

# ABA CONFERENCE DUBLIN 2017

## **MISUSE OF SOCIAL MEDIA IN THE WORKPLACE**

**Kylie Nomchong SC  
Denman Chambers**

6 July 2017

# INCREASING SOCIAL MEDIA PLATFORMS

- \* Facebook
- \* Twitter
- \* Instagram
- \* YouTube
- \* LinkedIn
- \* WeChat
- \* Viber
- \* Reddit
- \* Tumblr
- \* Gab
- \* Weibo
- \* WhatsApp
- \* Snapchat
- \* Baidu

# STATISTICS

- Social media has surpassed pornography as the number one use of the internet.
- The fastest growing demographic is the 55-64 age group
- There are more iPhones sold per second in the world than there are babies born.
- 25% of Facebook users do not understand privacy settings

# THE 'VIRAL' EFFECT

Justine Sacco, senior director of corporate communications at IAC  
In 2013 she began tweeting “jokes” as she travelled on a flight from New York to London, at which point she had 170 Twitter followers):

- \* *Weird German Dude: You're in First Class. It's 2014. Get some deodorant.' — Inner monologue as I inhale BO. Thank God for pharmaceuticals.”*
- \* *Chilly — cucumber sandwiches — bad teeth. Back in London!”*

And on the final leg of her trip to Cape Town:

- \* *Going to Africa. Hope I don't get AIDS. Just kidding. I'm white!”*

By the time she landed, there were literally tens of thousands of responses. She was dismissed and publicly shamed in the media.

# MISUSE OF SOCIAL MEDIA IN THE WORKPLACE

- \* Fraud
- \* Misuse of confidential information
- \* Misleading and deceptive conduct
- \* Breach of consumer laws
- \* Reputational damage
- \* Bullying and harassment
- \* Breach of Privacy
- \* Discrimination
- \* Vilification

# REQUIREMENT FOR A SUFFICIENT CONNECTION TO THE WORKPLACE

Did conduct occur during ordinary work hours, at a work-related function or during work-related travel?

Did the conduct occur using work equipment?

Did the conduct specifically relate to something that happened at work or between work colleagues?

Would other people who observed the conduct connect the activity with the workplace? Did the audience include colleagues, clients/customers, the general public?

Did the employee intend to express a personal view, or were they holding themselves out to be a representative of the employer?

What is the effect on the workplace or the employer's business and reputation?

# LEGAL BASIS TO CONTROL USE OF SOCIAL MEDIA

- \* Contract
- \* Implied duty of fidelity and good faith – to work in the best interests of the employer
- \* Express social media policies – incorporated into the contract?
- \* Work Health & Safety legislation
- \* Anti-discrimination/ Vilification legislation
- \* Public sector governance

# ROSE v TELSTRA CORPORATION: THE ABILITY TO CONTROL OUT OF HOURS CONDUCT

1. viewed objectively, it is likely to cause serious damage to the employment relationship; or
2. it damages an employer's interests; or
3. it is incompatible with the employee's duties.



# ROSE v TELSTRA CORPORATION: THE ABILITY TO CONTROL OUT OF HOURS CONDUCT

The Full Bench of the Fair Work Commission has held that employers may regulate an employee's social media activity where:

- the social media account clearly links a person to their employment (eg inclusion of employer's name in profile);
- the activity is accessible to the public, colleagues &/or clients and causes damage to the reputation of the business;
- confidential or sensitive information is revealed;
- it results in the employee being unable to perform their duties eg loss of reputation, loss of trust or confidence

# SOCIAL MEDIA IN THE WOKPLACE

## ***Renton v Bendigo Health Care Group*** [\[2016\] FWC 9089](#)

- \* Employee shared a video on Facebook of an obese woman in her underwear dropping her stomach on to the back of a man on all fours and “tagged” two of his co-workers with the caption “Frank getting slammed by Jo at work yesterday!”
- \* The Employee was dismissed.
- \* The FWC found a valid reason for termination in that the social media post had the potential to adversely affect the reputation of Bendigo Health and exposed the two co-employees to humiliation and potential ridicule at work.

# IMPLIED RIGHT TO FREEDOM OF COMMUNICATION

## ***Chief of the Defence Force v Bernard Gaynor [2017] FCAFC 41***

Mr Gaynor's blog on his personal website, [bernardgaynor.com](http://bernardgaynor.com) (and shared on Twitter and Facebook) included:

- \* that he would not let homosexual people teach his children;
- \* that it was wrong for the Defence Force to have granted permission for members of the ADF to march in uniform at the Sydney Gay Mardi Gras;
- \* the ADF should not support of transgender ADF members: *“the Army is now the employer of choice for those who want to take their cross-dressing career a little further. The Army is so generous, it even offers men unfettered and free access to the ladies' showers while they contemplate the best way to fulfil their sexual identity.”*

# *Chief of the Defence Force v Gaynor (cont)*

- \* Gaynor was terminated after continuing to publish the material following a direction to desist from the the Deputy Chief of the Army.
- \* Gaynor alleged that the termination impermissibly conflicted with the implied freedom of communication on government and political matters.
- \* The Full Court of the Federal Court rejected that argument and held that the “freedom” of political communication is directed to limits on legislative power not personal rights.
- \* Further, that it was never the subject matter of the communications but the tone and attributes of the communication and its clear link to ADF policies and practices that served as the basis for termination.

# VICARIOUS LIABILITY

## Potential claims by other workers

Unlawful  
discrimination  
and  
harassment

Bullying

Victimisation

Vilification or  
inciting hatred

Stalking or  
other  
criminally  
offensive  
behaviour

# REMEDIES

## Enforcement

### Employment

- Disciplinary action (up to and including termination)

### Civil law

- Defamation
- Misleading and deceptive conduct

### Criminal law

- Serious bullying
- Stalking
- Inciting violence