

NOTICE OF FILING

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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number: NSD1215/2015
File Title: Scott McIntyre v Special Broadcasting Service Corporation
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 12/10/2015 2:51:34 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 17
Rule 8.05(1)(a)

Statement of claim

No. NSD of 2015

Federal Court of Australia
District Registry: New South Wales
Division: Fair Work

Scott McIntyre

Applicant

Special Broadcasting Service Corporation

Respondent

A. Parties and Relevant Persons

1. The applicant (**Mr McIntyre**) was employed by the respondent (**SBS**):
 - (a) as a casual employee initially in the position of production assistant between early 2003 and 5 August 2008;
 - (b) as a permanent employee, in the position of a Reporter in Sport, on and from 6 August 2008; and
 - (c) remained employed until dismissed from his employment, in the circumstances pleaded below, on 26 April 2015.
2. At all material times the SBS:
 - (a) was and is a body corporate established pursuant to section 5 of the *Special Broadcasting Service Act 1991* (Cth) (**SBS Act**);
 - (b) had the "*principal function to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all*

Filed on behalf of (name & role of party)	Scott McIntyre, Applicant		
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Australians, and, in doing so, reflect Australia's multicultural society" pursuant to section 6(1) of the SBS Act;

- (c) was required, pursuant to section 55 of the SBS Act, to endeavour to achieve and maintain high standards as an employer in relation to terms and conditions of employment, non-discriminatory employment practices and other related matters;
- (d) was and is a Commonwealth authority within the meaning of section 12 of the *Fair Work Act 2009 (FWA)*.

3. At material times:

- (a) Mr Michael Ebeid was the Chief Executive Officer and Managing Director of SBS;
- (b) Mr Ken Shipp was the SBS "*Head of Sports*" who reported to Mr Ebeid;
- (c) the Hon Malcolm Turnbull MP was the Minister of Communications with ministerial responsibility for SBS.

B. The Contract and Relevant Terms of Employment

4. Mr McIntyre's employment as a Reporter in Sport at SBS:

- (a) was pursuant to a letter dated 6 August 2008 from Mr Khammarathh to McIntyre (**Letter**);
- (b) by the terms of the Letter, at material times, was subject to:
 - i. the "*SBS Certified Agreement*";
 - ii. the "*SBS Award*";
 - iii. "*various programming and policy documents*";
 - iv. the "*SBS Codes of Practice and Editorial Guidelines issued by SBS as varied from time to time*";
 - v. the "*SBS Code of Conduct*" (**Code**);
 - vi. the "*SBS Performance Management Program*";
- (c) at material times, was relevantly subject to:
 - i. Part 5 of the SBS Act;
 - ii. the additional provisions relating to termination of employment provided for in Part 6-4 of the FWA;

- (d) meant that, at material times, within the meaning of section 795 of the FWA, Mr McIntyre was a public sector employee employed in public sector employment.

5. Terms of Mr McIntyre's employment contract included:

- (a) an express term that Mr McIntyre was employed as a Reporter in Sport;
- (b) an express term (**Code Compliance Term**) which required compliance by both Mr McIntyre and SBS with:
- i. the Code;
 - ii. the "*Informal Discussion, Counselling and Misconduct Procedures*" document referred to in clause 3.1 of the Code (**Misconduct Procedures**) and any other policies relating to performance management or misconduct (which SBS has refused to provide to Mr McIntyre);
 - iii. the "*Elimination of Workplace Harassment Policy*" referred to in clause 2.5 of the Code (which SBS has refused to provide to Mr McIntyre);

Particulars

The particulars of the refusal are that the request for the further documentation referred to in subparagraphs (ii) and (iii) was made by letter by Mr McIntyre's solicitors dated 5 June 2015 and such request was refused by SBS's solicitors by letter dated 12 June 2015.

- (c) an express term (**Express Misconduct Term**) being clause 3 of the Code entitled "*Breaches of the Code of Conduct*" which, on its proper construction, provided that:
- i. an employee who is found to have breached any aspect of the Code may be subject to disciplinary action;
 - ii. such disciplinary action (which could include termination of employment) is to be conducted in accordance with the terms of the Misconduct Procedures; and/or
 - iii. disciplinary action could only occur in circumstances where the employee would be entitled to procedural fairness and/or a fair hearing prior to dismissal;
- (d) in the alternative to the Express Misconduct Term, an implied term (**Implied Misconduct Term**) that:

- i. any disciplinary action (which could include termination of employment) is to be conducted in accordance with the terms of the Misconduct Procedures; and/or
- ii. disciplinary action could only occur in circumstances where the employee would be entitled to procedural fairness and/or a fair hearing prior to any "finding" of breach and/or any dismissal;

Particulars

The Implied Misconduct Term is to be implied from all the circumstances including the statutory duty pleaded in paragraph 2(c) above, the fact that any "finding" as to breach of the Code was to be made by an officer of the Commonwealth; and it is necessary because (in the event that the Express Misconduct Term does not exist), absent the implication, the enjoyment of the rights conferred by the contract including the Misconduct Procedures would be rendered nugatory or worthless.

- (e) an implied term of good faith (**Good Faith Term**) that obliged Mr McIntyre and SBS:
 - i. to co-operate in achieving the contractual objects of the employment contract; and/or
 - ii. to fairly deal with one another and/or exercise any contractual rights in good faith and for a proper purpose.

Particulars

The Good Faith Term is implied not from some presumed or imputed intention of the parties; rather, the term is a legal incident of the contract as it is necessary to the maintenance of the integrity of contract.

C. Twitter Account

- 6. At all material times, Mr McIntyre was a registered user of an on-line social networking service provided by Twitter, Inc. called "Twitter", operating an account known as '@mcintinhos' which enabled him to post "tweets," being up to 140 character messages, which could be read by registered and unregistered users of Twitter.

D. The Events of 25 April 2015

- 7. On 25 April 2015, being ANZAC Day, Mr McIntyre posted the tweets (copies of which comprise schedule A to this statement of claim) (**Tweets**) which conveyed the following comments by Mr McIntyre:

- (a) *"The cultivation of an imperialist invasion of a foreign nation that Australia had no quarrel with is against all ideals of a modern society."*
- (b) *"Wonder if the poorly – read, largely white, nationalistic drinkers and gamblers pause today to consider the horror that all mankind suffered."*
- (c) *"Remembering the summary execution, widespread rape and theft committed by these 'brave' Anzacs in Egypt, Palestine and Japan."*
- (d) *"Not forgetting that the largest single – day terrorist attacks in history were committed by this nation & their allies in Hiroshima & Nagasaki."*
- (e) *"Innocent children, on the way to school, murdered. Their shadows seared into the concrete of Hiroshima."*

8. In response to the Tweets (but prior to any contact between Mr McIntyre and any representative of SBS in relation to the Tweets) there was debate on Twitter, of a political nature, as to:

- (a) the appropriateness of the opinions expressed by Mr McIntyre in making the Tweets;
- (b) the appropriate response of responsible Ministers in the Commonwealth Government given:
 - i. the opinions expressed by Mr McIntyre in making the Tweets;
 - ii. the fact that SBS was publically funded by the Commonwealth with such funding involving the use of "taxpayer" funds;
- (c) whether, in the circumstances, political intervention by Mr Turnbull was necessary.

Particulars

Particulars will be supplied prior to the hearing, but at the hearing Mr McIntyre will rely on business records of Twitter Inc., which will establish that immediately following the Tweets, numerous registered users of Twitter reacted to the Tweets by retweeting the Tweets and some registered users reacted adversely to the Tweets and called for political responses by the Executive Government including as follows:

- i. *At 6.37pm Mark Textor with account "@AGFchairman' tweeted to a News Corporation journalist "@RitaPanahi this man is happy to take a wage from the taxpayers he insults. How brave. @SBS";*

- ii. *At 6.51pm Jamie Briggs with the account “@BriggsJamie” tweeted “I wonder is @SBS agrees with this from a publicly funded journalist? This is disgraceful and shouldn’t be tolerated [attached link to Mr McIntyre’s tweet]”;*
 - iii. *Mr Textor then “retweeted” Mr Briggs tweet to his followers;*
 - iv. *Another person then tried to bring the tweet to the attention to Mr Turnbull tweeting “@BriggsJamie @SBS @TurnbullMalcolm DO something about this or resign if URnot in control of your job #FFS These DHs we R paying their wages”;*
 - v. *Another person tweeted: “Complete filth you are. When is @TurnbullMalcolm going to reign in SBS & ABC journos?”;*
 - vi. *Mr Chris Kenny, a journalist employed by News Corporation, then tweeted “@RitaPanahai: SBS presenter proudly flaunts his weapon grade stupidity. Ungrateful, disrespectful tool”;*
 - vii. *Another person then tweeted “@chriskkenney @RitaPanahi Jesus...this bloke needs to be taken outside and given a flogging! What a fucking muppet!”*
9. At approximately 7.43pm, Mr McIntyre received a telephone call from Mr Shipp in relation to the Tweets (**First Call**) during which, among other things:
- (a) Mr McIntyre offered to put out an express disclaimer that the Tweets were not the views of SBS and were his views alone but Mr Shipp told him not do to that because it would look as if “*management*” had pressured him;
 - (b) Mr Shipp suggested that Mr McIntyre take the Tweets “*down*” to which Mr McIntyre noted that the Tweets had been retweeted hundreds of time by then and any damage was done and Mr Shipp agreed and withdrew his suggestion; and
 - (c) Mr McIntyre offered to publish a tweet recognising that atrocities were committed on both sides and that war had affected both sides and Mr Shipp said he would think about that suggestion.
10. After the First Call (but prior to any further contact between Mr McIntyre and any representative of SBS) there was further debate on Twitter, of a political nature, as to:
- (a) the appropriate response of responsible Ministers in the Commonwealth Government to the Tweets; and

- (b) whether, in the circumstances, political intervention by Mr Turnbull was necessary.

Particulars

Particulars will be supplied prior to the hearing, but at the hearing Mr McIntyre will rely on business records of Twitter Inc., which will establish at 8.12pm, Mr Kenny attempted to bring the Tweets to the attention of Mr Turnbull, tweeting "Please look at this creep's timeline @mcintinhos and get him off public payroll. Disgrace @SBS @TurnbullMalcolm @JasonClareMP @RSL_Aus". A few minutes later Mr Kenny tweeted: "Please read this timeline @mcintinhos Contact @sbs He lives off your taxes/dishonours you. Also try @TurnbullMalcolm @Jason ClareMP #auspol"; by using, the 'hashtag' "#auspol", in doing so, Mr Kenny's tweet referred to "Australian Politics" and enabled twitter users to see all tweets with that hashtag.

11. At 8:19pm and 8:20pm, Mr McIntyre received two short message service communications from Mr Shipp:
- (a) proposing the terms of a tweet to be sent by Mr McIntyre in the following terms: *"I sincerely apologise for the offence caused as a result of my words on this important occasion. I did not mean to cause upset and now see my comments were very insensitive"*; and
 - (b) requesting Mr McIntyre telephone Mr Shipp.
12. Prior to Mr McIntyre calling, at 8.24pm, Mr Shipp rang Mr McIntyre again (**Second Call**) and said:
- (a) *"things were getting serious"* (referring to the comments made on Twitter referred to in paragraphs 8 and 10 above);
 - (b) in response to Mr McIntyre's query about whether he would be *"sacked"*, denied that suggestion saying *"no, there are other ways they can go about it; for example, they could make you redundant as part of the efficiency review"*;
 - (c) Mr McIntyre *"should consider apologising"*.
13. At 8.40pm, Mr Shipp rang Mr McIntyre again (**Third Call**) and:
- (a) Mr Shipp said to Mr McIntyre that:
 - i. *"I think you should consider apologising"*;
 - ii. repeated his denial made in the Second Call that Mr McIntyre would be *"sacked"*;

- (b) Mr McIntyre said to Mr Shipp that *"he did not see the point in apologising"* as, in his opinion, the Tweets were *"factually accurate"* and that *"some people don't like to be confronted"* by views which make them feel *"uncomfortable"*;
 - (c) in response to Mr McIntyre's comments, Mr Shipp reiterated that Mr McIntyre *"should consider"* apologising.
14. Sometime prior to 9.07pm, Mr Turnbull rang Mr Ebeid and had a discussion with Mr Ebeid as to the Tweets and as to an appropriate response by SBS (**Turnbull Call**).

Particulars

Response by Mr Turnbull to question from "Crikey" published on 27 April 2015.

15. After the Turnbull Call:
- (a) at 9.07pm, Mr Ebeid (without having spoken to Mr McIntyre) tweeted:
"Comments from @mintinhos are his own, disrespectful and not at all the views of @SBS. We remember and commemorate our ANZACs."
 - (b) at 9.11pm, Mr Turnbull:
 - i. retweeted Mr McIntyre's tweet, *"Innocent children, on the way to school, murdered. Their shadows seared into the concrete of Hiroshima"* and then tweeted: *"Difficult to think of more offensive or inappropriate comments than those by @mcintinhos. Despicable remarks which deserve to be condemned";*
 - ii. retweeted Mr Ebeid's tweet of 9.07pm.
16. After the tweets by Mr Ebeid and Mr Turnbull, there was further debate on Twitter, of a political nature, as to the appropriate response of SBS to the Tweets.

Particulars

Particulars will be supplied prior to the hearing, but at the hearing Mr McIntyre will rely on business records of Twitter Inc., which will include that:

- i. at 9.23pm the Hon Fred Nile MLC tweeted to Mr Ebeid: *"@michaelebeid we should expect an investigation and definite outcome in this @mcintinhos matter. #teamnile"*.
- ii. Mr Michael Hart MP, a member of the Queensland Legislative Assembly, tweeted Mr Ebeid: *"@michaelebeid you pay @mcintinhos for his opinions. His opinion today is disgraceful, he doesn't deserve to work 4 @SBS."*
- iii. Mr Kenny tweeted: *"@michaelebeid @mcintinhos @SBS don't think a little tweet quite cuts it .. if he said that about Turks you'd sack him"*

@TurnbullMalcolm"; "@jimoneill50 nup, I reckon he'll sack him"; and
 "@jimoneill50 the scumbag hates Australians but sucks a living from them."

E. The Dismissal and Subsequent Events

17. At 10.10am on 26 April 2015, Mr Shipp had a telephone conversation with Mr McIntyre and:
- (a) told Mr McIntyre that his employment was being terminated by Mr Ebeid with immediate effect for a "*breach of contract*";
 - (b) said words to the effect that Mr McIntyre's position had become "*untenable*".
18. At 11.19am on 26 April 2015, Mr McIntyre received an email from Mr Shipp asserting the termination of Mr McIntyre's employment with SBS, which email asserted that the termination was on the basis that:
- (a) Mr McIntyre had refused to follow "*reasonable directions*" from Mr Shipp that he delete the Tweets and apologise;
 - (b) the Tweets breached the SBS Code of Conduct, SBS's Corporate Values and SBS Social Media Guidelines which resulted in the "*community and our audiences*" losing "*confidence and faith*" in Mr McIntyre as a "*member*" of the SBS "*on-air team*".
19. At no time prior to the communication of the dismissal on 26 April 2015, did SBS:
- (a) give any direction to Mr McIntyre to delete the Tweets;
 - (b) give any direction to Mr McIntyre to apologise for the Tweets;
 - (c) make any allegation to Mr McIntyre that he had breached the Code, or SBS's corporate Values or the SBS Social Media Guidelines;
 - (d) provide any particulars to Mr McIntyre of any breach of his contract with SBS and/or any breach the Code, or SBS's corporate Values or the SBS Social Media Guidelines;
 - (e) find, in accordance with clause 3.1 of the Code, that Mr McIntyre had breached any aspect of the Code and/or "*Key Principles*" of the SBS Social Media Protocol;
 - (f) invoke or comply with the terms of the Misconduct Procedures;
 - (g) provide procedural fairness and/or a fair hearing to Mr McIntyre;
 - (h) in concluding it would dismiss Mr McIntyre, take into account:
 - i. Mr McIntyre's past performance as an employee of SBS;

ii. consider alternatives to termination of employment.

20. By letter dated 28 April 2015 addressed to Mr McIntyre:

- (a) SBS purported to find (in accordance with clause 3.1 of the Code) that Mr McIntyre had breached sections 2.2 and 2.3 of the Code and “Key Principles” 3, 4 and 5 of the SBS Social Media Protocol;
- (b) particularised, for the first time, any allegation of any breach by Mr McIntyre.

F. Jurisdiction

21. On 9 June 2015, Mr McIntyre filed an “*Application for the Commission to Deal with an Unlawful Termination Dispute*” in the Fair Work Commission.

22. The application was filed outside the time required by section 774(1)(a) of the FWA.

23. On 1 October 2015, the Fair Work Commission granted Mr McIntyre’s application for an extension of time to make the application and issued a certificate pursuant to section 776(3) of the FWA.

G. Contravention of the FWA

24. The Tweets:

- (a) were an expression of Mr McIntyre’s political opinion about following matters:
 - i. Australia’s cultural, political and historical identity generally;
 - ii. characteristics of fundamental norms or ideals of a modern society generally;
 - iii. historical participation by Australia in actions which could be characterised as “imperialism”, being a political policy of extending foreign power and influence through colonisation by the use of military force, or other means;
 - iv. the present perception of Australia’s historical participation in armed conflict and:
 - 1. how that perception is consistent with honouring or uncritically praising conduct which could be described as imperialistic;
 - 2. how that perception is inconsistent with the ideals of modern society;
 - v. the appropriateness of present remembrance of past unlawful conduct allegedly engaged in by the Australian and New Zealand military;

- vi. the present perceived failure by many persons engaged in uncritical “cultification” of ANZAC day to have regard to the horror of war;
 - vii. perceived differences between the racial background, education and political views of parts of Australian society as to their susceptibility to uncritical “cultification” of ANZAC day.
 - viii. the appropriateness of the celebration of the centenary of the ANZAC landings; and/or
 - ix. the question of what constitutes “terrorism”;
- (b) created a political controversy as to:
- i. the appropriate response of responsible Ministers in the Commonwealth Government to the Tweets;
 - ii. whether, in the circumstances, intervention by Mr Turnbull with SBS management was necessary; and/or
 - iii. whether Mr McIntyre should be allowed to express his opinions, as reflected in the Tweets, while being employed by an organisation funded by “taxpayer funds”;

Particulars

Mr McIntyre repeats the particulars subjoined to paragraphs 8, 10 and 16 and paragraph 15.

25. The Tweets were an expression of Mr McIntyre’s political opinion within the meaning of section 772 of the FWA.
26. Mr McIntyre’s offer to SBS during the First Call (being an offer to publish a tweet recognising that atrocities were committed on both sides and that war had affected both sides) as being an appropriate and proper response to the political controversy referred to in paragraph 24(b), was an expression of Mr McIntyre’s political opinion within the meaning of section 772 of the FWA.
27. The reasons for the termination of Mr McIntyre’s employment included:
- (a) his expression of political opinion in the Tweets; and/or
 - (b) SBS attempting to bring to an end the political controversy referred to in paragraph 24(b) which controversy was occasioned by Mr McIntyre’s expression of political opinion in the Tweets; and/or
 - (c) SBS rejecting Mr McIntyre’s political opinion that for him to publish a tweet recognising that atrocities were committed on both sides and that war had

affected both sides was an appropriate and proper response to the political controversy referred to in paragraph 24(b); and/or

(d) the expression of his political opinion that the Tweets were "*factually accurate*".

28. The decision to terminate Mr McIntyre's employment taken by Mr Ebeid and/or Mr Shipp:
- (a) was done by them as a public sector employee's employing authority acting on behalf of the employee's employer (being SBS);
 - (b) by reason of section 795(2) of the FWA, is taken to have been done by the SBS;
 - (c) is attributable to SBS given their roles and conduct pleaded above.

29. In the premises, SBS contravened 772 of the FWA.

H. Breach of Contract

30. Further, or in the alternative, the dismissal of Mr McIntyre in the circumstances pleaded in paragraphs 19, 20 and 27, amounted to:

- (a) conduct by SBS inconsistent with the provisions of the Code and the Misconduct Procedures in that it was disciplinary action:
 - i. conducted otherwise than in accordance with the terms of the Code and the Misconduct Procedures including the fact that no "*finding*" of breach was made prior to disciplinary action being taken; and/or
 - ii. in circumstances where the employee was denied procedural fairness and/or a fair hearing prior to any "*finding*" of breach;
 - iii. in circumstances where the employee was denied procedural fairness and/or a fair hearing prior to dismissal;
- (b) conduct which was inconsistent with the obligations of SBS to co-operate in achieving the contractual objects of the employment contract;
- (c) conduct which involved the summary dismissal of Mr McIntyre for reasons unrelated to his performance as an employee of SBS but for the purposes pleaded in paragraph 27 (which conduct constituted SBS engaging in unfair dealing and in the exercise of a purported contractual right for an improper purpose).

31. In the premises, SBS breached:

- (a) the Code Compliance Term; and/or
- (b) the Express Misconduct Term or Implied Misconduct Term; and/or

(c) the Good Faith Term.

I. Loss and Damage

32. By reason of the contraventions of the FWA and/or the breach of contract, Mr McIntyre has suffered loss and damage.

Particulars

- i. Loss of income;*
- ii. Damage to reputation;*
- iii. Dislocation to life;*
- iv. Humiliation, distress and anxiety;*
- v. Further particulars will be provided prior to hearing.*

AND Mr McIntyre claims the relief set out in the Originating application under the *Fair Work Act 2009* alleging unlawful termination of employment.

Date: 12 October 2015



Signed by Josh Bornstein
Solicitor for the Applicant

This pleading was prepared by R Francois of Counsel and M B J Lee of Senior Counsel.

Certificate of lawyer

I, Josh Bornstein, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 12 October 2015

A handwritten signature in black ink, appearing to be 'JB' with a long horizontal stroke extending to the right.

Signed by Josh Bornstein
Lawyer for the Applicant

Schedule A

Tweets

Tweets & replies

Photos & videos



Scott McIntyre @mcintinhos · Apr 25

Innocent children, on the way to school, murdered. Their shadows seared into the concrete of Hiroshima.



785



912





Scott McIntyre @mcintinhos · Apr 25

Not forgetting that the largest single-day terrorist attacks in history were committed by this nation & their allies in Hiroshima & Nagasaki

← ↻ 946 ★ 1.2K ⋮



Scott McIntyre @mcintinhos · Apr 25

Remembering the summary execution, widespread rape and theft committed by these 'brave' Anzacs in Egypt, Palestine and Japan.

← ↻ 549 ★ 889 ⋮



Scott McIntyre @mcintinhos · Apr 25

Wonder if the poorly-read, largely white, nationalist drinkers and gamblers pause today to consider the horror that all mankind suffered.

← ↻ 542 ★ 992 ⋮



Scott McIntyre @mcintinhos · Apr 25

The cultification of an imperialist invasion of a foreign nation that Australia had no quarrel with is against all ideals of modern society.

← ↻ 904 ★ 1.3K ⋮