Patience With Shrill Dogma of Administrators', *The Australian,* 31 May 2019, 30.

> A manufacturer of weapons or fireworks would have a legitimate interest in ensuring that its employees did not use its products in a manner which was contrary to law, might bring the product into disrepute or could contribute to the case for greater restriction on sales or even complete prohibition of the product. In my view the same applies to a manufacturer of alcohol.[18]

In *Rose v Telstra*, Rose, a technician for Telstra, was terminated after becoming involved in a fight (in which he was stabbed) outside of work hours while temporarily relocated for work purposes at the employer's expense. As a result, Telstra terminated Rose's employment for improper conduct. Telstra's main argument was that his off-duty conduct was part of the scope of his employment, because Telstra covered his travel costs including the hotel room where the fight occurred. However, the Commission disagreed and found the behaviour had no sufficient connection to Rose's employment duties. Rose was not been wearing his Telstra uniform at the time, nor was he on-call, and any inclination to harm to Telstra's interests was weak.[19]

Regarding bringing a sport and/or sporting body into disrepute, in *Zubkov v FINA* (Court of Arbitration for Sport), Ukrainian swimming coach, Mykhaylo Zubkov, was charged by FINA (international governing body for swimming) with violating the FINA Code of Conduct and thus bringing the sport of swimming into disrepute when broadcasted footage showed Zubkov physically harassing his daughter during a swimming meet in Melbourne in March 2007. Zubkov was initially banned from coaching for six years, but on appeal the Court found that although Zubkov's conduct was aggressive and violent and a violation of the Code of Conduct, there was no evidence to demonstrate that his actions had brought the sport of swimming into disrepute. According to the wording of FINA Code of Conduct, it must be shown that Zubkov's conduct had actual—rather than mere potential—adverse effects on the sport of swimming. 'In other words: public opinion of the sport of swimming must be diminished as a result of the conduct in question.'[20]

Note also that Zubkov's altercation with his daughter occurred in a private area with no witnesses present. However, the event was captured on a remote video camera mounted nearby. The video of the altercation was leaked to the media and appeared on the local television news, and an article on the altercation appeared in a local newspaper the next day. The video was subsequently passed to the international media and appeared on news

[18] *Nick Kolodjashnij v Lion Nathan T/A J Boag and Son Brewing Pty Ltd* [2009] AIRC 893, [52]-[53].
[19] *B. Rose v Telstra Corporation Limited* [1998] AIRC 1592.
[20] *Mikhaylo Zubkov v Federation Internationale de Natation* (FINA) [2007] CAS 2007/A/1291, [17]-[21].

platforms around the world. Thus, it was suggested that it was actually the broadcaster and FINA who were responsible for any offence of bringing the sport into disrepute by showing the footage around the world.[21]

So how did Folau's post on his personal Twitter account bring Rugby Australia, or the game into disrepute or discredit? His paraphrase of 1 Corinthians 6 from the Christian Bible—the same Bible used by courts to swear in witnesses and by the Parliament to swear in new Members and Senators—reflects the orthodox Christian belief that homosexuality is immoral and a violation of God's law, and, as with all violators of God's law, homosexual offenders are destined for eternal damnation. While many will no doubt vehemently reject either this particular view, or, indeed, Christianity altogether, the view Folau is proclaiming is not an unpopular, despicable or extreme one, on the same moral plane as 'holocaust denial.'[22] On the contrary, the view that homosexuality is immoral and sinful has been the standard orthodox view of the global Church throughout history, and is still widely held by Christians in Australia and around the world. This includes all the major evangelical denominations,[23] as well as the Catholic[24] and Eastern Orthodox Churches. This view is also shared by Muslims and orthodox Jews.

It is important to emphasise that Folau's Instagram post was made on his personal account, and he did not mention, or purport to represent, Rugby or Rugby Australia. Indeed, his post made no references to rugby, Rugby Australia, the Wallabies, the upcoming World Cup, any of the sponsors (including Qantas) or the Waratahs, nor did it show Folau wearing a Wallabies or Waratahs uniform. Even if it is widely known that Folau is a star Waratahs and Wallabies player, how could any reasonable person think that his post may be attributed to, or endorsed by, Rugby Australia and/or its sponsors?

---

[21] Ibid.

[22] Note that Folau's post reflects the popular characterization of Hell as a flaming inferno where unbelievers are eternally tortured for their sins. This characterisation is drawn from the book of Revelation's reference to sinners being thrown into the "Lake of Fire." (Revelation 20:10, 12-15). But Revelation is a record of a highly symbolic vision (or dream) given by God to the Apostle John. Theologically, Hell is eternal separation from God, and Revelation intends to communicate that such separation will be as painful and tormenting as being thrown into a "Lake of Fire." Rather than God sending people to Hell, it is more theologically accurate to state that people *choose* Hell because they choose to reject communion with God.

[23] Pentecostals, Evangelical Baptists, Evangelical Anglicans, Lutherans, Presbyterians, Salvation Army, Christian Brethren, Seventh-Day Adventists, and Mennonites.

[24] While the Catholic Church accepts the reality of same-sex attraction, it holds that acting on such attraction is sinful. See Catholic Church, *Catechism of the Catholic Church*, 2nd ed, (2012), [2357]-[2359].

Did Israel Folau bring himself into disrepute? In the case of *D'Arcy v AOC*, the Court of Arbitration for Sport held that 'bringing a person into disrepute is to lower the reputation of a person in the eyes of ordinary members of the public to a significant extent.'[25] The case concerned a physical altercation between Australian swimmers Nicholas D'Arcy's and fellow swimmer Simon Cowley. D'Arcy's Olympic swimming team "membership agreement" stated that D'Arcy could not engage in conduct which, if publicly known, would be likely to bring him into disrepute. Because D'Arcy was 'out at a public bar in the early hours of the morning, intoxicated' when he struck Cowley in a manner that 'led to [Cowley] being very seriously injured and taken to hospital,' the Court found this was sufficient to bring D'Arcy personally into disrepute. On appeal, the Court affirmed the original decision and added that it was not necessary to also show that the Australian Olympic team or the sport of swimming was brought into disrepute.[26]

Taking the normal dictionary definitions, to be disreputable means that you are viewed as lacking in respectability with respect to personal and moral character. But this cannot be said of Israel Folau. He has done nothing in his career to warrant scorn or condemnation. He is a highly respected champion player and even those who vehemently disagree with his views on homosexuality have acknowledged that Folau is a "great guy."[27] To be discredited means that you have lost a good reputation. Again, the public support for Folau among fans, many fellow players, and many of the general public shows that his personal standing remains intact.[28]

Unlike Nicholas D'Arcy, Israel Folau did not commit a criminal offense, nor was his conduct violent or abusive, nor did he incite or encourage others to be violent or abusive. Rather than bringing himself, the game, or Rugby Australia into disrepute, it appears Israel Folau is guilty of merely expressing an opinion that is contrary to that of his employer, Rugby Australia, and its major sponsor Qantas.

In addition, as in *Zubkov*, one has to consider the role that Rugby Australia and the media had to play in publicising Folau's post and encouraging many of the general public to condemn him and heap scorn on his views. One could argue that if any disrepute has been

[25] *D'Arcy v Australian Olympic Committee* [2008] CAS 2008/A/1539, [1].
[26] *D'Arcy v Australian Olympic Committee* [2008] CAS 2008/A/1539, [8]-[9].
[27] Springboks player Handre Pollard, and Japan captain Michael Leitch called him "a nice guy."
[28] See Alan Jones, 'The monsters gather, hunting after Folau', *The Australian* (Sydney), 14 June 2019, 36.

attributed to Rugby Australia or the game, it was caused not by Folau but by Rugby Australia's mishandling and overreaction to the situation.

VIII. HARSHNESS OF THE PENALTY

Was the termination of Israel Folau's playing contract excessive and harsh? In *Byrne and Frew v Australian Airlines*, Black CJ stated that 'to dismiss an employee who is in fact not guilty of any misconduct is objectively 'unjust'' [29] Given that Folau's contract was apparently terminated not because of any misconduct but because he expressed an opinion as a private citizen that was contrary to Rugby Australia's management and its major sponsor's CEO, the penalty seems manifestly harsh and unjust. But according to Rugby's Australia's Code of Conduct Tribunal, Folau was guilty of a "high-level breach" which apparently warranted the termination of his contract.[30] This is despite the fact that the possible sanctions listed in the Code of Conduct do not explicitly include contract termination.[31]

As noted above, Rugby Australia appears to have reached a decision regarding Folau's contract before any hearings had taken place. At the tribunal hearing, Raelene Castle admitted that she had called (Qantas chief customer officer) Ms Hudson the day after Folau had posted his comments, and informed her that Rugby Australia intended to terminate Folau's contract.[32]

In *Selak v Woolworths*, Tony Selak consumed alcohol on a work-related lunch, in contravention to explicit terms in his employment contract, and encouraged his subordinate to so as well. After summarising the case law with respect to unjustified termination, the Commissioner affirmed that 'Misconduct justifying dismissal is conduct that is so serious that it goes to the heart of the contract' and that 'A termination may be harsh because it is disproportionate to the gravity of the misconduct.' Because of Selak's position of authority as Store Manager and the explicit prohibition in his contract against drinking during work

[29] *George Albert Byrne and George Mortimer Frew v Australian Airlines Limited* (1994) 120 ALR 274, 275.
[30] Rugby Australia, above n 4.
[31] Contract termination may only be implied from the statement in Annex 1, clause 3.3 (viii): "…or such other sanction as may be appropriate."
[32] See: Alan Jones, 'Folau's Rights Have Been Trampled in Rugby Australia Haste To Do Suponsor's Bidding,' *The Australian*, 7 June 2019, 32.

hours, the Commissioner concluded that his conduct was serious enough to violate the heart of the contract, and that termination was not disproportionate.[33]

In Folau's case, his 'misconduct' was to express a traditional and orthodox teaching from the Bible. Although this view may be unpopular and offensive to social progressives, it is still widely held among social conservatives—especially those with religious beliefs. In any case, his expressed belief is totally unrelated to the heart of his playing contract, which was to play Rugby Union. Moreover, to have one's contract terminated for such a manifestly trivial action — an action that was not criminal or abusive, and did not incite others—is clearly disproportionate.

IX. EMPLOYEE CONDUCT AND EMPLOYER'S RIGHTS

The Folau case raises important issues regarding the extent to which employers can dictate or regulate the conduct of employees outside of working hours. Although it is surely reasonable for employers to insist upon standards of conduct while an employee is working for, or representing their employer, many employee contracts seek to impose similar restrictions on conduct outside the workplace and outside of business hours.

In their media release announcing that Folau had been served with a breach notice, Rugby Australia stated:

> At its core, this is an issue of the responsibilities an employee owes to their employer and the commitments they make to their employer to abide by their employer's policies and procedures and adhere to their employer's values.[34]

This statement indicates that Rugby Australia believes it has the right to demand contracted players submit in more or less total conformity, and at all times, to the organisation's will and values—values of which the contracted players have no say or input. Instead of contracts for the provision of labour or professional services, or—in Folau's case—to play Rugby for New South Wales and Australia, many employers impose terms that reflect a belief they *own* their employees' souls. This shift appears counter to what McHugh and Gummow JJ observed in *Byrne v Australian Airlines*:

---

[33] *Tony Selak v Woolworths Limited* [2007] AIRC 786.
[34] Rugby Australia, above n 4.

> The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee).[35]

In past times, the master's authority over the servant was pervasive. The master controlled almost every aspect of a servant's life, but as McHugh and Gummow JJ state, this is no longer the case.

When it comes to the question of bringing oneself or the organisation into disrepute, most employer Codes of Conduct—including Rugby Australia's—indicate that committing a criminal offence is likely to bring oneself and/or the organisation into disrepute. However, the case law on this point indicates the Courts are quite restrictive in their assessment of whether criminal offences are grounds for dismissal. The apparent limitations to an employer's right to discipline or terminate an employee's service with respect to out of hours conduct is most clearly illustrated by the High Court's decision in *Commissioner for Railways (NSW) v O'Donnell*, where the Court held that the fact that an employee had been arrested and charged with an offence did not necessarily constitute misconduct warranting termination of employment.[36] In *HEF of Australia v Western Hospital*, Lawrence DP observed:

> The conviction of an individual for a criminal offence does not necessarily have any effect upon that person's employment. The question of the relevance of a conviction for an employee's alleged misbehaviour to the employee's work should be considered in terms of whether or not the employee has breached an express or implied term of his or her contract of employment. Whether events occurring outside the actual performance of work will be relevant to the employment relationship will vary from case to case. For example, an accountant who has committed an act of dishonesty (for which he may have been charged and convicted) in the course of some activity outside his employment might be said to have breached a term of his contract of employment.[37]

Thus, in *Hussein v Westpac Banking Corporation*, Staindl JR stated:

> [A] conviction on a drink-driving charge which occurred outside work hours would not be relevant to the employment of many people. However it would be of critical relevance to a truck driver or taxi driver. It seems to me that an appropriate test is whether or not the conduct has a relevant connection to the employment.[38]

---

[35] *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 436.
[36] *Commissioner for Railways (NSW) v O'Donnell* (1938) 60 CLR 681, 691-692.
[37] *HEF of Australia v Western Hospital* (1991) 4 VIR 310, 324.
[38] *Hussein v Westpac Banking Corporation* (1959) 59 IR 103, 107.

In this case, Hussein was convicted of credit card fraud in relation to activities outside his work. At Westpac, he was employed as a migrant liaison officer, giving advice to members of the Turkish community. The Court held that there was a sufficient connection between his work and the conviction for credit card fraud in relation to another bank. Because Hussein was in a position of responsibility, honesty and trust, his conduct was sufficient to justify dismissal.

But what about conduct that is not criminal? In *Rose v Telstra*, the Court laid down the following circumstances where an employee's employment may be validly terminated due to out of hours conduct: (1) 'the conduct must be such that, viewed objectively, it is likely to cause serious damage to the relationship between the employer and employee'; (2) 'the conduct damages the employer's interests'; or (3) 'the conduct is incompatible with the employee's duty as an employee.'[39] Ross VP went on to state: 'In essence the conduct complained of must be of such gravity or importance as to indicate a rejection or repudiation of the employment contract by the employee.' In addition, Finn J has cautioned that 'when any extension is made to the supervision allowed an employer over the private activities of an employee…It needs to be carefully contained and fully justified.'[40]

With respect to social media posts, most cases in Australia concern employees posting criticisms of their employers and management action, or posting photographs online.

In *Singh v Aerocare Flight Support*, Mr Singh was a baggage handler employed as a casual employee by Aerocare Flight Support, although he had a regular work roster. Singh was issued with an airport security identification card and was authorised to work in restricted and security sensitive areas inside Perth Airport. After posting on Facebook comments that appeared to support ISIS and Islamic extremism, Singh was dismissed by Aerocare. Singh's post shared another post from an Australian Islamic Group with his own comments: 'We all support ISIS.' Two of Singh's Facebook friends who were fellow workers informed Aerocare about the posts. As a result, Aerocare undertook an investigation and met with Singh to discuss the matter and informed him that the Facebook posts were contrary to their social media policy and given the nature of the posts and his job, he represented a security

[39] *B. Rose v Telstra Corporation Limited* [1998] AIRC 1592, 12.
[40] *McManus v Scott-Charlton* (1996) 140 ALR 625, 636.

risk. Singh declared that the posts were sarcastic, and that he was actually opposed to ISIS and extremism.[41]

The Commissioner accepted that Singh's posts did indeed breach the Social Media Policy and that Singh was aware of the Policy, but refused to disregard them because they were made outside of work hours and with the protections of privacy settings. However, the Commissioner found that his dismissal was unjust, harsh and unreasonable because Aerocare: (1) failed to thoroughly review Singh's complete Facebook newsfeed which would have led to the conclusion that he did not really support ISIS; (2) spent only ten minutes deliberating his response to the allegations put to him, which suggested the decision to terminate his employment was predetermined; and (3) did not consider any other alternative disciplinary action apart from termination.

In *Colwell v Sydney International Container Terminals*, the employer wanted to encourage more women to work in the stevedoring industry, so it introduced workplace policies addressing bullying, harassment and misconduct of a sexualised nature, but it had no Social Media Policy. Colwell was aware of these policies, but on his day off and when he had been drinking, he sent a pornographic video via Facebook Messenger to his Facebook friends, including 16 male and 3 female work colleagues. One particular female responded with a strong objection, and Colwell posted an apology on his Facebook page the following day. Although no formal complaint was lodged by the employees who received the video, his employer subsequently became aware of his actions. After finding him guilty of serious and wilful misconduct including a breach of company policy, they terminated his employment. Colwell.[42]

Colwell argued that there was no reason to terminate his employment because there was an insufficient connection between the conduct and his employment because the video was sent outside of work hours and did not involve any work-related IT equipment. Moreover, he argued that any issue over private communications between friends should be resolved between those friends, and does not concern their employer, nor should such communications be regulated by their employer. The Commissioner disagreed, stating that

[41] *Singh v Aerocare Flight Support Pty Ltd* [2016] FWC 6186.
[42] *Luke Colwell v Sydney International Container Terminals Pty Ltd* [2018] FWC 174.

> if an employee engages in conduct outside of the physical workplace towards another employee that materially affects or has the potential to materially affect a person's employment that is a matter which legitimately may attract the employer's attention and intervention.

In this regard, the Commissioner found that Colwell's Facebook friends were so only because of their work relationship and therefore there was a relevant nexus or connection to his employment.

The recent UK case of *Ngole v University of Sheffield* bares many similarities with Folau's case. Ngole was a social work student who was thrown out of his course for posting social media comments (including Biblical quotations) that were critical of homosexuality. The Court of Appeal allowed Ngole's appeal because the University adopted the *untenable position* that any public expression of disapproval of homosexuality was a breach of the relevant professional code and guidelines.[43] In addition,

> The University wrongly confused the expression of religious views with the notion of discrimination. The mere expression of views on theological grounds (*e.g.* that 'homosexuality is a sin') does not necessarily connote that the person expressing such views will discriminate on such grounds.[44]

Regarding Ngole himself, the Court noted that there was positive evidence suggesting he had never discriminated on such grounds in the past and was not likely to do so in the future because the Bible itself prohibited such discrimination.[45]

From the above cases, the following principles can be extracted:

1. *An employee's out of hours conduct may result in termination if there is a relevant connection to their employment (Rose v Telstra, Colwell);*

2. *If an employee commits a criminal offence, it does not necessarily justify termination (HEF of Australia v Western Hospital; Hussein v Westpac);*

3. *Termination is justified if conduct is of such gravity or importance that it indicates a rejection or repudiation of the employment contract by the employee (Rose v Telstra);*

4. *Any extension to the control or supervision of an employer over the private activities of an employee needs to be carefully contained and fully justified (McManus);*

---

[43] *Ngole v University of Sheffield* [2019] EWCA Civ 1127, [5](1).
[44] Ibid, [5](10).
[45] Ibid.

5. *Where conduct involves social media posts, all posts over period of time should be taken into account to determine true beliefs and intentions (Singh);*

6. *The mere expression of religious views does not in itself constitute discrimination (Ngole);*

7. *Employees should be given the opportunity to defend their conduct and employers must give their defence due consideration (Singh);*

8. *Employers should not have predetermined outcomes (Singh); and*

9. *Employers should consider other alternative disciplinary actions apart from termination (Singh).*

When we consider the Folau case in the light of these principles, the following should be noted:

1. *Folau's conduct was not criminal;*

2. *Folau's conduct had no connection to his employment as a Wallabies and Waratahs Rugby player;*

3. *Folau's conduct did not repudiate or break his contract in any way;*

4. *Folau merely expressed his religious views regarding the morality of homosexuality. There is no evidence that he ever has, or likely will, actually discriminate against homosexual people;*

5. *There is no evidence that Rugby Australia took into account the numerous posts from Folau that indicate that he does not hate, harass, or discriminate against homosexuals;*

6. *Rugby Australia's public statement on 11 April 2019 (as well as Raelene Castle's testimony to the Tribunal) indicate they had already decided to terminate Folau's contract, and at no time did they consider any other action.*

Given the existing body of case law and the facts of Folau's case, it is difficult to see how any disciplinary action—let alone contract termination—can be justified. Folau's only crime was to express his moral conviction regarding homosexuality that differed from his employer and its sponsors.

X. CONCLUSION

Rugby Australia's treatment of Israel Folau over his social media posts should concern *every* Australian employee, not just Christians and those of other faiths. Australian corporate entities appear to be reverting back to an employer-employee relationship reminiscent of the old master-servant relationship. Employers are demanding more and more control and regulation not only over their behaviour, but also over the expression of their moral, ethical, political and religious beliefs—even when outside of work hours, outside the workplace, and when not representing the organisation.

All too often this program to control and regulate behaviour is masked by broad, and seemingly innocuous clauses in organisational Codes of Conduct. These clauses are deliberately vague and subjective so that they provide the widest scope for employers to either discipline employees, or to terminate their employment.

The use of broad and vague Code of Conduct clauses to coerce and intimidate employees into conforming to a particular pattern of behaviour and to check the expression of their beliefs is ultimately a form of corporate bullying. Likewise, corporate sponsors who 'express concerns' over the behaviour or speech of employees of the sponsored organisation.

This case should be a landmark case for establishing and/or limiting the extent to which employers can control or regulate the behaviour and expression of beliefs of their employees. The ultimate question before the courts is whether an employer who objects to an employee's moral, political or religious beliefs will constitute grounds for disciplinary action. If the courts are unwilling or unable to protect the rights of employees to express themselves on such issues, then governments must step in.