

Earlier this month, Australian rugby player Israel Folau wrote on [Instagram](#) that hell awaits “drunks, homosexuals, adulterers, liars, fornicators, thieves, atheists and idolaters.”

Rugby Australia subsequently announced that his comments breached the game’s code of conduct and it would seek to terminate his four-year contract of employment signed only last year and worth a purported A\$4 million.

Exercising his right under the code, Folau has [sought a full code of conduct committee hearing](#) on the matter. Here are the legal arguments likely to be made at the hearing, scheduled for Thursday.

Rugby Australia’s case

In seeking to terminate Folau’s contract, Rugby Australia won’t rely on any specific term in the player’s [contract](#). Rather, its arguments will be premised on the general contractual clause that players employed by Rugby Australia must abide by its [code of conduct](#).

Leer más: [*Israel Folau's comments remind us homophobia and transphobia are ever present in Australian sport*](#)

The preamble to the code outlines Rugby Australia’s “core values”, including a safe, fair and inclusive environment for all involved in the game. More specifically, a key clause states that players must “use social media appropriately”. Examples of related breaches of the code include making

any public comment that would likely be detrimental to the best interests, image and welfare of the game.

In addition, there is a clause in the code that asks players to

treat everyone equally, fairly and with dignity regardless of gender or gender identity, sexual orientation, ethnicity, cultural or religious background, age or disability.

Rugby Australia's argument is likely to be that Folau breached all of the above, entitling the organisation to seek unilateral termination of his contract. This would also take into account the fact that Rugby Australia had [previously warned](#) Folau about the exact same behaviour in April 2018.

In brief, Rugby Australia's case will be that Folau breached his duty as an employee to obey the lawful, reasonable instructions of the employer and, given the repeated nature of the misconduct, termination of contract is justified.

Israel Folau's case

There are likely to be two principal aspects to Folau's submissions at the hearing – procedural and substantive unfairness.

On procedural unfairness, Folau may argue that even before a hearing was arranged, Rugby Australia had prejudged its outcome by declaring it would seek to [terminate his contract](#). He may also point to comments by the national team coach, Michael Cheika, that [he would have difficulty](#) ever selecting Folau for the national team again.

Folau's substantive unfairness argument also seems likely to be two-fold – one based on an interpretation of the code and one, possibly, based on human rights or discrimination law.

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On the first element, Folau could argue that the phrase in the code about using “social media appropriately” is overly subjective, and its scope left to be defined at the whim of the employer.

Rugby Australia’s reply here would be crucial. It could counter that Folau’s activity on social media prior to the disputed Instagram post of April 10 – he posted [52 times on Instagram, of which 43 had a religious theme](#) – is evidence of the organisation’s respect of his right to hold such views.

Human rights and discrimination law

Central to this whole affair is [Folau’s faith](#) . Australia doesn’t have a [federal bill of rights](#) or a [religious discrimination act](#) . Neither does New South Wales, where the hearing is to be heard.

But Australia has ratified the [International Covenant on Civil and Political Rights](#) (ICCPR). Article 18 of the ICCPR says that everyone has the right to freedom of thought, conscience and religion.

If this point is argued, the issue will be whether the restrictions Rugby Australia have placed on Folau’s freedom to manifest his religious beliefs are legitimate, necessary and proportionate, given that Folau’s views conflict with another fundamental right – the right not to be discriminated against because of one’s sexual orientation. This is protected under Articles 2 and 26 of the ICCPR.

In sum, the point of contention may well be, as is often the case in human rights law, a matter of conflicting rights. To quote [Anthony Whealy, former NSW Supreme Court judge](#) ,

Clearly the intent [of the code] is to whole-heartedly “include” the gay community in the rugby movement. But is its intention to “exclude” traditional Christian and other religious beliefs?

Explainer: does Rugby Australia have legal grounds to sack Israel Folau for anti-gay social media posts?

Written by Jack Anderson, Professor of Sports Law, Melbourne Law School, University of Melbourne

At the federal level, a person who suffers discrimination in employment on the basis of religion has two options. First, that person can make a complaint to the [Australian Human Rights Commission](#). Secondly, he or she could make an application to the Fair Work Commission for breach of the [Fair Work Act 2009](#), which prohibits employers from terminating a person's employment for reasons including religious views.

Leer más: [***Australia needs a better conversation about religious freedom***](#)

[NSW's Anti-Discrimination Act of 1977](#) also protects against discrimination of one's "ethno-religious origin".

In contrast, Rugby Australia's member protection policy, which works in tandem with the code of conduct, goes further than NSW law by specifically protecting "religion, religious beliefs or activities" against discrimination.

It will be interesting to see whether Folau, as part of his defence, will counter-claim that Rugby Australia has breached its own member protection policy

Possible outcomes of the hearing

If Folau doesn't succeed at the hearing, he has a right to appeal and may well decide to pursue the matter in federal court.

Rugby League's code of conduct is currently being argued in federal court: [Jack de Belin](#) is seeking various remedies against the National Rugby League pursuant to its policy to stand down players who are facing serious criminal charges, pending the outcome of the criminal trial.

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Even if Folau succeeds at his hearing, a point so far underplayed in this whole affair is what is called the concept of “ [mutual trust and confidence](#) ” between employer and employee. Put simply, employment law recognises that there is little point reinstating a worker who has been terminated unless the parties are able to work with mutual trust and confidence in a viable, productive way.

Given the unique employment environment of sport, it seems reasonable to suggest that even if Folau succeeds in the hearing, it is highly unlikely he will ever play again for the Wallabies or even the Waratahs.

In fact, if Folau wins, it is likely there will be a settlement to pay out his contract. The full-time player will then be free to become a full-time preacher.

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