A Balancing Act
Effective management of workplace disrepute by employees

As Benjamin Franklin once said, "Glass, china, and reputation are easily cracked, and never well mended." It is commonplace in the modern workplace for contracts of employment to include terms giving the employer the right to terminate the employment relationship if the employee brings the employer’s business into disrepute. But how is one to judge whether damage has been suffered to one’s reputation?

The answer is not always as simple as one might first assume. With the rise of social media and other ‘instant’ sources of publication, the ability for content harmful to a business’ reputation to go viral has created breeding grounds for morally questionable content. Naturally, it has been a struggle for Australian courts to respond to this, in the face of the sheer amount of content being posted by Australians to social media sites.

Recently, the current common law position on publishing content in social media was discussed in Von Marburg v Alfred, where Justice Dixon held that “[t]he person who first spoke or composed the defamatory matter (the originator) is of course liable, provided (they) intended to publish it or failed to take reasonable care to prevent its publication.”

This case held that a Facebook page administrator who had reasonable capacity to remove a defamatory statement against a person could be liable for the defamatory content. Dixon J also stated that: “...a Facebook ‘wall’ may feature multi-layered privacy settings, and complex systems governing each individual’s capacity to view, add, alter, or exchange content on the ‘wall’. An individual, such as the administrator of the ‘wall’, will have greater control over the content on the wall than a third party viewing or adding to that content.”

Whilst he did so in the context of a defamation case, Dixon J’s observations and findings are significant for both employers and employees. Over 14 million Australians have a Facebook account, many of whom state their place of employment on their profile. What rights, if any, does the employer have to control the content that viewers of a social media platform may then associate with a business simply by virtue of the fact that the person holding the account states the name of their employer on their profile? The 2011 Fair Work Commission case of Damian O’Keefe v Williams Maui’s Pty Ltd T/A Troy Williams The Good Guys, concerned implicit, but highly derogatory, remarks being made by an employee on his private Facebook account about his Operations Manager and his pay. The employer dismissed the employee for doing so on the ground of serious misconduct. Despite the applicant not expressly identifying his employer on his Facebook account, the Fair Work Commission dismissed his application, having found that it was reasonably likely that viewers of his posts would infer that the comments he had made were about his employer’s Operations Manager. In her judgement, Deputy President Swan stated that “[t]he fact that the comments were made on the applicant’s home computer, out of work hours, does not make any difference. The comments were read by work colleagues and it was not long before [the Operations Manager] was advised of what had occurred. The respondent has rightfully submitted, in my view, that the separation between home and work is now less pronounced than it once used to be.”

It is important to pause here to note that the test here is not whether an employer, or its business, has been ‘defamed’. Indeed, in many instances it may very well be the case an employer operating under a corporate structure is incapable of being defamed - Nevertheless, employers (especially those directed to do so within their contracts of employment) should conduct themselves in a manner which does not tarnish the name (and, as a possible consequence, the profitability) of their employer. Mitchell Pearce is a case in point. His employer has corporate sponsors. Regardless of what the Sydney Roosters otherwise think of his alleged conduct in terms of how it makes them ‘look’, the sponsors do not like their brand being associated with such conduct.

Various commentators have outlined the detriment that the private comments and behaviour of employees on social media may bring to an organisation’s reputation. However, blanket bans on the use of social media in and outside of the workplace are an impractical and draconian solution when attempting to prevent disrepute to businesses through the online activity of their employees. Instead, employers are better occupied taking a more considered approach in handling the issues created by social media. Employers who do not have a specific social media policy in place should do so immediately, combined with comprehensive training for new and current staff in this developing field.

A particular area of conduct that has received attention in recent years is drug use, and references to it, made online by employees — even if done so under the umbrella of their personal lives. Even organisations with a low duty threshold (where out-of-hours recreational drug use may not significantly affect work performance, if at all) may suffer significant consequences in the court of public opinion. The media have often been scathing towards organisations that ‘turn a blind eye’ to this behaviour, even if...
it is not actioned onsite. ANZ has recently had its fair share of such media coverage, with the bank being blamed for a ‘toxic and unsafe culture’ from excusing executives’ partying lifestyle outside of the office.

Countering this public opinion element, in the Fair Work Australia decision of Caltex Australia Limited v Australian Institute of Marine and Power Engineers, The Sydney Branch; The Australian Workers’ Union, the question posed to Senior Deputy President Hambenger was whether workplaces needed to have appropriate safeguards for random drug and alcohol testing. Firstly, in the context of that employer, termination of employment was only found to be valid after “repeat positive tests”. Thus, organisations may be encouraged under case law to implement drug and alcohol policies which move away from “one strike”, and work toward a more collaborative and supportive program to counsel employees away from drug and alcohol issues at the workplace.

So what is an employer to do?

The courts have recognised that reacting to an employee’s recreational behaviour in an overly authoritarian manner, namely through terminating employment, is not always a fair means of handling such situations; although actions which contravene employment conditions or policies may give rise to a contractual right on the part of an employer to dismiss offending employees. This notwithstanding, there are multiple guidelines that must be followed, and employers must apply a balance between maintaining their repute, and ensuring any common law or statutory rights of the employee are upheld.

Put more plainly, a knee-jerk reaction by an employer in responding to reputational damage may only extenuate the severity of the situation. This idea was evidenced in the Fair Work Commission decision of Heidi Cannon v Poultry Harvesting Pty Ltd, where an employee who was dismissed after operating heavy machinery whilst intoxicated was found to not have been afforded procedural fairness. The applicant was not given an opportunity to make a case as to why he should not have been dismissed, and the respondent was ordered to pay compensation. However, arguably more damaging for the employer was the nationwide publicity that the case received in the Sydney Morning Herald.

Similarly, in the ongoing Fair Work Commission proceedings of McIntyre v Sydney Broadcasting Services Corporation, Mr McIntyre is still contending that his summary dismissal was carried out, unilaterally, without a proper investigation allowing an opportunity of reply. This is despite the SBS’s stance that the applicant’s controversial tweets (which, for context, included suggestions that ‘brave’ Anzacs in Egypt, Palestine, and Japan were involved in “summary execution, widespread rape and theft”) breached the SBS’s relevant social media policy. Previously, Mr McIntyre also contended that his termination was unlawful on the basis that discrimination laws protected him from persecution for expressing a political belief, though that argument was abandoned when it was conceded that the NSW discrimination legislation does not include political belief as a protected right. That technicality aside, as discrimination laws do vary across the Australian jurisdictions, employers should be mindful when taking steps to protect their reputation (at the expense of an employee), that their need to so do is not triggered by some action of the employee which may otherwise be capable of being coached as a protected workplace or human law right.

Reputation vs rights

What the courts are showing us time and time again is that there is a fine line between protecting one’s business reputation and facilitating the rights that an employee should be able to enjoy inside and outside the workplace. For many organisations, it is not an easy process to afford procedural fairness to an employee that the employer (or ‘management’) considers has gravely damaged the name of the organisation through “outside” explicit activity particularly in the form of instant online publications. However, affording opportunities for employees to provide reasons or an explanation for what they have done, and why it does not adversely affect or relate to their employment, is as crucial in this sense as in any workplace–related misconduct matter.

With a view to strengthening its position in the event of such public issues arising, the Fair Work Commission proceedings of McIntyre v Sydney Broadcasting Services Corporation, Mr McIntyre is still contending that his summary dismissal was carried out, unilaterally, without a proper investigation allowing an opportunity of reply. This is despite the SBS’s stance that the applicant’s controversial tweets (which, for context, included suggestions that ‘brave’ Anzacs in Egypt, Palestine, and Japan were involved in “summary execution, widespread rape and theft”) breached the SBS’s relevant social media policy. Previously, Mr McIntyre also contended that his termination was unlawful on the basis that discrimination laws protected him from persecution for expressing a political belief, though that argument was abandoned when it was conceded that the NSW discrimination legislation does not include political belief as a protected right. That technicality aside, as discrimination laws do vary across the Australian jurisdictions, employers should be mindful when taking steps to protect their reputation (at the expense of an employee), that their need to so do is not triggered by some action of the employee which may otherwise be capable of being coached as a protected workplace or human law right.

Reputation vs rights

What the courts are showing us time and time again is that there is a fine line between protecting one’s business reputation and facilitating the rights that an employee should be able to enjoy inside and outside the workplace. For many organisations, it is not an easy process to afford procedural fairness to an employee that the employer (or ‘management’) considers has gravely damaged the name of the organisation through “outside” explicit activity particularly in the form of instant online publications. However, affording opportunities for employees to provide reasons or an explanation for what they have done, and why it does not adversely affect or relate to their employment, is as crucial in this sense as in any workplace–related misconduct matter.

With a view to strengthening its position in the event of such public issues arising, the Fair Work Commission proceedings of McIntyre v Sydney Broadcasting Services Corporation, Mr McIntyre is still contending that his summary dismissal was carried out, unilaterally, without a proper investigation allowing an opportunity of reply. This is despite the SBS’s stance that the applicant’s controversial tweets (which, for context, included suggestions that ‘brave’ Anzacs in Egypt, Palestine, and Japan were involved in “summary execution, widespread rape and theft”) breached the SBS’s relevant social media policy. Previously, Mr McIntyre also contended that his termination was unlawful on the basis that discrimination laws protected him from persecution for expressing a political belief, though that argument was abandoned when it was conceded that the NSW discrimination legislation does not include political belief as a protected right. That technicality aside, as discrimination laws do vary across the Australian jurisdictions, employers should be mindful when taking steps to protect their reputation (at the expense of an employee), that their need to so do is not triggered by some action of the employee which may otherwise be capable of being coached as a protected workplace or human law right.

Reputation vs rights

What the courts are showing us time and time again is that there is a fine line between protecting one’s business reputation and facilitating the rights that an employee should be able to enjoy inside and outside the workplace. For many organisations, it is not an easy process to afford procedural fairness to an employee that the employer (or ‘management’) considers has gravely damaged the name of the organisation through “outside” explicit activity particularly in the form of instant online publications. However, affording opportunities for employees to provide reasons or an explanation for what they have done, and why it does not adversely affect or relate to their employment, is as crucial in this sense as in any workplace–related misconduct matter.

With a view to strengthening its position in the event of such public issues arising, the Fair Work Commission proceedings of McIntyre v Sydney Broadcasting Services Corporation, Mr McIntyre is still contending that his summary dismissal was carried out, unilaterally, without a proper investigation allowing an opportunity of reply. This is despite the SBS’s stance that the applicant’s controversial tweets (which, for context, included suggestions that ‘brave’ Anzacs in Egypt, Palestine, and Japan were involved in “summary execution, widespread rape and theft”) breached the SBS’s relevant social media policy. Previously, Mr McIntyre also contended that his termination was unlawful on the basis that discrimination laws protected him from persecution for expressing a political belief, though that argument was abandoned when it was conceded that the NSW discrimination legislation does not include political belief as a protected right. That technicality aside, as discrimination laws do vary across the Australian jurisdictions, employers should be mindful when taking steps to protect their reputation (at the expense of an employee), that their need to so do is not triggered by some action of the employee which may otherwise be capable of being coached as a protected workplace or human law right.

Reputation vs rights

What the courts are showing us time and time again is that there is a fine line between protecting one’s business reputation and facilitating the rights that an employee should be able to enjoy inside and outside the workplace. For many organisations, it is not an easy process to afford procedural fairness to an employee that the employer (or ‘management’) considers has gravely damaged the name of the organisation through “outside” explicit activity particularly in the form of instant online publications. However, affording opportunities for employees to provide reasons or an explanation for what they have done, and why it does not adversely affect or relate to their employment, is as crucial in this sense as in any workplace–related misconduct matter.

With a view to strengthening its position in the event of such public issues arising, the Fair Work Commission proceedings of McIntyre v Sydney Broadcasting Services Corporation, Mr McIntyre is still contending that his summary dismissal was carried out, unilaterally, without a proper investigation allowing an opportunity of reply. This is despite the SBS’s stance that the applicant’s controversial tweets (which, for context, included suggestions that ‘brave’ Anzacs in Egypt, Palestine, and Japan were involved in “summary execution, widespread rape and theft”) breached the SBS’s relevant social media policy. Previously, Mr McIntyre also contended that his termination was unlawful on the basis that discrimination laws protected him from persecution for expressing a political belief, though that argument was abandoned when it was conceded that the NSW discrimination legislation does not include political belief as a protected right. That technicality aside, as discrimination laws do vary across the Australian jurisdictions, employers should be mindful when taking steps to protect their reputation (at the expense of an employee), that their need to so do is not triggered by some action of the employee which may otherwise be capable of being coached as a protected workplace or human law right.

Reputation vs rights

What the courts are showing us time and time again is that there is a fine line between protecting one’s business reputation and facilitating the rights that an employee should be able to enjoy inside and outside the workplace. For many organisations, it is not an easy process to afford procedural fairness to an employee that the employer (or ‘management’) considers has gravely damaged the name of the organisation through “outside” explicit activity particularly in the form of instant online publications. However, affording opportunities for employees to provide reasons or an explanation for what they have done, and why it does not adversely affect or relate to their employment, is as crucial in this sense as in any workplace–related misconduct matter.

With a view to strengthening its position in the event of such public issues arising, the Fair Work Commission proceedings of McIntyre v Sydney Broadcasting Services Corporation, Mr McIntyre is still contending that his summary dismissal was carried out, unilaterally, without a proper investigation allowing an opportunity of reply. This is despite the SBS’s stance that the applicant’s controversial tweets (which, for context, included suggestions that ‘brave’ Anzacs in Egypt, Palestine, and Japan were involved in “summary execution, widespread rape and theft”) breached the SBS’s relevant social media policy. Previously, Mr McIntyre also contended that his termination was unlawful on the basis that discrimination laws protected him from persecution for expressing a political belief, though that argument was abandoned when it was conceded that the NSW discrimination legislation does not include political belief as a protected right. That technicality aside, as discrimination laws do vary across the Australian jurisdictions, employers should be mindful when taking steps to protect their reputation (at the expense of an employee), that their need to so do is not triggered by some action of the employee which may otherwise be capable of being coached as a protected workplace or human law right.