



Express law

fast track information for clients

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Army Reservist discharged for public comments wins in Federal Court

A recent decision of a single judge of the Federal Court in [Gaynor v Chief of the Defence Force \(No 3\) \[2015\] FCA 1370 \(4 December 2015\)](#) may have implications for disciplinary action against public servants who make public comments.

Background

- The Federal Court (Buchanan J) has set aside a decision of the Chief of Defence Force that terminated the commission of a Major in the Australian Army Reserve because of the Major's public comments on social media sites and his website.
- Justice Buchanan held that the termination decision infringed the implied constitutional freedom of political communication.

Implications

The decision raises potential issues about disciplinary action taken against employees because of breach of government social media policies. This is particularly so in cases where the employee's communication is not in the course of duties and is in a private, rather than an official, capacity.

There may be additional considerations where an employee has breached the Australian Public Service Code of Conduct by failing to comply with the duty not to disclose information imposed by reg 2.1 of the *Public Service Regulations 1999*. That provision has previously been held to be valid as not infringing the implied constitutional freedom of communication on political matters (see [R v Goreng-Goreng \(2008\) 220 FLR 21](#), a decision of the ACT Supreme Court constituted by Refshauge J). Justice Refshauge's decision pre-dates several decisions of the High Court that were applied by Justice Buchanan in his reasons for judgment but was not discussed by Justice Buchanan in *Gaynor v Chief of the Defence Force (No 3) [2015] FCA 1370*.

The decision gives rise to a range of issues in relation to public sector social media policies. AGS is available to advise on the implications of the decision, noting that any legal work involving any constitutional issues can be undertaken only by AGS and AGD.

AGS understands that consideration is presently being given to the possibility of an appeal.

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