



Précis Paper

Managing Social Media use in the Workplace

A discussion on the use of social media in the workplace including the risks, the challenges for employers when managing social media and the consequences of termination of employment as a result of social media misuse.

Discussion Includes

- Controlling the use of social media in the workplace
- Challenges for employers when managing social media use
- Termination of employment for social media use
- Management of social media and invasion of privacy
- Surveillance in the workplace
- Liability of employers
- Actions an employee can take if terminated
- Takeaways for legal practitioners

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Managing Social Media use in the Workplace

1. In this edition of BenchTV, Glenn Fredericks (Barrister – State Chamber, Sydney) and Ian Benson (Solicitor – A R Conolly and Company, Sydney) discuss the use of social media in the workplace including the risks, the challenges for employers when managing social media and the consequences of termination of employment as a result of social media misuse.

Controlling the use of social media in the workplace

2. Social media has become a central part of many people's lives both in their personal lives and in the workplace.
3. One of the key features of social media is the potential for messages to be spread widely, very quickly.
4. If an employee goes onto a social media platform and complains about their employer, the amount of people who can read it can be exponential.
5. Social media carries risks particularly in the sense that the damage that a communication can do is magnified if done through social media.
6. How the employer manages its own social media accounts has risks as does the extent to which the employer can manage the employee's own use of social media.
7. Social media can be used as a means of bullying fellow employees, employees might make disparaging comments about customers on social media, employees might make disparaging comments about their employer or they might disclose information which they should not be disclosing.
8. As such, if an employer does not have an effective way of dealing with employee's use of social media, there is significant risk of damage to the employer's reputation.

Challenges for employers when managing social media use

9. Inherent in the notion of social media itself is that it is something that can spiral out of control very quickly.
10. Social media is a tool which by and large, the employer does not control and it is an area where it is difficult to put in hard and fast lines which can or cannot be crossed when using social media.
11. The challenge for the employer is deciding why they want to control the use of social media and to what extent is it appropriate for an employer to try and intrude into people's non-work lives.
12. It is essential for employees to have a policy in place.
13. An area that is often cause for concern is when an employer terminates the contract of an employee due to something that employee has said or done on social media and that

employee subsequently brings an unfair dismissal claim in the Fair Work Commission, the Commission is going to look to see if the employer has a policy which provides rules to employees as to what the employer considers permissible conduct on social media.

14. It is essential for an employer to consider what they are trying to achieve with a social media policy.
15. A social media policy will set guidelines as to what the employer regards as appropriate behaviour on social media.
16. The challenge is to set the guidelines in a way that will not be improperly infringing into an employee's private life.
17. In an unfair dismissal case, it will be recognised by the Commission that employees do have a right to privacy.
18. An employer needs to think about the boundaries they are looking to set and how they relate back to the employment relationship.
19. Employers can take action in respect to out of work behaviour where it potentially has an adverse impact on the employer's reputation.
20. Policies need to be readable, that is the shorter and more precise a policy, the better.
21. Once a policy is put into place, an employer must let employees know about it.
22. Employers must enforce policies.

Termination of employment for social media use

23. Each case regarding the use of social media is going to turn upon its own facts.
24. To determine whether an employee has been fairly dismissed, the Commission will look at:
 - i. Whether there was a policy;
 - ii. Whether the policy was reasonable;
 - iii. Did the employees know and were they educated in the policy;
 - iv. Was the behaviour in breach of the policy?
25. The Commissioner will look at what was said, the context in which it was said, how many people are likely to have read it and what the employee did when the issue was brought to their attention.
26. It is a balancing of what was said, to who it was said and how often it was said.
27. The Commission acknowledges that people are entitled to a private life and free to express their views.
28. It would be difficult to justify the termination of an employee based on obnoxious comments that does not have anything to do with the workplace.
29. If an employee regularly posts racist or homophobic comments generally, an employer has better prospects of justifying a termination if it has become known that the employee works for the employer.
30. An example of social media damaging the reputation of an employer unfolded in the case of *Toll Transport Pty Ltd & Ors v Erikson* [2017] FCCA 3120.

31. Toll dealt with the behaviour of an ex-employee who was the member of a white supremacist organisation and posted videos of himself being critical of a politician whilst wearing a Toll uniform.
32. Toll commenced proceedings in the Federal Circuit Court and got orders that he return all of his Toll uniforms, remove the relevant videos and not post further videos associating himself with Toll.
33. He did not follow the orders and Toll commenced contempt proceedings where the ex-employee was found guilty of contempt.

Management of social media and invasion of privacy

34. One of the common things claimed in unfair dismissal cases is that the management of social media use constitutes an invasion of privacy.
35. The greater extent to which the expression of views can be shown to have a direct impact back into the employment relationship in the workplace, the greater the ability of the employer to take action regarding it.
36. An asserted right to free speech nearly always appears in these cases and is recognised by the commission and the courts as an important consideration.
37. Australia does not have a constitutional right to free speech as is the case in the USA.
38. The common law in Australia is generally regarded as recognising a right to free speech in the sense that the common law will not prevent a person from going out and saying something, it just means that you must bear the consequences of it.
39. Australia does have a constitutionally recognised right of free speech but it is a right of political communications.
40. The Australian courts regard the right of free speech as a restriction on how Parliament can act. Therefore it will not have an impact on what an employer can do vis-a-vis an employee.

Surveillance in the workplace

41. One of the increasing challenges of employers is that it is becoming increasingly common for employees to bring their own device.
42. The question is to what extent is it possible for an employer to monitor an employee's personal phone or laptop if they are using it for work purposes.
43. The extent to which surveillance can occur through an employer's IT system is quite extensive.
44. There are legal issues with some means of tracking.
45. In NSW, the *Workplace Surveillance Act 2005* (NSW) deals with what an employer is and is not permitted to in relation to tracking of location, CCTV and monitoring an employee's use of an IT system and email.

46. The *Workplace Surveillance Act* stipulates that an employer must have a policy in place and that employees must be notified of what the employer is going to do before an employer starts doing it.
47. An employer who is considering the use of workplace surveillance must ensure that it is aware of its legislative obligations before it does so.

Liability of employers

48. Employers can be held liable for the conduct of their employees on social media.
49. Vicarious liability means that an employer can be liable for the actions of an employee which the employee undertook in the course of their employment.
50. In regard to social media, the issue will be whether the conduct done was conduct in the course of the employee's employment.
51. If employees are saying things on the employer's official Facebook page, the employer would generally be regarded as likely to be held vicariously liable for what the employees do.
52. Another situation which arises in which an employer may be vicariously liable is where an employee alleges that other employees are bullying them through social media.
53. The Fair Work Commission has the jurisdiction to deal with a case where a person is being bullied at work.
54. Where an employer is engaged in a campaign of bullying against another employee, the employer may be liable and receive an order to stop bullying from the Commission.
55. If the employer is aware of the bullying and does not take reasonable steps to stop it happening at work there is a risk the employer would be vicariously liable for the bullying behaviour.
56. In principle, it does not make a lot of difference if the workplace bullying is happening through social media or not.

Actions an employee can take if terminated

57. If the employee is terminated and falls in the jurisdiction, they may bring an unfair dismissal claim.
58. The employee may bring an adverse action claim as the *Fair Work Act 2009* (Cth) prohibits the termination of employment on a number of bases for example, expressing a political opinion.
59. The employee may be able to bring a discrimination claim depending on the nature of the communication they were terminated for.
60. An employee might also bring a claim in common law if an employer has terminated someone summarily for a social media post, then they must show that the conduct justifies the action.

Takeaways for legal practitioners

61. This is an area that is still evolving.
62. As the nature of social media changes, the way employers have to deal with it also changes.
63. There is no specific set of steps for employers to deal with employees when it comes to social media related issues.
64. The extent to which an employer can purport to control what an employee does outside of work is difficult.
65. Often an employer is going to have to make a judgement call as to whether an action can justify termination of employment.

BIOGRAPHY

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Glenn Fredericks was admitted as a lawyers in 1991 before being called to the bar in 2015. He is an experienced corporate and employment lawyer. Previously, he worked as a senior in-house lawyer with the Commonwealth Bank of Australia and had previously been a partner of Freehills (now Herbert Smith Freehills). He often writes for law reviews and presents for CLE seminars on various aspects of Employment law.

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Ian Benson is a solicitor at AR Conolly and Company and holds a First Class Honours degree in law and Bachelor of Science. He also has a Graduate Diploma in Mathematical Studies.

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Legislation

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