Israel Folau’s case is simple, once you look past the distractions

There are broader questions that don’t have clear answers, of course. But it's not so complex when you keep your eye on the ball.

We’re nearly two weeks into the latest Israel Folau controversy and the commentary is still filled with distractions. So, with his closed code of conduct hearing now scheduled for May 4, let’s be clear about what he actually did.

Firstly: this is a serious issue. Much of the initial responses to Folau’s comments focused on the fact that, if he is right about who he says is going to hell, we’re all going to hell. Cue lots of tweets poking tongues in cheeks about the consequences of fornicating, drinking and lying. If Folau’s injunction had been restricted to the consequences of what people do, then yeah whatever. However, the point is frequently missed that there’s a difference between what we do and what we are. Specifically, here: the state of being gay.

Folau, in explicit terms, posted on Instagram that homosexuality (a state of being) will result in consignment to hell. If you’re LGBTIQ, that is a brutal stab of exclusion from a person of high stature and long reach. Those words hurt.

Secondly: this is not about religious freedom. Folau's freedom, as an individual, to hold and express his belief about damnation is absolute. He can write it, preach it, stand for parliament and stick it in his maiden speech. He runs no risk of prosecution, persecution or prevention. Recently the High Court ruled that anti-abortion campaigners can say whatever they like, just not within 150m of a clinic which offers abortion services in Victoria or Tasmania; the same principle is true here. Folau will never be short of opportunities for openly sharing his faith.

The legal question here is straightforward: does Rugby Australia have the right to terminate Folau's contract as its employee, for breach of its social media policy? It may be old-fashioned of me to say so, and this is absent from most of the hot takes, but there does remain a fundamental truth to employment relationships: employers pay employees to work for them. Employment can be intrinsic to human dignity, but it is not a human right. Employers carry no legal or moral obligation to provide employment to anyone.

Of course, employees have rights; employers are constrained by rafts of laws which protect employees from exploitation and unfairness. If Folau's contract with Rugby Australia said nothing relevant to his private social media usage, then he could not validly be disciplined under it for his posts. He has the full protection of contract law, anti-discrimination law and plenty of other laws.

Still, the contractual bargain has a role to play. An employer acting in good faith has the right to impose its organisational values on its employees; they can make and enforce reasonable rules in relation to behaviour which promotes or degrades those values. In Folau's case, there's no question of ignorance or inadvertence. He did the same thing a year ago and was given a second chance with the promise that he'd lay off the anti-gay posts.

Another thing this is not about: the quasi-religious status of sport in Australia. Yes, Rugby Australia occupies the peak position in a major football code; it speaks for rugby and it influences social norms. If that makes it a religion, so be it. Either way, it has no greater or lesser a right than any other body of influence to regulate the messages it chooses to transmit.

It would pass without comment if a religious school sacked a teacher who had been publicly proclaiming that God doesn't exist. That's not to equate rugby with faith; rather, it shows how far employers (religious bodies *and* secular organisations) may go to enforce uniformity of public expression by its employees.

There are legitimate arguments to be had about what an employer should be able to control. The High Court is currently hearing a case regarding the Commonwealth's ability to prevent public servants from criticising government policy on social media. The Jack de Belin case is exploring a different aspect of the same thing: whether the NRL can protect its public image at the cost of its players' individual rights (in de Belin's case, the presumption of innocence). Businesses are increasingly seeking to assert control over their employees' public presence, prioritising commercial interests over free speech. There has to be a limit to that.

If you accept that these broader questions don't have clear answers, Folau's case is not so difficult. Rugby Australia is a public-facing institution; its players are, as they

know and accept, its prize assets and promoted as role models. The game promulgates specific values, which include the core value of diversity and acceptance. Folau openly flouted that core value. His action cannot be reconciled with what Rugby Australia stands for. If he were allowed to remain — if they kept paying him to wear their stripe — then the whole thing would be a joke.

Opinions widely differ as to whether Israel Folau should be allowed to express his religious beliefs without risk to his employment, or whether that should be governed only by his performances on the field. I'd say no, but only one opinion actually matters: that of Folau's employer. Rugby Australia has said that this behaviour it cannot accept. It has every right to do so.