Tim Donaghey
Barrister

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CASENOTE: Skelton v Commonwealth of Australia (trading as Australian Bureau of Statistics) [2023] FedCFamC2G 89 (15 February 2023)

The Applicant, Ms Skelton (also '**Employee'**) was employed by the Australian Bureau of Statistics ('**ABS**' or '**Employer**'), a Commonwealth agency.

1. Dismissal

Background
By letter of engagement dated 26 June 2021, the Employee was offered casual employment pursuant to Commonwealth legislation including the *Australian Bureau of Statistics Act* 1975 (Cth). Her position was as 'Field Officer'.

The Field Officer was required to delivering and collecting census materials. Field Officers visit households and deal with members of the public, assisting them with the census.

The Employee was required (per her letter of engagement) to:

- perform all duties of her role to the standard in the Field Officer Role Statement;
- use her best endeavours to promote and protect the interests of the ABS; and
- follow all reasonable and lawful directions given to her by the ABS, including complying with policies and procedures as amended from time to time (including, without limitation, the Census Field Staff Code of Conduct and the Work Health and Safety Guidelines).

The policies required of the Employee included the Social Media Policy ('**Policy**'). This Policy included (in part) that the Employee:

(i) must follow the Code of Conduct ('**Code**') when using social media, even when posting privately, anonymously or using an alias;
(ii) "*must not make comments on behalf of ABS or Government – add a disclaimer that anything you publish is an expression of your personal view and not the ABS or Government*"; and
(iii) must not make comments that could compromise public confidence in the census of the ABS.

Also on 26 June 2021, the Employee signed the contract acceptance form. This confirmed she had read and understood the job description and essential duties. In mid-August 2021, the Employee posted the words to a post in LinkedIn:

> *When is enough, enough?*
> *It's time to STAND UP AUSTRALIA.*
> *AUSTRALIAN REVOLUTION NOW!*

This appeared at the head of a graphic entitled 'Dear Neighbour', setting out the purported damage suffered by lockdowns.
Following the 'Dear Neighbour' post, communications passed between the parties as follows:

- on 18 August 2021, a complaint was received in relation to the comment of Ms Skelton from a member of the public. Ms White (on behalf of Mr Luff, the ABS Director People

Management and Wellbeing) emailed the Employee seeking a response to the complaint. On 25 August Ms Skelton replied, saying she was seeking legal advice.

- on 26 August, Ms White emailed, directing Ms Skelton to de-identify as employed by the ABS on LinkedIn and noting that her employment is subject to satisfactory conduct and the matter may be referred for potential early termination of her employment. On 27 August in response, Ms Skelton denied any breach of the Code or Policy; and

- on 30 August Ms White indicated that she considered there was a breach of Ms Skelton's obligations including the Policy, in a 'show cause' email, seeking the Employee's response as to why her employment should not be terminated. Ms Skelton responded on 1 September, in a lengthy missive, saying that 'bullying is rife' and other irrelevant things, as well as demanding an additional 6 hours' pay.

In response, the ABS wrote to the Employee on 2 September, terminating her employment, in the following way:

> *The reason for termination being that you posted anti lockdown content on your LinkedIn profile while identifying yourself as an ABS employee. This matter was brought to ABS' attention through a complaint made by a member of the public on 18 August 2021, which questioned the impartiality and good reputation of the ABS.*

2. <u>Hearing</u>

Her Honour Judge Mansini of the Federal Circuit and Family Court of Australia presided at trial. During the hearing, the Employee had difficulty articulating how she had established that there was a 'workplace right'. Ms Skelton pressed that she was terminated from her employment for a discriminatory reason, or based upon her political views.

Ms Skelton argued that she was terminated because of her expression of her political opinion and/or the fact of her political opinion itself. The ABS responded in the following manner:

(i) the ABS denied that Ms Skelton was terminated for a reason that included her political opinion. Mr Luff as the only decision-maker and his state of mind at the time of termination was based upon two reasons: <u>first</u>, because the LinkedIn Post clearly contravened the ABS Social Media Policy and the Code; and <u>second</u> because Ms Skelton's subsequent response to the issue reflected that she did not understand the seriousness or her obligations under the Code of Conduct and the Social Media Policy; and

(ii) further, Ms Skelton's subsequent response to the issue was unnecessarily and inappropriately aggressive, and itself amounted to a breach of the Code.

Alternatively, the Respondent relied upon the 'inherent requirements' exception to section 351: that is, if the Court found that Ms Skelton was terminated for a reason that included her political opinion, the ABS sought to invoke the operation of section 351(2)(b), to the effect that the Code and Policy were 'inherent requirements' of Ms Skelton's role and therefore section 351(1) did not apply to the termination.

Her Honour noted that the present case involved the holding of a political opinion and the expression (via LinkedIn) of that opinion, protected by section 351(1) of the FW Act: see <u>Sayed v CFMEU</u> [2015] FCA 27. Her Honour rejected the Applicant's submission that the political opinion was a 'substantial and operative factor' in the termination, finding that Mr Luff's evidence was credible and not contradictory as the Employee urged her to find.

Her Honour found that the causation element was not made out and that Ms Skelton was not terminated for her political opinion. For completeness, her Honour would have found that compliance with the Code and the Policy were inherent requirements of the role and therefore within the exception at section 351(2)(b) of the FW Act.

Significance of the decision

The significance of this decision lies in its relatively unusual subject matter: few cases are heard on section 351, far fewer indeed consider 'political opinion' as an iteration of discrimination. Sayed (which is referred to above) is one of the few superior court cases on this.

I have little doubt that Ms Skelton's conduct offended against the Code and the Policy. It seems clear on its terms; however, *quaere* whether stating an opinion about the negative consequences of lockdowns in Australia is by its nature 'political'. We have to date only the single-justice *obiter* findings in Sayed as a guide: considering those, I prefer a construction which requires *political content* in an applicant's conduct, rather than a broader meaning, which could involve any or any potential activities of government. Such a point was not raised in this case and therefore still remains to be considered.

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20 March 2023