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PUTRI PAN PACIFIC
JOHOR BAHRU

"MANAGING SOCIAL MEDIA AT THE WORKPLACE"
4TH JULY 2013
(9.05 TO 10.30 AM)

PRESENTED BY:
DATO' JALALDIN BIN HJ. HUSSAIN
INDUSTRIAL COURT CHAIRMAN
INDUSTRIAL COURT
KUALA LUMPUR

1. **Social Media And The Workplace**

1.1. **Definition**

Andreas Kaplan, Professor of Marketing at the European Business School defines “social media” as “a group of internet-based application that allow the creation and exchange of used generated content”.

1.2. **Form**

The primary forms of social media includes:-

(a) Social networking sites – *Facebook, Twitter, Yammer, LinkedIn*, where users share information with a community friends

(b) Blog – a term derived from Web log. It is an online personal journal on a topic where people who subscribe to the blog can comment on the posting e.g. *Twitter*, Blogger/*weibo*

(c) Video and photo sharing sites – *Youtube, vimeo, Flickr*, *Picasa* and others make it easy to share view and comment on postings.

(d) Chat/chatroom and message board: online meeting and shared opinions on topics of interest e.g. Mums net.

(e) List servs – message sent to registered members

(f) *Hikis* – information site that anyone can edit or update i.e. *Wikipedia*

(g) Social book marking e.g. stumble upon – here users can suggest interesting content to others and even rate it

(h) Mobile application – GPS location service, on line games e.g. second life/*Blendr*

(i) Electronically Stored Information (ESI) – it is data stored as an electronic medium entity is custodian of record

(j) Cloud computing – data stored in high speed internet access used to outsource custodian to third parties. Entity no longer custodian of record and their ability to access depend on contract with the third party cloud computing provider.

2. **And The Workplace**

It is pertinent from the onset to note the word “and” and not “in”. This is due to the fact that social media is not only used “in” the workplace and during working hours but also used “outside” the workplace and outside of work hours “to exchange, comment, *veus* or opine on matters concerning the workplace”. Such use is likely to cause dire consequences including termination as it breaches the trust and confidence, confidentiality, employer’s business interest and incompatible with the employees’ duty as an employee.

3. **The Use Of Social Media**

In November 2006, Blogging Asia’s survey shows 46% of the workforce use social media. In March 2012, a TNS survey found 61% use social media and by February 2013, 70% of Gen Y workforce uses the social media in the workplace (individuals ages 28 to 34). As at April 30 2013, Malaysia ranked no 20 in *facebook* user with a 13,380,00 *facebook* users (47.32% of the total population).

The survey on workplace interest Leisure Browsing (WILD) shows an average use of 15 minutes a day with a low of one minute and a high of 120 minutes per day. The largest age group users in Malaysia are those in the 18 to 24 totalling 4,628,020 users. Out of this 53% are male users while 47% are female.

4. **Benefit of Social**

Social media usage results in the following:-

(a) reduction of cost of recruiting staff, venting, interviews and application.

(b) less human intervention and reducing the number of employees.

(c) less storage capacity to store electronic information and low inventory capacity.

(d) time saving since handling all stages in production or in service sector using computers and network.

(e) business expansion locally or internationally using internet.

(f) generate more sales by reaching a wider audience and giving the cost of employing more salesperson.

(g) better and faster service to customer by directly engaging them.

(h) gather data and customer feedback to improve and do research on products

(i) increase brand loyalty by interacting and updating customers on present and new products

(j) target advertising and marketing from feedback.

(k) increase and improve public relations from data gathered i.e. sending birthday greetings, season offers and promotions.

(l) sharing information more efficiency within the department in the company.

(m) creating networking with others.

5. **Constraint of Social Media**

The constraints of social media are as follows:-

(a) Waste of time

Studies had shown that if a worker uses social media for 15 minutes a day of his working time then productivity will be affected. It would mean a total loss of 1.9% of employees' productivity.

(b) data leakage from staff exchanging information freely

(c) damage to business reputation due to loss of trade secret

(d) illegal practices by cyber hackers/crooks

(e) open access to organisation information due to outdated passwords

(f) criminal activities by disseminating wrong information

(g) cause embarrassment to the company or organisation due to critism and attention from public

(h) infringement of personal privacy when co-workers exchange comments on personal information

(i) social media can be created by others i.e. wife and daughter – see *Linfox Australia Pty Ltd. v. Glen Stutsel [2012] FWAFB 7097* and comments which are derogatory posted.

(j) proving the person as author and aware of contents of the said social media – see *Bax Global (Malaysia) Sdn. Bhd. v. Saravanan Rajagopal [2007] 3 ILR 434*

(k) entail action on infringement of copyright, trade mark, defamation and sedition

(l) competition issues – disparaging remarks about competitors

6. Challenge of Social Media

6.1. Development

An interesting development in social media and the workplace is the increase in the number of companies introducing the BYOD (Bring Your Own Device) policy. Through such policy, employees are allowed to bring and use their own devices for work. This is a shift from using corporate own device. It allows optimal flexibility mobility. It is argued to have increased productivity, reduced cost and simplified IT management. Studies at AT & AT in 2008 and 2009 and in office Produce Management Group have shown increase in efficiency and productivity of employees (see De raut, John (2010) Social Networking and Workplace Productivity). It shows a 9% more productivity that those who do not (see Fahney 2009). It also shows that by taking breathers through surfing the brain is refreshed and renewed (see De likat, M Pitchers J.D and Becking I (2011) Orrick, Berlin).

6.2. Argument On Use

Employers on the one hand, argue on the issue of security of trade secrets, while employees raise issues of harassment and sexual discrimination in the workplace and infringement of personal privacy due to ease of dissemination. Companies say there is loss of control over sites visited by employees, brand

damage, litigation on infringement of copyright and trade marks, defamation suites, sedition, hacking, unfair competition, angry former employees, dissatisfied customers and employees involving in criminal activities such as pornography. Both employer and employee had called for controls on the use of the social media. Companies now can no longer ignore the use of social media in the workplace and as such there is a need to establish rules and regulations to control their abuse. Companies too need to enforce and monitor their employees as a lot of sensitive information is stored. Information stored is considered "data" which needs to be protected as trade secrets and confidential information. For the government departments, security issues remain as the highest priority. Business goodwill and reputation may take years to build but through social media may only take hours to destroy. The ability to copy, distribute and comment on contents posted on social media can easily break a company. No employer is safe from "on line persecution" by internet users leading to real and serious financial consequences as there are now more than 500,000,000 (500 million) users of *facebook* alone and another 200,000,000 (200 million) active mobile phone user.

6.3. **Problems**

The more challenging and practical problem, however, concerns an employee's misuse of social media away from work. It is now not uncommon for employees to vent about their work experience on their social media pages. How then do we deal with such a situation? There is also the problem of post termination postings or comments on social media. The issue is to be considered as the employment relationship has ended. Can the employer rely on exit interview or post termination conduct to justify dismissal? See *Ranhill*'s case – the recent decision of the Court of Appeal quashing the decision of the High Court and the Industrial Court's award.

See also *Hays Specialist Recruitment (holdings) Ltd. v. Ions [2008] EWHC 745* for the English (UK) position.

7. The Position in Other Countries

There is thus no dispute that there is a need to use social media at the workplace or outside it. There is, however, a need to strike a balance. To do so we shall look at the practices in France, the Europe Union, Australia, New Zealand and Malaysia. It is hoped that the said practices would be helpful as a guide.

7.1. The Position In France

In France the **use of social media at the workplace is permitted as long as it is reasonable.** (See Cecile Martin, Employment & Industrial Relation Law April 2011). According to Article 10 of the convention for the Protection of Human Rights and Fundamental Freedoms, every French citizen has the right to freedom of speech. In 2004, the French Supreme Court held that this applies both within and outside the company provided it is not abusive. The company, however, on legitimate grounds can:-

(a) restrain an employee's type of internet use or prohibit access to specific websites or to content such as pornography

(b) limit access to downloading software, connection forum, private chats and personal mailbox

(c) delimit time slots

(d) require non disclosure of confidential information

The works council oversees such monitoring. French Courts have decided on 16 October 2006 that a former employee must delete from her blog all slanderous and defamatory words she had posted about her employer.

On 19 November 2010, the Labour Court of Boulogne – Billan Court had decided that the employee who had posted a negative comment on *Facebook*, could not ignore that *Facebook* network accessible *via* the internet which does not guarantee the confidentiality of comments posted on the wall of "a friend", since that friend may possibly have "hundreds of friends" with access to his or her wall. The employers' disciplinary actions against the employees were upheld. The above decision was upheld by the Court of Appeal of Reinus on 9 June 2010.

The French Data Protection Agency had in January 2011 reminded all *Facebook* users in France to **divide their contacts to family, friends and business, adapt confidentiality parameters to share and separate information among the separate group.**

The **French Supreme Court had since 2006 decided that a company's Code of Conduct is legally binding on employees and enforceable against them.**

French law strongly protects privacy right and invasion of privacy is a crime. The French Court had on 19 November 2012 banned a gossip magazine from further publishing topless photographs of the wife of Britain's Prince William, the former Kate Middleton. It has also ordered the magazine to hand over the pictures to the royal couple.

The following cases reiterate the need to balance between personal privacy rights and reasonable expectations and the need for clear code of conduct to protect the employer. See *Nikon*'s case (2001), *Klajev v. Sté Cathnet Science* (2005), *Employee v. Société Jalma emploiet protection société*

(2006), *Securitas France v. Employee* (2011) and *Employee v. Société Gan Assurances IARO* (2011).

7.2. **European Union**

The European Union gives EU Directives, however, there are Universal Directions which the EU followed and accepted. The Universal Declaration of Human Rights (1948) European Convention On Human Rights, International Covenant on Civil and Political Rights (1966) OELD Guidelines on the Protection of Privacy and Transborder FLOWs of Personal Data (1980), United Nations Guidelines concerning computerised personal data files (1990) and Code of Practice on the Protection of Workers' Personal Data (1995), ILO Code of Practice on the Protection of Workers Personal Data (1995) and Charter of Fundamental Rights of the European Union (2000) are examples thereof. See also the EU Directive 95/46 E.C 97/66 EC, 2002/58/EC and Directive 2009/136/EC. Directive 95/46/EC regulates the use of collection and transfer of unsolicited communication. The Directives, Article 13 states that the use of social media and electronic mail may only be allowed in respect of subscribers who have given their prior consent. This Directive according to Article 3 covers personal data wholly or partly by automatic means or otherwise which forms a filing system or are intended to form part of a filing system. This includes names, addresses, telephone numbers, marital status as well as terms of employment, salary, bonuses and performance appraisal.

Article 25 does not allow EU countries to send data to non EU countries and requires all EU states to restrict the transfer of personal data. The transfer to non EU countries must have adequate date protection.

Directive 97/66/EC is replaced by Directive 2002/58/EC. Directive 2002/58/EC focuses on online privacy and the European Union Data Protection Directive of 1998. Article 4 states that a public provider of electronic communication must take appropriate technical and organisation measures to safeguard security of its services. It must provide a level of security appropriate to the risk presented. Article 6 states that traffic data relating to subscribers and users processed and stored by the provider must be erased and made anonymous when it is no longer needed for the purpose of transmission of a communication.

Directive 2009/136/EC emphasises the Privacy and Electronic Communication Directive CE – privacy Directive 2002/58/EC by requiring confidentiality of information, treatment of traffic data, spam and cookies to be subjected to prior consent.

Non EU countries are covered under Article 17 of the International Covenant and Civil and Political Rights applicable to the Organisation of Economic Cooperation and Development (OECD). However, they are not legally binding.

7.3. **United Kingdom**

The European Community Directives are legislative instruments for members. However, each state can enact their own statutes. For the United Kingdom position, see the following cases:-

(a) *Taylor v. Simerfield ETS/107487/07*;
(b) *Gosden v. Lifeline Project Ltd ET/2802731/09*;
(c) *Stephen v. Halford ET/1700796/10*;
(d) *Preece v. JD Wether Spoons plc ET/1200382/11*;
(e) *Whitham v. Club 24 ET/1810462/10*;

(f) *Crisp v. Apple Retail (UK) ET/1500258/11*;

(g) *Flexman v. BG International ET/1500258/11;*

(h) *Teggart v. Teletech U.K. Ltd. [UTCNI]* Case No. 70411;

(i) *Young v. Argos Ltd ET/1200382/11*; and

(j) *Smith v. Trafford Housing Trust [2012] EHCW 3221*.

Taylor v. Simerfield

The claimant had been alleged to have posted a video clip on Youtube showing a member of the Company's staff dressed in the company's uniform being struck on the head by another employee. The clip was posted through his computer.

The claimant claimed that the video was posted by a colleague named Austyn Webster after a drinking session as at that time "with alcohol it seemed we wouldn't do any harm and it would be funny".

The company felt that such a video had disparaged the company's reputation and was not to be tolerated. The claimant was dismissed, summarily for posting the footage which it said had brought the company into disrepute.

The Employment Tribunal (Scotland) held the **dismissal to be unfair.** There was **no evidence to show that the company's reputation had been affected as the company did not adduce evidence to show how many "hits" it had received, the decision maker had not seen the video**, no loss to the standing of the company, the video was on the internet only three days which is a short time, the conduct was not a gross misconduct and the video only come to light when some two

weeks later someone mentioned it in a Sunday newspaper of an article concerning earlier video clips.

Whitnam v. Club 24

The claimant posted in his *Facebook* the following:-

> "I think I work in a nursery and I do not mean working with plants". A friend commuted saying, "ya, work with a lot of plants through!! to which the claimant responded "a tree".

The company dismissed him for such comments on the ground it had potential damage to the company's and Ventura's reputation.

The Employment Tribunal held that the **comments were minor**. The company should have investigated whether or not the **comments** made to colleagues and **not about the company** had jeopardised the company's relationship with Ventura. The company's decision was outside the boundaries of reasonable responses.

Crisp v. Apple

The claimant in his *Facebook* posted the following:-

(i) "once again fuck you very much work"

(ii) "mobile me [an apple application] fuck up my time zone for the third [time] in a week and wake me up at 3 am! JOY!!

(iii) "Jesus phone" confessing to his Apple phone.

(iv) "tomorrow's just mother day that hopefully I will forget" which was posted the day before Apple use the tagline "Tomorrow is another day. that you'll never forget".

The Employment Tribunal held that the claimant's dismissal was within the range of reasonable responses. The Tribunal was satisfied that the **claimant's conduct in posting the said comments amounted to misconduct.** The **claimant was aware of the company's** electronic communications **policy,** should have been aware that **these types of comments could damage Apple's reputation** and so bring the company into disrepute. In light of the **great importance of image to the company,** the claimant's act could be treated as gross misconduct.

Young v. Argos Ltd.

The claimant's colleague posted a comment on *Facebook* at the following:-

"as much use as a chocolate teapot".

Young commented that she "liked" the comment and added "that this had been the worst year in her 15 years with Argos Ltd. and was so happy that her former colleague had "escaped".

The company dismissed Young.

The Employment Tribunal held the **dismissal to be unfair** as no reasonable employer could have unclouded that Young's comments amounted to gross misconduct. The **comments were "being no more than workplace gossip routine critism of an employer".**

Smith v. Trafford Housing Trust

The claimant a Christian employee of the company posted comments in his *Facebook* objecting to gay marriage. The company found the claimant's comments to be work related as 45 of his *Facebook* friends were

colleagues at the company. The claimant's comments were held to be impermissibly promoting his religious views causing offence to colleagues and thereby bringing disrepute to the company.

The claimant was found guilty and demoted by the company.

The High Court held the decision **unfair as the comments were the moderate expression of a view about gay marriage, was not judgmental or disrespectful, was not misconduct, even though some colleagues found the comment offensive.**

From the above cases, it can be seen that **employers need to have a policy** on the usage of social media. Employers too need to consider and ensure that the said policy is not only **made known to employees** but the **consequences of misuse of such social media too must be specified** i.e. its coverage and usage. There must be **clear limitation of usage.**

The above cases also reflect that companies must have a **reasonable response to contents of social media.** It must also be shown that the **company is named and the derogatory remarks had damaged the reputation of the company.** Upon establishing both of the above, will the Court hold that the dismissal was a reasonable response. In case of conflict between EC Directives and local law, the case of *Crisp v. Apple Retail (UK) ET 1500258/11* clarifies that the position in the UK is the UK legislation prevails.

There is thus a thin line between what is permissible and what is unreasonable depending on facts and circumstances of each case.

7.4. **Australia and New Zealand**

7.4.1. **Background**

Australia and New Zealand offers a number of latest issues on social media. Decisions by the former Australian FWA (Fair Work Australia) and the present (Fair Work Commission) by a single Commissioner and an appeal to the Full Bench (FWAFB) recently and decisions of the ERA 2006 New Zealand offers a different approach. In France the Court seems to be very lenient with the use of social media emphasising on Freedom of expression limiting only to personal privacy. The EU believes in legislating and issues directives to states. It emphasises the stringent controls over cross border or cross EU data. Data is not only limited to personal data but include anything which is reduced into storing by companies which is considered confidential.

In both Australia and New Zealand, however, challenges are made both by employers and employees on the use of social media during and after work.

7.4.2. **Australlia**

For purposes of discussion, reference will be made to four (4) Fair Work Australia decisions and Three (3) Full Bench (appeal) cases as follows:-

(a) ***Dover Ray v. Real Insurance Pty. Ltd. [2010] FWA 85 44***

Miss Dover Ray was accused of posting in her blog on "My Space" the following:-

> **"corrupt employers", "witch hunters" and "chasing dollars over safety"**

She was dismissed after the **company had asked her to remove** the said comments and **she refused** to do so. She argued that the comments were placed as the company found her allegations of sexual harassment were unsubstantiated. She said her comments did not state the name of the company as it was anonymous. The FWA upheld her dismissal. The **FWA held** that the said blog is likely to cause serious damage in the relationship between the employer and the employee. **The blog was reasonable to be expected to eventually come to the attention of other employees, cause damage to the employers business and is incompatible with the employees' duty as an employee.** She had been asked to remove the said offensive comments but refused to do so.

(b) ***De Kart v. Johns River Tavern [2010] FWA 3389***

Mr. De Kart had gone on medical leave on the eve of New Year. Subsequently, he posted in his *Facebook* a photograph showing him taking part in a boat race in conjunction with New Year eve celebration. The company dismissed him. The FWA upheld his dismissal.

(c) ***Lee Mayberry v. Kijani Investments [2011] FWA 3496***

The company alleged that Mr. Lee had posted in his *Facebook* a photograph of him in cardboard car made from work material behind a service counter. Mr. Lee claimed that the picture was not posted by him but by a former employee. **The FWA found in favour of the applicant because the company could not prove any damage to the business**

due to the said picture. The company too could not establish that it was the applicant who posted the said photograph in the *Facebook*. The company should have investigated and established that it was the applicant who had misused the employer's property.

(d) ***Damien O'Keefe v. William Muir's Pty. Ltd. [2001] FWA 5311***

Mr. O'Keefe was having problem with his pay from his employer. The person in charge of his pay, one Miss Taylor had again made mistakes. Mr. O'Keefe posted at home after working hours in his personal computer on *Facebook*, the following that he **"wonders how the f _ _ _ work can be so f _ _ _ ing useless and mess up my pay again. C _ _ _s are going down tomorrow"**. The company found out the comment and dismissed him

Mr. O'Keefe argued that the dismissal was unfair because the company had no policy on *Facebook*, the postings were made on his home computer after working hours and that he had set the maximum privacy settings allowable in *Facebook.* The comment too did not cause any damage to the company and that the company was not mentioned of.

The company argued that the comments constituted sexual harassment and threatening behaviour towards Miss Taylor in breach of the company's staff handbook on communication with colleagues, sexual harassment and bullying.

Deputy President Swan held that, “the **manner** in which the threat was made **and the words used** provided sufficient reason for the applicant’s dismissal on the grounds of **sexual misconduct”.** It held further that the applicant made the comment in the house computer or out of business hours and that **“the separation between home and work is not less pronounced than it once used to be”.**

The FWA said the claim failed due to the threatening nature of the comments, that it was directed to a co-worker, that is was **visible to 70 workers and 11 of Miss Taylor’s colleague,** activities on social media outside office hours are no longer immune from security and sanction and that the **staff handbook had stated** the following, **“employees shall not use offensive language, resort to personal abuse or threaten or engage in physical contact”.** There was thus sufficient reason to dismiss the claimant.

Deputy President Swan added that “the claimant was wrong to vent his anger on his *Facebook* instead of raising the matter with the manager for grievances address which was available to him”.

The three Full Bench decision are as follows:-

(a) ***Sally Anne Fitzerald v. Dianne Smith [201] FWA 7358, [2011] FWA FB 1422***

Sally Anne was a hairdresser working in Escape Hair Saloon, the salon/ company Dianne Smith was trading as. Before Christmas, she was given a Christmas bonus coupled with a

warning letter for coming to work late and leaving early. She was then paid half her holiday pay. It was paid by cheque and not cash. She then posted the following in her *Facebook*:-

> **"Xmas bonus a longside a job warning followed by no holiday pay!! Whoooo!! The hairdressing industry rocks man!!! Awesome!!!".**

She was dismissed for "public display of dissatisfaction of terms and conditions of employment, through *Facebook",* by her employer in February the following year.

The FWA found her dismissal unfair. The **FWA held** as follows, **"an employee who thinks that they may say all what they want about their employer in *Facebook* with total immunity from consequences is foolish.** However, in this case, the employer was not named; Ms. Fitzerald too had not put her *Facebook* in her profile where she worked. Clients too could not access Fitzerald's *Facebook* nor had it been shown that any had read the postings".

The posting had not adversely affected the employer and thus not a valid reason for her dismissal.

The FWA highlighted that the post may have affected trust and confidence of her employer but **her employer chose not to take immediate action** when she first became aware of the post, suggesting that she did not consider the trust and

confidence in the employment relationship damaged to an extend that warranted disciplinary action.

The employer being dissatisfied appealed to the Full Bench. The Full Bench upheld the FWA's decision. They said at most Ms. Fitzerald **comments were "sarcastic rather than aggressive".** The FWA's approach on the issue was correct but failed to give adequate reason for their decision on compensation awarded. The matter was returned to the FWA for compensation.

(b) ***Glen Stutsel v. Linfox Australia Pty. Ltd. [2011] FWA 8444***
Linfox Australia Pty. Ltd. v. Stutsel [2012] FWAFB 7079

Mr. Stutsel was employed by Linfox as a truck driver from April 1989. He was dismissed for serious misconduct for the following reasons:-

"(i) on your *Facebook* profile page which was open to the public, you made a number of statements about one of your managers, Mick Assaf that amounted to racially derogatory remarks;

(ii) on your *Facebook* profile pages, which was open to the public, you made a statement about one of your managers, Miss Nina Russell, which amounted to sexual discrimination and harassment; and

(iii) you made extreme derogatory comments about your manager, Mr. Assaf and Miss Russell".

The comment about **Mick Assaf** was that he was a **"bacon hater"**. The comment about **Miss Nina Russell** was that, "she **was a Linfox female manager providing sexual favours for employees in exchange for industrial peace".**

The comments on **Assaf and Miss Russell** were, **"I admire any creature that has the capacity to rip Nina and Assaf heads off, slit down their throats and then chew up and spit out their lifeless body!".**

Commissioner Roberts on 19 December 2011 decided as follows:-

"<u>Conclusion and findings</u>

Mr. Stutsel's employment was terminated for serious misconduct, on the basis of comments which appeared on his personal *Facebook* page. The termination letter (see paragraphs 4 and 5 above) set out three grounds for the termination. Some of the evidence encompasses other allegations against Mr. Stutsel. In my decision making I have confined myself to the three specific allegations made in the termination letter. In this regard, I also note the evidence of Miss Neill (see paragraph 38 above) that the reasons for dismissal were set out in the termination letter and no further reasons are relied upon.

As the Applicant's conduct is the reason given by the Company for the termination, I have to determine for myself whether the impugned conduct occurred and, if so, whether it amounted to a valid reason for termination of employment. In

this regard I respectfully agree with the following observations of the Full Bench in *King v. Freshmore (Vic) Pty. Ltd.* 74:-

> "When a reason for a termination is based on the conduct of the employee, the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s.170CG(3)(a). The Commission must determine whether the alleged conduct took place and what it involved.
>
> The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."

In *Container Terminals Australia Limited v. Toby* 75, a Full Bench of the Australian Industrial Relations Commission said:-

> "In our view, the consideration of whether there was a valid reason for termination is a separate issue from the determination of whether a termination was harsh, unjust or unreasonable…"76

Northrop J in *Selvachandran v. Peteron Plastics Pty. Ltd.* 77 said:-

> "In its context in s 170DE(1), the adjective **"valid"** should be given the **meaning of sound, defensible or well founded.** A reason which is **capricious, fanciful,**

spiteful or prejudiced could never be a valid reason for the purposes of s 170DE(1). At the same time the reason must be valid in the context of the employee's capacity or conduct or based upon the operational requirements of the employer's business. Further, in considering whether a reason is valid, it must be remembered that the requirement applies in the practical sphere of the relationship between an employer and an employee where each has rights and privileges and duties and obligations conferred and imposed on them. The provisions must 'be applied in a practical, commonsense way to ensure that' the employer and employee are each treated fairly, …."

In *Qantas Airways Ltd v. Cornwall* 78, the Full Court of the Federal Court said:-

"The question is whether there was a valid reason. In general, conduct of that kind would plainly provide a valid reason. However, **conduct is not committed in a vacuum, but in the course of the interaction of persons and circumstances, and the events which lead up to an action** and those which accompany it may qualify or characterize the nature of the conduct involved."

In *Edwards v. Justice Giudice* 79, Moore J said:-

"The reason would be valid because the **conduct occurred and justified termination.** The reason might not be valid because the conduct did not occur or it did occur but did not justify termination."

In the case before me, there is no contest that the material upon which Linfox based its decision to terminate Mr. Stutsel's employment appeared on his *Facebook* page. Mr. Stutsel's *Facebook* account had some 170 other persons with the status of 'friends', many of them Linfox employees. The material complained about by Linfox was contained in a series of conversations between Mr. Stutsel and others.

The evidence:

A thorough examination of the evidence leads me to a number of conclusions which have guided me in making my decision in this matter. **Firstly,** I accept as truthful the evidence of Mr. Stutsel that his ***Facebook* account was set up by his wife and daughter** and that he believed that the account had been set on the **maximum privacy setting** available and that he did nothing to vary that setting. That is, he believed that the comments posted on his page could only be viewed by himself and those persons he had accepted as *Facebook* friends. I further accept Mr. Stutsel's evidence that he was **unaware that he could delete comments** from *Facebook* friends once they had been posted.

I further accept Mr. Stutsel's evidence that comments he **posted about terrorism** and the death of a terrorist, were an expression of **his private views** at the time and that he **later came to regret** the making of some or all of those comments. Whether Mr. Stutsel's contrition in that regard is genuine need not concern me as I consider his comments to be within his right to free speech in such matters even though many, including myself, would find much of the *Facebook* discourse

which is in evidence to be distasteful. It is a bridge too far in my opinion to make a connection between those comments and any personal attack on Mr. Assaf. The Applicant's *Facebook* page was not a web blog, intended to be on public display. It was not a public forum.

The reference "**bacon hater"** was obviously directed as a descriptor of Mr. Assaf. Such a **remark is clearly in poor taste but cannot amount to being a racially derogatory** remark intended, or acting to, vilify Mr. Assaf on racial grounds. The actual comment could just as easily be used in relation to members of other religious groups and not just Mr. Assaf and Muslims. **In my considered view, the remark was not intended to be hurtful,** even if that was not so. Mr. Assaf was entitled to be offended by the comment but I note that he only saw it through the action of Ms. Russell. I further note that I have paid no regard to any evidence, submission or material which sought to bring Mr. Assaf's religious piety into issue. I am content to accept Mr. Assaf's self description in such matters.

I note **that none of Mr. Stutsel's *Facebook* friends posted any comment** objecting to any of the above material (or indeed to any of the material complained of) and apparently found it unexceptionable. That does not totally excuse it but rather, indicates the nature of the milieu in which the remarks were made. When the *Facebook* comments are read in sequence and as a whole, the nature of them becomes clearer. In context, there are several participants in each thread of discussion, all of whom appear well versed in what

the discussion involves and the personalities involved. The chains of comments have very much the favour of a group of friends letting off steam and trying to outdo one another in being outrageous. Indeed it has much of the favour of a conversation in a pub or cafe, although conducted in an electronic format. Any external reader not familiar with either Linfox or particularly the NDC, would have considerable difficulty in making out what was going on in several instances and would have some difficulty in determining about whom some of the remarks were made.

Some of the material also quite directly relates to Mr. Stutsel's TWU delegate activities and discussions about such matters as the recently finalised enterprise agreement, the use of subcontractors and other in-house matters appear to me to be little different from any discussion between persons who are interested in or involved in such matters. The fact that some of the material is not complimentary towards Linfox managers is unsurprising. This always has been, and always will be the fate of those holding managerial positions.

The **comments of a sexual nature made about Ms Russell fall into a different category entirely.** She was entitled to be outraged by those comments and to complain about them. However, the problem for Linfox in these proceedings is that the **main offending comments about Ms. Russell were not made by Mr. Stutsel.** Having accepted Mr. Stutsel's evidence that he was unaware that he could delete comments once they were made, I cannot find any fault in him in relation to the offending material of a

sexual nature about Ms. Russell. I accept Linfox's submission that he could have posted a comment disassociating him from the comments. It was a mistake for him not to do so but the fact remains that he did not make the offending comments. That Linfox saw fit to take action against Mr. Stutsel over the Russell comments rather than against their author strikes me as being more than passing strange.

The evidence of Ms. Russell is somewhat problematic in my view. I accept that she was probably extremely annoyed by the material concerning herself which she found on Mr. Stutsel's *Facebook* page. I do not believe and do not accept that she believed that the ursine material 'articulated in graphic detail what can only be described as my torture, mutilation and death'. Such a statement strains credulity. As I have noted above, that material was an attempt at humour in my view and did not contain any credible threat to Ms. Russell's wellbeing. The material was metaphorical and hyperbolic but certainly not hortatory. It might be, as Mr. Baroni described it, 'disgusting' but it was in no way threatening. In broad, I agree with the submissions of Mr. Fagir on this point, as set out at paragraph 64 above.

Mr. Fagir and Mr. Stutsel expressed a suspicion that Ms Russell had accessed Mr. Stutsel's *Facebook* page when he inadvertently left his account open at work. I do not believe this as it is clear from the evidence of Mr. Assaf and Ms. Neill that both of them were able to view Mr. Stutsel's *Facebook* page when accessed by Ms. Russell. For her part, Ms. Russell took some pains to navigate through Mr. Stutsel's

Facebook account when she discovered that she could access it. I am curious as to why she would access the account when she was not a *Facebook* friend. However, it was perfectly natural for her to forensically go through the account when she first discovered unflattering references to herself. Mr. Assaf's outrage was largely the resultant product of Ms. Russell's endeavours.

The evidence of Mr. Hurst had not assisted me in the making of my decision and I have disregarded it. The evidence of Ms. Neill strikes me as broadly truthful as to her role in the investigation instigated by the complaints of Ms. Russell and Mr. Assaf.

At the time of Mr. Stutsel's dismissal, **Linfox did not have any policy relating to the use of social media by its employees.** Indeed, even by the time of the hearing, it still did not have such a policy. The Company relies on its induction training and relevant handbook (see paragraphs 28 and 29 above) to ground its action against Mr. Stutsel. **In the current electronic age, this is not sufficient and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies. Linfox did not.**

All in all, I find that Mr. Stutsel was not guilty of serious misconduct relating to the matters set out in the termination of employment letter. I further find that there was not a valid reason for the termination of his employment, based on my reasoning set out above.

I now turn to the question of whether the dismissal of Mr. Stutsel was harsh, unjust or unreasonable. Section 387 of the Act sets out the criteria for considering harshness etc. It provides:-

"**387 Criteria for considering harshness etc"**

In considering whether it is satisfied that a dismissal was harsh, unjust or unreasonable, FWA must take into account:-

(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and

(b) whether the person was notified of that reason; and

(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and

(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and

(e) if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and

(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and

(h) any other matters that FWA considers relevant."

In *Byrne v. Australian Airlines* 80, McHugh and Gummow JJ of the High Court said:-

"It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted."

The question of valid reason is dealt with above. It is apparent from the materials and evidence that Mr. Stutsel was notified of the reasons for the termination of his employment. It is

further clear on the materials and evidence that he was given an opportunity to respond. Mr. Stutsel was allowed to have a support person present with him at his disciplinary hearing. The question of unsatisfactory performance does not arise in these proceedings. The size of the employer's enterprise is a factor which is likely to have impacted on the procedure followed in effecting Mr. Stutsel's dismissal. On what is before me, I conclude that Linfox is a large operation with access to advice internally on industrial relations matters. This would have impacted significantly on the procedures followed by the Company in effecting the dismissal of Mr. Stutsel. All in all, I am satisfied that the termination of Mr. Stutsel's employment was procedurally fair and I so find.

I now come to the question of **differential treatments** by Linfox of persons who made offensive comments on Mr. Stutsel's *Facebook* page. Disparity in the treatment of different persons has been dealt with in several decisions of the Tribunal and its predecessor. In *Sexton v. Pacific National (ACT) Pty. Ltd.* 81, Vice President Lawler said:-

"It is settled that the differential treatment of comparable cases can be a relevant matter under s.170CG(3)(e) to consider in determining whether a termination has been "harsh, unjust or unreasonable". In National Jet Systems Pty Ltd. v. Mollinger 82 the Full Bench concluded that in the particular factual circumstances it was appropriate for the member of the Commission at first instance to have regard to different treatment afforded to another employee involved in the same incident.83"

There is nothing before me to indicate that persons other than Mr. Stutsel who were in the employ of Linfox and made offensive comments on Mr. Stutsel's *Facebook* page were the subject of any sanction by the Company. This factor has not been determinative in my decision making but has had some influence in my ultimate finding relating to harshness.

Other matters which I have considered relevant in the making of my decision are Mr. Stutsel's extremely good employment record over some 22 years, his age and his employment prospects.

Mr. Stutsel would be wise to take note of a comment he posted on his *Facebook* page on 11 November 2010. That comment read: "Law of Probability - The probability of being watched is directly proportional to the stupidity of your act." Here is wisdom.

All in all, I have concluded and find that the termination of Mr. Stutsel's employment by Linfox was harsh, unjust and unreasonable.

Section 390 of the Act provides:-

> "**390 when FWA may order remedy for unfair dismissal"**
>
> (1) Subject to subsection (3), FWA may order a person's reinstatement or the payment of compensation to a person, if:-

(a) FWA is satisfied that the person was protected from unfair dismissal (see Division 2) at the time of being dismissed; and

(b) the person has been unfairly dismissed (see Division 3).

(2) FWA may make the order only if the person has made an application under section 394.

(3) FWA must not order the payment of compensation to the person unless:-

(a) FWA is satisfied that reinstatement of the person is inappropriate; and

(b) FWA considers an order for payment of compensation is appropriate in all the circumstances of the case.

In all the circumstances of this case, **reinstatement is in my view both practicable and desirable.** Mr. Stutsel seeks reinstatement and I find that reinstatement is an appropriate remedy. My assessment of Mr. Stutsel and his conduct is that he is quite capable of resuming his duties as NDC. He has shown no rancour towards Management and I believe that the employee/employer relationship can be re-established provided that there is goodwill on both sides. I have no doubt in this context that Mr. Stutsel is fully aware of the comments on his *Facebook* page were foolish and he regrets the entire situation. Mr. Assaf is now based in Bangkok and there is

nothing before me which would indicate that Mr. Stutsel and Ms. Russell are likely to come into contact with each other to any degree.

Section 391 of the Act provides: -

"**391 Remedy - reinstatement etc.**

Reinstatement

(1) An order for a person's reinstatement must be an order that the person's employer at the time of the dismissal reinstate the person by:-

(a) reappointing the person to the position in which the person was employed immediately before the dismissal; or

(b) appointing the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

(1A) If:-

(a) the position in which the person was employed immediately before the dismissal is no longer a position with the person's employer at the time of the dismissal; and

(b) that position, or an equivalent position, is a position with an associated entity of the employer.

the order under subsection (1) may be an order to the associated entity to:-

(c) appoint the person to the position in which the person was employed immediately before the dismissal; or

(d) appoint the person to another position on terms and conditions no less favourable than those on which the person was employed immediately before the dismissal.

Order to maintain continuity

(2) If FWA makes an order under subsection (1) and considers it appropriate to do so, FWA may also make any order that FWA considers appropriate to maintain the following:-

(a) the continuity of the person's employment;

(b) the period of the person's continuous service with the employer.

or (if subsection (1A) applies) the associated entity.

Order to restore lost pay.

(3) If FWA makes an order under subsection (1) and considers it appropriate to do so, FWA may also make any order that FWA considers appropriate to cause the employer to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the dismissal.

(4) In determining an amount for the purposes of an order under subsection (3), FWA must take into account:-

(a) the amount of any remuneration earned by the person from employment or other work during the period between the dismissal and the making of the order for reinstatement; and

(b) the amount of any remuneration reasonably likely to be so earned by the person during the period between the making of the order for reinstatement and the actual reinstatement."

In summary, I find that there was no valid reason for the termination of Mr. Stutsel's employment and I further find that his dismissal was harsh, unjust and unreasonable. I find that he should be reinstated to his former position at the NDC with full continuity of employment for all purposes excepting wages from the date of his termination of employment until the date of his reinstatement. That reinstatement should take place on the earliest possible date and in any event from no later than seven days from the date of this decision.

Mr. Stutsel did not actively pursue a claim for compensation for lost wages following the termination of his employment. However, in all the circumstances of this case, I find that an order for compensation is required to achieve a just outcome for Mr. Stutsel. However, I do not believe Mr. Stutsel should be compensated for the entire period following his dismissal on 31 May 2011. Accordingly, I find that Mr. Stutsel should be compensated for lost wages at his ordinary rate, as applicable at the time he was dismissed, on and from 1 July 2011 until the date of his reinstatement. The amount comprising

compensation for lost wages shall have deducted from it the amount of any remuneration earned by Mr. Stutsel from employment or other work during the period between dismissal and the making of my order for reinstatement and any amount of other remuneration earned by him during the period between the making of my order for reinstatement and the actual reinstatement.

In accordance with s.381(2) of the Act, I am further satisfied that each party has been accorded a 'fair go all round' in these proceedings.

The Appeal

Linfox argued on appeal that in deciding that the dismissal was unfair, the Commissioner:-

(a) relied on irrelevant considerations as mitigating Mr. Stutsel's culpability;

(b) gave no or insufficient consideration to relevant facts and made errors of fact; and

(c) place undue emphasis on a purported right to free speech

Linfox also appealed Commissioner Robert's orders of reinstatement and back pay.

The Decision

The **Full Bench dismissed Linfox's appeal**, finding that Commissioner Roberts' decision that there was no valid reason for termination was reasonably open to him in the circumstances and that the remedies ordered by the Commissioner were appropriate.

In doing so, **the Full Bench outlined a number of key principles to be applied in assessing the validity (or fairness) of a dismissal for misconduct based on misuse of social media:-**

> "Importantly, the Full Bench found that the **posting of derogatory, offensive and discriminatory statements or comments about managers or other employees on *Facebook* might provide a valid reason for termination of employment.** In each case, the enquiry will be as to the nature of the comments and statements made and the width of their publication. In this regard, the Full Bench was mindful of the need not to impose unrealistic standards of behaviour or to ignore the realities of workplaces".

The Full Bench did not altogether agree with Commissioner Roberts' assessment of the relevant *Facebook* conversations as *"having the flavour of a conversation in a pub or café".* The Full Bench observed that the electronic form of the conversations gave the comments a different characteristic and a potentially wider circulation than a pub discussion. **The Full Bench noted that employees ought to exercise considerable care in using social networking sites, highlighting the fact that the relevant comments were published to a wide audience (including Linfox employees), the ease of forwarding comments on to others and the permanent nature of those comments.** This suggests the Full Bench may have decided the "valid reason" point differently if they were permitted to rehear the matter.

The **Full Bench identified** a number of “other matters” which supported Commissioner Roberts’ decision at first instance that the dismissal was “unfair”. These matters include the following:-

(a) the **long period** of Mr. Stutsel’s **employment** (22 years), his age and his employment prospects;

(b) Mr. Stutsel’s belief that his ***Facebook*** **page was on maximum privacy** settings and that the comments posted on his page could **only** be **viewed by him and his *Facebook* friends**, and the finding that the **comments were never intended to be communicated to the managers concerned**;

(c) the conduct complained about occurred outside of the workplace and outside of working hours;

(d) some of the **statements complained about** on the *Facebook* page **were made by others,** and that Mr. Stutsel did not know that he could delete comments made by others once they had been posted; and

(e) **Linfox did not take action against other employees who took part in the relevant *Facebook* conversations.**

Importantly, the Full Bench noted that some of these factors may be given less weight in future cases in light of increased use and understanding about *Facebook* in the community and the adoption by more employers of social networking policies.

(Decision of Full Bench as per Appendix 1). Reference was made to the UK position as per the decided cases of *Crisp v. Apple Retail (UK) ET/1500258/11* and *Preece v. JD Wetherspoons Ple*. (Appendix II)

Linfox had appeal to the Federal Court of Australia for Judicial Review [FC A-NSD 1623/2012] which is pending.

(c) ***Gloria Bowden v. O Hey Lodge [2012] FWA 6458***

FAWB decision 6 February 2013

Gloria Bowden was involved in an argument on *Facebook* with another employee who accused her of intimidation. The conversation was sparked due to an ongoing investigation conducted by the Chief Executive into the company's supposed low morale.

An employee named Crocker filed a complaint against some of Bowden/s friends. Some complications surrounding this complaint cause Bowden to write a post on her *Facebook* wall about the incident. Crocker then posted the words "f_ck you all", believing Bowden's post was about her. She removed the post believing she had gone too far. Bowden then sent Crocker an email entitled "office politics". Crocker felt intimidated and fear that it may lead to disciplinary action. Crocker then lodged a complaint against Bowden. Bowden was dismissed summarily without notice for posting the said, "office politics".

The **Fair Work Commission** (formerly the Fair Work Australia) **held that the decision to dismiss Bowden was unfair.** She should at **least be dismissed with notice.** It was found that Bowden's dismissal was unnecessary given that she was working in a separate area to the other women. "It was harsh as she had no previous allegations – complaints made about her conducts and the allegations related to an occurrence". **Commissioner Anna Lee Cribb said, "as well (the other worker) participated equally in the *Facebook* exchanges and there does not appear to have been any disciplinary action taken regarding (that worker's f_ck you all", *Facebook* post.**

Bowden appealed against the compensation that was awarded to her while the company appealed against the FWC's decision.

The Full Bench in February 2013 upheld the dismissal to be unfair and awarded a $7,500 compensation.

7.4.2. **<u>In New Zealand</u>**

In 2011 and 2012 New Zealand had seen continued growth of social networking sites and a corresponding increase in the number of cases relating to employees' inappropriate behaviour online as follows:-

(a) ***Hohaia v. New Zealand Post Limited [2011] NZLR 266***, an employee of the New Zealand Post was dismissed after he set up two crude *Facebook* pages called "PostieLad" and "PostieLand". These pages contained **unflattering physical**

references to a female work colleague and highly unflattering descriptions of New Zealand Post's customers. The employee had put **no privacy controls in place,** which meant that the page could be seen by the general public. While recognising the employee's freedom of speech, the **New Zealand's Employment Relations Authority** (the Authority) **decided that overall justice favoured the refusal of interim reinstatement. It said that at the very least, the nature of the *Facebook* comments New Zealand Post may have "seriously hindered" the employee's ability** to undergo reinstatement sincerely and fully.

(b) social media pages have also been used to evidence misconduct. In 2012, the Authority accepted evidence on an employee's online behaviour in assessing the validity of his dismissal on grounds of misconduct. In ***Tulapa v. Te Runanga [2012] NZERA (Auckland) 253***. Mr. Hohaia took sick leave then posted pictures of himself attending a waka man (traditional Maori boat racing) competition with his family on the same day. **The Authority held that Hohaia's employer was justified in dismissing him for misuse of sick leave.**

(c) employers in New Zealand are required to follow established investigation procedures when making misconduct investigations in relation to employees' online behaviour. In April 2012, the Authority found that **Kelly Linnell** was wrongfully dismissed for forwarding an email that contained an image of "a single male contortionist" to at least 28 personal and professional contacts. Linnell was suspended

and later dismissed because her employer considered the image was “pornographic”. **During the hearing, the Authority found that the employer approached Linnell’s misconduct investigation with preconceptions and had made a prior decision to dismiss.** She was awarded two week’s pay as lost wages and compensation for humiliation, loss of dignity and injury to feelings.

The authority observes as follows:-

> As technology evolves, so too does the nature of the modern workplace. Time spent at work premises can no longer be relied on as the definitive dividing line between “work-related” and “personal” behaviour”.

Observation

A recent study found that employee of “Generation Y” (born from the mid-1980s) in Australia and New Zealand highly value being able to socialise on social media sites during working hours in exchange for being accessible for work at other times. While an employer may attempt to reduce or stop personal access by “blocking” certain social media sites in the workplace, this approach is becoming less effective as social media sites such as *LinkedIn* in *Facebook* present a number of possible challenges to an employment relationship. In Australia and New Zealand it is expected that as general social awareness of the effects of social media use increases, the onus on employees to act responsibly in their online behaviour will also increase and the courts will display less tolerance to irresponsible social media use by employees

following the Full Bench decision in *Linfox Australia Pty Ltd. v. Glen Stutsel [2012] FWAFB 7079*.

8. **Malaysia**

I have in my paper entitled "Dismissal ICT Related Offences and Right of Privacy and Monitoring Of Email" at the Seminar Khas Pengerusi-Pengerusi Mahkamah Perusahaan on 23 March 2011 at ILKAP touched on the various legislations which govern ICT related offences such as:-

(a) Internal Security Act 1960 which has now been abolished.
(b) Protected Areas and Protected Places Act 1959
(c) Communication and Multimedia Act 1998 – Sections 231 to 244
(d) Sedition Act 1948
(e) Computer Crimes Act 1997 – Sections 3 to 7
(f) Penal Code – Sections 228, 292, 293, 415, 449, 503 and 506 (down loading of pornographic material)
(g) Electronic Commerce Act 2006
(h) Digital Signature Act 1997
(i) Electronic Government Act 2007
(i) DNA Act 2009.

A copy of the paper is attached as Appendix (III).

8.1. **Industrial Court Cases**

The cases that have so far reached the Industrial Court are those:-

(a) pertaining to the use of email as per:-
    (i) *Bax Global Imports (Malaysia) Sdn. Bhd. v. Saravanan Rajagopal [2007] 3 ILR 434*;
(b) please also refer to the following decided cases on emails:-
    (i) *Monash University Sunway Corporation Malaysia Sdn. Bhd. v. Zuriati binti Zulkifli – Award No. 1114 of 2008*; and

(ii) *Ooi Chik Peng v. Embedded Wireless Labs Sdn. Bhd. [2010] 2 LNS 1030*.

(c) cases on emails containing pornographic material are:-
Cases No. 25/4-1492/06, 25/4-642/07, 25(19)/4-335/08, 25/4-133/09, 25(12)/4-546/09 and latest case 13/4-636/12.

(d) interruption of a public servant in the cause of his judicial function:-
A.G. v. P. Gunalan

(e) to harm the reputation of another (Section 449 – Penal Code):-
Toh Yean San v. RIL Agencies (M) Sdn. Bhd. [2009] 2 LNS 0363

(f) criminal intimidation:-
Muhibbah Engineering v. See Hong Seng [2006] 2 LNS 0396

(d) sexual harassment:-
Yasmin Nor Hazleena Bohari Md. Nor v. IKIM [2009] 3 ILR.

(h) use of employees own internet:-
Sanjungan Sekata Sdn. Bhd. v.Liew Tham Seng [2003] 3 ILR 1155

8.2. **Personal Data Protection Act 2012**

For the position under the The Personal Data Protection Act 2010, see Appendix (IV).

8.3. **Question Of Admissibility and Proof**

For social media cases as stated earlier, the question of *Facebook* account, hacking and tracing remains to be proven by the employer. The consequences of such posting (its effect) and the question of a need for companies to have a clear social media policy was emphasised in *Linfox/Lee Mayberry*. The PDPA limits its breach to “commercial transaction”. A point to ponder is the definition of *Facebook* by Brown J in the Ontario Supreme Court of Justice case of *Leduc v. Roman [2009] Can L. 11 6838* as “a social website for the personal non commercial use of its users”. Would a comment by an

employee about his dissatisfaction of a colleague on *Facebook* be a "personal" non commercial or "commercial" matter? The word "personal data" too encompasses information on a data subject which can be a person or corporation. Any information which can be identifiable to a corporation or a person in for corporation will then become personal data so long as they are electronically stored. Where does confidential information start or end will again need to be proven as it will depend on facts and circumstances of each case.

The position for adducing computer generated evidence in criminal cases is quite settled, see:-

(a) *Ahmad Najib Anis v. PP [2009] 2 CLJ 800*; and

(b) *Azlan Alias v. PP [2009] 1 LNS 534.*

What would be the procedure for admission of evidence and proof thereof bearing in mind the fact that Sections 90A, B and C of the Evidence Act 1950 does not apply to the Industrial Court. At least the burden of proof is settled to be on a balance of probabilities. We have to be ready as to date, the Industrial Court is yet to decide on a case on comments posted on social media.

Observation

It is to be noted a perusal of the law and decisions of the Court in the UK, Australia and New Zealand is necessary, as it offers a guide to HR and IR practitioners in dealing with the use of social media. This is more as the use of social media is still developing in Malaysia and the Industrial Court is yet to decide on such issues.

The first and foremost consideration would be whether the employee had committed a misconduct and secondly whether the punishment meted out

may it be dismissal or otherwise was appropriate in the circumstances to constitute just cause and excuse for the said action. This is not only the position in UK, Australia and New Zealand but also that of Malaysia an enunciated by the Federal Court in *Milan Auto Sdn. Bhd. v. Wong Seh Yen [1995] 4 CLJ 449*.

In the United Kingdom as indicated in *Craig Tailor v. Somerfield Stores*, the yardstick of measurement is that of a "reasonable response of a reasonable employer". The test laid down in *British Home Store v. Burchell [1975] 1 RLR 379* and the provisions of Section 94 of the Employment Rights Act 1996 (ERA).

British Homes Stores v. Employment Appeals Tribunal (EAT) made it clear that dismissal must be based upon reasonable grounds after having carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The employer must be seen be have carried out a proper procedure on the substantial merits of the allegations against the employee to enable the dismissal to fall within the range of reasonable response. See *Maintenance Co. Ltd. v. Dorner [1982] 1 RLR 491* and *Post Office v. Foley [2002] 1 CR 1283*.

To this end, the Industrial Court will scrutinise the evidence and in doing so will look at whether the employee had admitted to have posted such material in the social media site. If it is admitted then the employer had proven that the employee had committed the act and what remains to be shown is that such act as decided in Linfox*, Australia Pty Ltd v. Stutsel* (supra) was:-

(i) prohibited by the company;

(ii) the employee was made aware of the said prohibition and its consequences thereto; and

(iii) it had cause damage to the company or its employer, other employees and had put the company's reputation at risk – as in Samuel *Crisp v. Apple Retail (UK) Limited* (supra).

However, if disputed then the company will have to prove that it was the employee alleged and not others who had done so as in *Lee Mayberry v. Kijani Investment [2011] FWA 3446*.

HR and IR Managers in dealing with the use of social media is advised to follow the decision in Linfox Australia and clearly spell out the following:-

(i) the use of the company's social media must be with the permission and registered by the company. Each and every person's usage must be identified, secured and employee made responsible as well as liable/accountable for its usage or misuse;

(ii) for social media registered through BOYD (bring your own device) or personal to the employee, the company must be informed. The employee must give his or her *facebook* address to the company and held liable to any misuse whether at home or at work if damage is caused to the company's reputation or that of its employee/customers. The registration/information must be kept in a separate register and periodically updated by a person appointed by the company. This will assist in identifying and proving that the said posting was made from the alleged employees computer or website;

(iii) define what is acceptable posting and what is not permissible. This is to ensure that company's secret, confidential, private or internal information is not divulged. It is noted that as it is almost all companies have confidential/secrecy terms in their letter of appointment. What needs to be added is "how so ever and what so ever".

(iv) policy on use of social media during office hours and outside working hours i.e. postings, gossip, chat and comment workers/vendors. Here the company's objectives or ideals must be noted, social media sites stipulated and language use restricted;

(v) clear and unsubstantiated reminder that any act in violation of the above is considered as a misconduct liable for disciplinary action which may lead to dismissal;

(vi) periodical reminders to all employees as there will be new one's who join and old ones who forgets;

(vii) guidelines on procedure to be adhered to in case of breach:-

(a) investigations to be carried out;

(b) interview with the employee;

(c) intention of employee for posting

(d) identify – posting and admission whether employee was the one who posted from which devise and during/outside working hours;

(e) seriousness of postings – what damage had it caused the company/employee/customer/vendor.

(f) consequence of posting – damage the trust and confidence between employee and employer (company);

(g) question of punishment – response of a reasonable employer/appropriateness.

For reasonable response and punishment, it is advisable to see Section 387 of the Australian Fair Work Act 2009 and the case of *Byrne v. Australia Airlines*, where the Mc. Hugh and Gunmow JJ of the High Court of Australia said:-

> "It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable or unreasonable but not harsh or unjust. In many cases,

the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably, have been drawn from the material before the employer, and may be harsh in its consequence for the perusal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct of which the employer acted".

(h) in cases where there had been earlier dismissal, the question of disparity in the punishment meted out must also be considered. Appropriate reasoning must be noted to ensure the punishment imposed is appropriate and commensurate with the gravity of the misconduct in each particular case. This is important as more often than not the decision makers will no longer be available to testify when the case finally ends up at the Industrial Court. See Australia decision in *Sexton v. Pacific National (ACT) Pty. Ltd., National Jet System Pty. Ltd. v. Mollinger* and *Studsell v. Linfox* (supra). It is to be noted that in Australia, the number of years of service and regret by the employee are factors to be taken into consideration as stated in *Linfox*'s case. This is not the post in Malaysia as decided in *Malaysia Smelting's* case.

(i) the company must carry on a contract review of its IT policy bearing in mind the recent development of the PDA and future legislation on the use of social media

In dealing with use of social media at the workplace, the company may come up with its own "dos and don'ts". In cases of usage outside the workplace or outside working hours, it is advisable that the terms be finalised with Union representation or representative of the workers through Collective Agreement to avoid smaill problem from magnifying itself into widespread disaster both for the company, its employees, the management, its customers and vendors. It would also help to contain the problem within the company and not open the company to suits.

The cases too indicate that **use is allowable, misuse punishable and abuse intolerable.**

9. **Social Media Policy For Your Workplace – Dealing With *Facebook*, Twitter, Blogs at Work**

A social media policy outlines for employees the guidelines or principles of communicating in the online world.

A social media policy can be a company's first line of defence to mitigate risks both employer and employee. You may already have a confidentiality agreement but it might not be enough. Adding a few lines in the employee handbook to clarify that the confidentially agreement covers employee interactions on social media sites might suffice. But it is advised to create a separate social media policy to have something specific on file and accessible to employees and that they are aware of the policies existence.

When drafting a policy, be sure to:-

(i) remind employees to familiarise themselves with the employment agreement and policies included in the employee handbook;

(ii) state that the policy applies to multi-media, social networking websites and blogs for both professional and personal use;

(iii) internet postings should not disclose any information that is confidential or proprietary to the company or to any third party that has disclosed information to the company;

(iv) if an employee comments on any aspect of the company's business, they must clearly identify themselves as an employee and include a disclaimer. The disclaimer should be something like "the views expressed are mine and do not necessarily reflect the views of the company";

(v) internet postings should not include company logos or trademarks unless permission is asked for and granted;

(vi) internet postings must respect copyright, privacy, fair use, financial disclosure and other applicable law;

(vii) employees should neither claim or imply that they are speaking on the company's behalf;

(viii) corporate blogs, facebook pages, twitter accounts, etc,. should require approval when the employee is posting about the company and industry; and

(ix) that the company reserves the right to request that certain subjects are avoided, withdraw certain postings and remove inappropriate comments.

10. **Conclusion**

Wireless remote access and social media usage is the reality today. The basic nature of wireless communications makes the transmission medium accessible from any point within its broadcast range both in the workplace and outside it. This is both its greatest strength as well as its greatest vulnerability. It is noted employees can post comments, air views and comments against the company or another employee, to remote servers and from web enabled applications to

malicious scripts such as malware, spyware and Trojan horses. This can be done by anyone. Upon coming into force of the PDPA, personal data of users of *Facebook* account will need the account holders consent before information can be obtained. Bearing in mind Sections 39 and 40 of the PDPA unreasonable withholding of such consent need be shown. In *Hays Specialist v. Ions*, the High Court held that even if confidentiality had been lost via the uploading of contacts to networks, the employee may still be in breach of post termination restrictions even though he had left the company.

The Industrial Court under Section 30(5) IRA 1967 should not be burdened with legal technicalities and be given flexibility to arrive at a decision based on substantial merits of the case. As such the Court is entitled to act on any material which is logically probable, see *Tan Yu Kee v. E. Business [2007] 2 LNS 1198*. Relevant documents under Section 29(b) and (c) can be ordered to be produced and persons acquainted with them can be subpoena. The Company must then on a balance of probabilities, adduce evidence before the Industrial Court to show that their view is logically probable.

It is trite law that employees are vested with certain obligation towards his employer. The employee should not conduct himself in a manner likely to damage the relationship of trust and confidence the employer had reposed in him (see *Pearce v. Foster [1987] (17) QBD 536*). The Australian approach to social media cases is to see whether such a conduct had demonstrated a breakdown in the relationship. In the UK , former employees can be asked to disclose information acquired during their tenure with the company – see *Hays Specialist Recruitment (Holdings) Ltd. v. Ions [2008] EWHC 745*.

In *Zulkifli Abdul Latif v. Sistem Penerbangan Malaysia Bhd. [2006] 1 ILR 1923* the Industrial Court held:-

> "Honesty and integrity are virtues that cannot be compromised in an employee, no matter what position he holds in an organisation".

It is to be noted that the Australian position takes the employee's long service consideration when imposing punishment in cases concerning comments on social media. The Industrial Court, however, had held that the claimant's long service does not insulate him from dismissal. See *Malaysia Smelting Corporation Bhd. v. Abu Bakar Muhamad [2002] 2 ILR 128*.

For the Australian position, see the cases of *Damien O'Keefe vis a vis* that of *Linfox* which emphasises that long service is to be taken into consideration in deciding what is "just" and "harsh" and whether to reinstate or not.

The Australian position seems to be different because of the presence of specific provisions in their Fair Work Act. It is the writer's view that the misuse of social media portrays misconduct not only against the interest of the company and other employees but further compromises the virtues of an employee. By misusing the facilities provided for his/her personal use, the employees had betrayed the trust and confidence reposed in them. HR and IR practitioners are advised that they should have a clear company policy on social media as opined in *Linfox* before action can be taken against an employee. In industrial jurisprudence where an employer no longer has confidence and trust in an employee, monetary loss is not a predominant factor, as decided in *Zulkifli*'s case. The Australian position, however, as in *Gloria Bowden* seems to differ in cases involving the misuse of social media. The Australian Courts had emphasised in *Gloria Bowden*'s case that damage to the company need be shown. HR and IR Managers are advised to ensure evidence of damage to company is available before you proceed to dismiss an employee. Mere assumption would be insufficient to prove damage on a balance of probabilities as shown by the UK cases.

For the inclusion of social media provisions in Collective Agreements, please see the Australian position in **Single Enterprise Agreement Broadmeadows Disability Service 2011** where the Fair Work Commission Australia had laid down guidelines which need to be incorporated pertaining to the use of social media at the workplace.

It is hoped that this paper be taken as food for thought and knowledge sharing among all those present today.

THANK YOU

APPENDIX (IV)

PERSONAL DATA PROTECTION ACT (PDPA)

With the development of social media, the infringement by linking through blogs causes confusion or deception. False social media accounts too add on to the problem as perception is often as powerful as the truth. The social media hijacker can cause havoc the system thereby making it difficult to protect data especially personal data. Having infringements to personal data had caused concerns as ones personal information is no longer sacred. We have seen cases of people using other people's personal data to take loans. This could only be possible when there are accomplices who divulge such information to irresponsible people to this end the Personal Data Protection Act (PDPA) 2010 was passed. It was supposed to come into force as of 1 January 2013 (as announced by the former Information, Communication and Culture Minister, YB Datuk Seri Rais Yatim) but till today it is yet to be enforced.

The position under PDPA Act 2010 is as follows:-

Personal Data is defined to mean any information in respect of commercial transactions which is:-

(a) processed wholly or partly by means of equipment operating automatically in response to instruction given;

(b) recorded with that intention; or

(c) recorded as part of a relevant filing system that relates directly to a data subject, who is identified or identifiable from that information or from that other information.

The Malaysian Act is similar to the Hong Kong Ordinance which had been in effect since 20 December 1996 and the UK Data Protection Act 1998. Decisions in both jurisdiction would be a guide in interpreting and enforcing the Malaysian Act.

The Act involves the data processor (Section 2 (1), the data subject (Section 2 (2) and the date user (Section 4). The date subject is an individual or a corporation (bodies corporate) who either processes the date or gives information and authorisation for the processing of the data. The personal data is related directly or indirectly to a data subject who can be identified from the data which is capable of being recorded automatically or manually.

There are seven data protection principle as follows:-

(a) A **General Principle** – that the processing of personal data requires consent;

(b) The **Notice and Choice Principle** – All data users are required to notify the data subjects regarding the purpose for which the data is collected and the right to request access and correction of the personal data.

(c) **Disclosure principle** – no personal data shall be disclosed without the consent of the data subject;

(d) **Security Principle** – a data user shall take practical steps to protect the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure alteration or destruction;

(e) **Retention Principle** – the personal data processed for any purpose for any purpose shall not be kept longer than is necessary for the fulfilment of the purpose to which it was obtained for;

(f) **Data Integrity Principle** – a data uses shall take reasonable steps to ensure the accuracy and to maintain the data current for the purpose it was collected for; and

(g) **Access Principle** – a data subject shall be given access to his personal data and shall be able to correct the personal data where the data is inaccurate or incomplete.

It is to be noted that under Section 2(1), the processing of any personal data is in respect of "commercial transaction". Commercial transaction has been defined as " ... of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of goods or services, agency, investments, financing banking and insurance but does not include a credit reporting business carried out by a credit reporting agency under the Credit Reporting Agencies Act 2010".

It is submitted that it would cover an employer – employee relationship as a contract of employment (oral or in writing) would be covered under "supply or exchange of services", under the Act.

The non disclosure of Data Principle is subjected to Sections 39 and 40 of the Act. **Section 39** allows disclosure without consent for the following reasons:-

(a) (i) is necessary to **prevent crime** of for purpose of investigation; or

(ii) is required or **authorised by law** or by order by the court (i.e. The Banking and Financial Institution Act 1989, Whistle Blower Act 2010).

(b) the data used acted in reasonable belief that he had the **legal right to disclose** the personal data to another party

(c) the data user acted in reasonable belief that he would have had the **consent of the data subject** if the data subject had known of the disclosing of the personal data and the circumstances of such disclosure; or

(d) the disclosure was justified as being in the **public interest** in the circumstances determined by the Minister.

Section 40 deals with **sensitive personal data**. Sensitive personal data is "... any data consisting of information as to the **physical or mental health or condition** of a data subject, his **political opinions**, his **religious beliefs** or other beliefs of similar nature, the **commission** or alleged commission by him **of any offence** or any personal **data as the Minister may determine** by order publish in the Gazatte". For sensitive data, the **data subject is required to provide his clear and express consent** to the processing of his personal data. Notwithstanding, the clear and express consent from the data subject **Section 40 allows the processing** of sensitive personal data where:-

(i) the process is necessary:-

(a) to **exercise or perform any right or obligation** which is conferred or imposed by law as the data user in connection with employment;

(b) in order to **protect the vital interest of the data subject or another person,** in case where consent cannot be given by or on behalf of the data subject or the data user cannot be expected to obtain consent of the data subject;

(c) in order to protect the vital interest of another person, in case where **consent** by on behalf of the data subject is **unreasonable withheld**;

(d) for **medical purpose** and is under taken by health care professional

(e) for any **legal proceeding**;

(f) to obtain **legal advice**;

(g) for the **administrative of justice**;

(h) for the exercise of any **functions conferred by law**; or

(i) for any purpose **as the Minister thinks fit**; or

(ii) the **information** contained in the personal data has been **made public as a result of steps taken by the data subject**.

A **non compliance** of the provision of the Act under **Section 16(4)** makes it an offence and upon conviction is subjected to a **fine not exceeding RM500,000.00 or an imprisonment for a term not exceeding three years or both.**

The Act, however, **does not apply to personal data processed outside Malaysia, to Federal and State Government** and if the processing is for the **individual's personal, household affairs and recreational purposes.**

Exemption is also given to personal data **for journalistic, literacy or artistic purposes**, for the **prevention and detection of crime, assessment of tax, physical or mental health of the individual** or far the **discharge of regularity functions** as stated in Sections 39 and 40 earlier.

The Act **prohibits the transfer of personal data outside Malaysia** subject to Section 30. A contravention of the said provisions would entail a **fine not**

exceeding RM300,000.00 or to imprisonment for a term not exceeding two years or to both.

Once implemented, **employees in breach of such provisions are subjected to dismissal.** Their dismissal would in the end be referred to the Industrial Court. Do we follow *Linfox*'s? Australia's approach or that of *Damien O'Keefe*? Or take the UK approach in *Crisp v. Apple*?

Under the PDPA, a lot of data is required to be protected. It also gives the employee a right to know all the data which the company has against him and who exactly made the allegation against him. More challenges would be made as to the exact reason as to why an employee was dismissed. The question of "sensitive data" too will be challenged. For cases involving abuse of information where such information would require clear and express consent, it would have to be established that consent was unreasonably refused. Disputes would arise and allegations raised as to what was the reason as to why an employee was dismissed. See the UK position in *Washington v. First West Yorkshire Ltd. ET/1810239/09.*

The proof that the said employee was the person who posted the impugned article in the social media as in *Lee Mayberry*' cases, are issues the employer would have to establish. How *Facebook* account is put up, the privacy clauses it entails are new areas HR and IR Managers would have to equip themselves with. Similarly the question of social media hackers, clear companies' policies on multimedia use at workplace, during and after working hours are also of major concern. HR and IR Managers cannot now in the light of *Linfox*'s case come to the Industrial Court without such a policy. The provisions of the PDPA 2010 must then be incorporated into the new policy on use of social media by employees.