



# Beyond a Rugby Contract

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## INTRODUCTION

Sport Australia outlines that a National Sporting Organisation (NSO) is to be accountable at the national level for establishing and enforcing the key policies that underpin integrity within their sport, whilst developing and implementing policies, programs and practices that encourage greater inclusion.

In the much publicised (and ongoing) conflict between Rugby Australia and 'former' star-player, Israel Folau, the rights, roles and capabilities of the NSO as an employer and custodian of the game of Rugby at a national level have been placed in the public spotlight.

The legal basis for dismissing Folau was on the grounds of a breach of his employment agreement, more particularly of Rugby's 'Code of Conduct', which is incorporated into each Player Contract. The Player Contract and Code of Conduct are both standardised instruments centrally negotiated and agreed by Rugby Australia and the Rugby Union Players' Association.

Rugby Australia maintains that Folau's dismissal was on the basis that his behaviour specifically breached terms of the Code of Conduct relating to inclusiveness and the requirement not to bring the game into disrepute. Folau claims he was dismissed on the basis of his religion.

NSOs will invariably take the position of enforcing the terms contained within their standardised and approved contracts and policies. The complex moral, ethical and legal issues in the 'Folau Case' raise the question whether the NSOs (in this instance Rugby Australia) are adequately qualified to assess the suitability of the terms of their own policies and instruments when they relate to fundamental rights such as freedom of speech and religious expression.

Issues of this complexity and consequence almost certainly need to be regulated at a level beyond national sporting bodies – the political and legal arenas need to lay down the framework and guidelines by which the NSOs can operate.

## POLITICAL

It became quickly apparent in the Folau case that the issues raised are bigger than Rugby.

It is not often that the sacking of an athlete becomes a Federal Election talking point. The Third Debate of the 2019 Federal Election saw both Bill Shorten and Scott Morrison being asked to weigh in on the issue. Shorten provided a non-committal response by acknowledging the damaging impact this type of behaviour from a public figure can have whilst sympathising that Folau should be entitled to his views and should not have suffered an employment penalty for his behaviour. Morrison also played both sides of the argument and cited the special responsibility of public figures, while maintaining that the established employment law is of paramount importance.

The issue has also fuelled particular political motivations with Conservative Senator Eric Abetz involving himself by personally referring the matter to the Fair Work Ombudsmen on the basis that he felt Rugby Australia's decision were in contravention of established 'Fair Work' employment law principles.

## LEGAL

Following the determination of Rugby Australia in its Code of Conduct Tribunal Hearing, Folau has lodged an action through the Fair Work Commission, that may end up in the Federal Court. Folau is grounding his claim in Fair Work legislation, specifically section 772 of the *Fair Work Act 2009*.

Section 772 tells us that employment is not to be terminated on the grounds of religion ((1)(f)).

Folau maintains that his Instagram post was merely a means through which he communicated the word of God as contained in the Bible and is claiming that his employment was terminated on the basis of his religion.

The Court's determination (if it proceeds to trial) will swing on their interpretation as to whether he was dismissed for reasons that include his religion (needing only to be among the reasons).

The Court will likely consider the parameters of the freedoms of speech and of religious expression and the extent to which they provide protections to Folau's behaviour.

Any decision will have far reaching implications relating to acceptable employee behaviour and the rights of employers to regulate conduct.

Pending the outcome, it could also prompt Government to enact new legislation, or to reform the current regulatory framework. The Folau case could be the trigger for the introduction of a Religious Discrimination Act in a similar vein to the existing *Sex Discrimination Act 1984* and *Race Discrimination Act 1975*.

## CONCLUSION

Ultimately the Fair Work Commission or the Federal Court needs to decide the extent to which an employer has a right to control their employee.

As is often the case in employer/employee disputes a settlement is the most likely outcome, though given the acrimony between the parties there remains a distinct opportunity that the Court will be asked to determine the outcome and potentially lay down an important legal precedent.

If the Court is asked to determine the outcome it would seem most likely that the rights of the employer will triumph on the basis that common law has historically favoured the rights of employers to enforce behavioural policies.

The Court may however see this as an 'opportunity' to instead stem the tide towards greater employer oversight. In making a determination the Court may also consider modern society's steady move towards inclusivity and the embracing of diversity.

Watch this space!

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