

# Israel Folau's court challenge may hinge on the meaning of one word

Rugby Australia had plenty of opportunities to sack Israel Folau for his posting of religious beliefs on social media. They only did so when the posts were homophobic.

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ISRAEL FOLAU (IMAGE:AP/RICK RYCROFT)

Israel Folau has a prodigious leap and a powerful fend. He does not, however, turn the other cheek. Having lost his \$5m playing contract with Rugby Australia, Folau decided to skip the step of an internal appeal and take his case to court. Reportedly, he'll be seeking damages on top of his lost salary, taking his claim towards \$10m.

Folau has launched proceedings against Rugby Australia (RA) in the Fair Work Commission, claiming wrongful termination. Specifically, his case is under section 772 of the *Fair Work Act*, the precise wording of which is critical:

*An employer must not terminate an employee's employment for one or more of the following reasons, or for reasons including one or more of the following reasons: (f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*

RA says that it sacked Folau because he breached his contract, in particular its social media policy with which Folau was contractually bound to comply. That policy prohibited contracted players from doing what Folau did: going on social media with public statements that directly contradicted RA's stated values.

RA's values include diversity and inclusiveness. Folau said, because he believes it to be true, that gay people will be going to hell. RA said sorry, we can't have you out there as our brand ambassador saying stuff like that, love you but you're gone.

The case will boil down to a single question: did RA terminate Folau because of religion?

Folau's supporters have been loudly shouting yes, of course, what else could it have been? Folau wears his faith on his Facebook page, what he said was 100% an expression of religious belief, and he was sacked because he said it. Case closed.

Clearly, s772 prohibits termination because of an employee's religion; RA couldn't have sacked Folau because he's a Christian, or because he believes that gays are going to hell (which can only be a religious belief, hell being a strictly religious destination).

Equally clearly, RA didn't do that. It was no secret that Folau is deeply religious, like plenty of other rugby players. He'd been plastering Facebook with his beliefs for a long time, but RA had called him on it only twice: both times for posts that were objectively homophobic.

So, the sacking came not because of Folau's religion but because of what his religious faith caused him to do. Does the distinction matter?

The High Court had to deal with a similar question under s772's predecessor, in 2012. An employer had suspended one of its employees (Mr Barclay), who was also a trade union officer. Barclay had allegedly breached his contract by publishing to members of his union information regarding an internal audit of the employer.

Barclay claimed that he had been suspended because of his union role, which was illegal. The same applies under s772; you can't terminate an employee because they belong to a union or engage in union activities.

The case turned on the meaning of "because". The employer's evidence was clear: it would have suspended Barclay whether or not he was a union member or officer. The High Court unanimously upheld the suspension, confirming that "because" refers to the subjective motivation of the employer. As the court said:

"It is erroneous to treat the onus imposed on an employer [by the Act] as being made heavier (or rendered impossible to discharge) because an employee affected by adverse action happens to be an officer of an industrial association."

The point being that, if an employee possesses one of the characteristics listed in s772, that does not invest them with extra rights over and above those enjoyed by any other employee. They are still subject to contract law like everyone else.

Translating this to Folau's situation, it would be wrong to suggest (as many commentators and politicians have) that it is legally impossible for an employer to take disciplinary action against an employee in respect of anything the employee does which has a religious element to it.

If Folau hand-wrote "Gays are going to Hell" on his Wallabies jersey before running onto the field, he would be sacked. Nobody, surely, would argue that RA could not do that. However, that act would be no more or less connected to his religion and religious beliefs than his Facebook posts were.

Would RA have terminated Folau for posting that gays are going to hell, if his religion actually commanded the exact opposite? Or if he was an atheist? Or, did it sack him only because he didn't just say it, but also believes it?

The reality here is that Folau was sacked not because of who he is, but because of what he did. The fact that the cause of his action was religion may explain his motivation, but is unconnected with the reason why his employer kicked him out.

His case, therefore, isn't good.

Ironic, given that Folau's judgment on LGBTQI people was made solely by virtue of who they are, not anything they did.

*Do you think Folau will win his legal challenge? Write to [boss@crikey.com.au](mailto:boss@crikey.com.au) with your full name and let us know.*