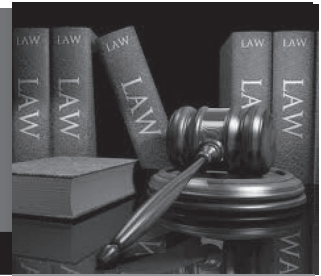




Malaysian Court Practice

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PP 11356/01/2013 [031727]

INTERNET MISUSE OR ABUSE AT WORKPLACE A GROSS MISCONDUCT

Introduction

Internet which supports a wide variety of communications, offers access to a vast amount of information and is an effective means of communication, research, marketing and collaboration. The internet has allowed people virtually unrestricted access to the various websites from their computer. It has also made it possible for individuals to work from their home and attend meetings without their physical presence or face-to-face appearance. Further, emails have largely replaced the ordinary postal mail. It is the fastest mode of dissemination of messages, files, reports and presentations to more than one recipient at any one time.

In the workplace, access to the internet and the use of electronic communication tools such as email facilities is the norm today and in many cases vital for the survival of the business. Employees today are mostly computer savvy and they frequently use internet and email as a communicative tool to promote their organisation's business. However, excessive use of internet unrelated to work or surfing the net for personal reasons during working hours such as *YouTube*, *Twitter* and *Facebook* can have negative impact on the productivity of the business. This includes using internet to check personal sites like social media, downloading videos, uploading photos, playing computer games, doing online shopping and paying bills through the company internet, among others. It has a negative impact on the number of hours employees devote to work, their level of concentration during these hours, and the overall productivity.

Misuse and abuse of internet in the workplace such as downloading and installing unauthorised software and games onto the workplace computers may expose the employer to potential liability for

breach of copyright under the Copyright Act 1987. Likewise, sending slanderous letters to a public website or sending offensive or sexual emails to co-workers or displaying pornographic or obscene materials on the workplace computer screen, among others, could expose the employer to various legal risks such as failure to provide safe place of work or defamation suit, among others.¹ An employer may also be vicariously liable for the defamatory statements, or publications made online by their employees which have the effect of injuring the reputation of another person or holding such person to hatred, ridicule or contempt.

Again, using the company's internet facilities to promote hatred, contempt or to excite disaffection against any Ruler, Government, the administration of justice or to promote feelings of ill will and hostility between different races or classes of the population among races could pose risk to the employer for abetting sedition under the Sedition Act 1948. Offences relating to misuse of computers are also regulated by the Computer Crimes Act 1997.

The courts in Malaysia have taken judicial notice of the fact that cyber and internet infiltrations and crimes are on the increase.² For example, Cybercrime Malaysia, an agency under the Science, Technology and Innovations Ministry, reported that fraud cases detected in cyberspace

- 1 See for example *PP v Rutinin Suhaimin* [2013] 2 CLJ 427, where the accused was charged in the sessions court for committing an offence under section 233 of the Communications and Multimedia Act 1998 for posting a remark on the online visitor book of the homepage of the HRH Sultan of Perak stating that the HRH Sultan of Perak was mad. Again, in *Ahmad Rizal Mat Noh v Naza Bikes Sdn Bhd* [2013] 2 LNS 0927 the claimant's dismissal allegedly on grounds of sending emails that contained statements insulting the respondent's superiors was held to be with just cause or excuse.
- 2 See *Md Daud Baba v Bank Islam Malaysia Berhad* [2013] 2 LNS 1308.

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had jumped 20% in 2017 compared to 2015.³ Besides that fraud, hacktivism, online scams, espionage and harassment have also been on the rise over the past few years.⁴ In *Fan Yew Teng v PP*,⁵ the Federal Court stated:

'In any civilised society there must be law and order which are the prerequisites to the advancement of harmonious living and human happiness. It is important to bear in mind that Malaysia has a plural society. Therefore, it is the primary and fundamental duty of every Government to preserve law and order. It is in connection with this function of the Government that the offence of sedition must be looked at. Thus, acts, speeches, words or publications constitute sedition if they have a 'seditious tendency' as defined by the provisions of s 3 of the Act. It is, therefore, not difficult to see why they would be regarded as seditious if they seek to bring the Government into hatred or contempt or to excite disaffection against the Government; or to promote feelings of ill-will and hostility among races or classes of population in the country.'

In *Bax Global Imports (Malaysia) Sdn Bhd v Saravanan a/l Rajagopal*,⁶ the claimant was dismissed for allegedly writing emails that contained abusive and offensive language in particular to female readers as they contained words of profanity. In upholding the dismissal of the claimant, YA Chew Soo Ho, Chairman of the Industrial Court, stated: 'The provision of internet facility is basically for work related matters such as speedy communication via e-mails, submitting of reports or other relevant documents or materials, quick response to clients, research, internet banking and other legitimate use. It is an abuse to use it as a tool to attack the integrity of one's superior or other employees. Such act is an act which cannot be tolerated and is a violation of the internet policy, a serious misconduct in any organization or industry.'

3 'Cybercrime surge in Malaysia' at <https://www.thestar.com.my/business/business-news/2017/05/20/rates-of-cyber-crime-higher-now/#HLvR6Gi9jXB3tlm.99>

4 'Cyber threats on the rise in Malaysia' at <https://themalaysianreserve.com/2017/07/24/cyber-threats-rise-malaysia/>

5 [1975] 2 MLJ 235; [1975] 1 LNS 38. See also *PP v Karpal Singh Ram Singh* [2012] MLJU 208; [2012] 5 CLJ 580.

6 [2007] ILJU 504; [2007] 3 ILR 434.

Again, in *Jagdish Singh Gill a/l Amir Singh v Bayer Cropscience (M) Sdn Bhd*,⁷ the claimant altered the content of the banner advertisements in 'The Planter Magazine' and thus, posting an inaccurate representation that all generic and illegal pesticides were unsafe to the food chain and/or the crops and/or the environment. This inaccurate representation besides causing serious embarrassment to the company was injurious to the company's interest and reputation and exposed the company to potential legal liability. The Industrial Court held that the claimant had failed to discharge his duties and responsibilities expected of an employee at his level and position. The company's decision to dismiss the claimant was warranted and was for a just cause or excuse.

Lastly, in *Rutinin Suhaimin v PP*,⁸ the appellant was charged and convicted under the Communications and Multimedia Act when he entered a comment '*Sultan Perak sudah gilaaaa*' via his internet protocol account. The appellant's was asked to enter his defence mainly based on the inference that since the impugned entry was transmitted using the computer and the internet account of the appellant, it must have been the appellant who made and initiated the transmission of the impugned entry. On appeal, his conviction and sentence was set aside. The appellate court held, inter alia, that the prosecution had failed to establish beyond reasonable doubt that it was the appellant who made and initiated the transmission of the impugned entry. The inference made by the trial court was tantamount to invoking a presumption against the appellant which the existing law did not allow.

As from the foregoing, an employee who abuses or misuses the employer's internet facilities such as circulating emails that contained abusive language and profanity may be dismissed from employment for gross misconduct. Having said the above, this article seeks to examine the misuse or abuse of workplace internet facilities and its consequence with reference to the Industrial Court's awards.

Internet Misuse or Abuse: A Gross Misconduct

Internet abuse or misuse at the workplace is strictly prohibited. Sending emails via the company email system should not contain illegal

7 [2014] 1 ILJ 356; [2013] 2 LNS 1645.

8 [2015] 3 CLJ 838.



images, offensive, vulgar or harassing language. Similarly, sending or posting information that is defamatory to the company and its products or services among others is also prohibited. Again, browsing or accessing certain websites or downloading or uploading illegal files are also prohibited. Likewise, retaining pornographic material in the office computer, sending such materials via company email address to other staff,⁹ and sending emails containing derogatory, insolent and impertinent language towards a superior officer,¹⁰ among others is viewed seriously and may warrant dismissal from employment, if found guilty.

It is noteworthy that sexual harassment includes explicit printed materials such as, showing pornographic materials, drawing sexually based sketches or writing sexually based letters. The mode of sending the printed material would include faxing, short message service (SMS) and electronic mail (e-mail). It also includes visual harassment for example, the displaying of pornographic image on the computer screen. Such display could be something which is not directed to any particular person but which, nevertheless, creates a hostile or humiliating environment for others. This has the potential effect of degrading or offending the female workers.

9 See in *Kelana bin Sidek v Petronas Maritime Services Sdn Bhd*, [2010] ILJU 1361; [2011] 1 ILR 155.

10 See *Rachel Mathews & Anor v BASF (Malaysia) Sdn Bhd* [2008] 3 ILR 709; *Intan Zafina A Rahman v Power Cables Malaysia Sdn Bhd* [2010] 1 ILR 338; *Molex (M) Sdn Bhd v Kang Siew Bee* [2004] 1 ILR 684. In *Mior Rosli Mior Mohd Jaafar v Bumi Armada Berhad* [2009] ILJU 153; [2009] 2 ILR 39, the claimant was dismissed for being rude in his email where he had stated in that e-mail that it had been illogical for him to be transferred to Johor to manage the human resources of the third Company given his qualifications, seniority and experience in the first and second Companies. The contents of the second e-mail had been grossly insubordinate and had gone beyond acceptable bounds. In *Chen Kong Men v Asia Travelmart Sdn Bhd* [2006] ILJU 24; [2006] 4 ILR 2343 the claimant's e-mail contained rude, abusive and derogatory remarks about COW1.

Section 292 of the Penal Code specifically states that it is an offence to have in one's possession or to circulate obscene material. The Communications and Multimedia Act 1998 prohibits communications of pornographic materials via the internet and action would not only be taken against the content providers, but also the service providers for allowing the transmission and the accessing of obscene materials.¹¹ Further, the Printing Presses and Publication Act 1984 prohibits pornographic materials under 'undesirable publication'.¹² Apart from the above, the distribution, exhibition and circulation of obscene books, pamphlets, among others, are also prohibited with penal consequences under the Penal Code.

An employer owes a common law duty to take reasonable care of his workers safety at the workplace.¹³ This includes the duty to take necessary measures to protect workers from victimisation and harassment whether sexual or otherwise perpetrated by superiors, peers or subordinates. Further, section 81F of the Employment Act 1955 provides that an employer shall be deemed to have committed an offence if he fails to inquire into complaints of sexual harassment; fails to inform the complainant of the refusal to entertain the complaint of sexual harassment and the reasons for the refusal; fails to inquire into complaints of sexual harassment when directed to do so by the Director General; or fails to submit a report of inquiry into sexual harassment to the Director General. The employer shall, on conviction, be liable to a fine not exceeding RM 10,000. The internet misuse or abuse is further discussed below with reference to the awards of the Industrial Court in relation to browsing or accessing prohibited websites, disseminating inappropriate materials to co-workers or external parties using the company's computer facilities and sending email containing derogatory or vulgar language to company's senior officers, among others.

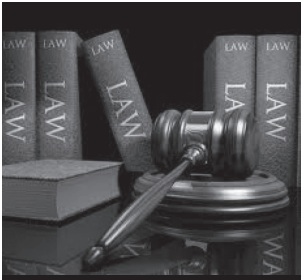
11 See ss 211 and 233 of the Act.

12 Section 7 of the Act defines 'undesirable publication' as articles, photographs, writing, sound, music and statements in any manner which is prejudicial to the order of the society.

13 See for example *Gelau Anak Paeng v Lim Phek San and Ors* [1986] 1 MLJ 271.



Article



Article

Internet Misuse or Abuse: Browsing prohibited websites and disseminating obscene materials to co-workers or external parties

Assessing or browsing prohibited websites using the office computer and further disseminating the obscene materials to others via the office emails is viewed seriously and may warrant dismissal from employment. In *Ng Hock Cheng v Pengarah Am Penjara & Ors*,¹⁴ the Federal Court stated, inter alia, that the act of disseminating pornographic material is a serious misconduct and more so using the employer's e-mail facilities. In *Lim Chiew Seng v Jobstreet.Com Sdn Bhd*,¹⁵ the claimant was dismissed after he was found guilty of assessing pornographic material using the office computer during working hours and this was witnessed by his colleagues. Again, in *Jaya Balan @ Sundra Raj Suppiah v Texas Instrument (M) Sdn Bhd*,¹⁶ the claimant was alleged to have used the company's computer to receive, view and transmit pornographic material. He had forwarded the email to one or two of his friends who were not the company's staff. The Industrial Court held, inter alia, that the company's decision to dismiss the claimant had been reasonable.

In *Low Tiam Seng v Panasonic Electronic Devices Malaysia Sdn Bhd and Anor*,¹⁷ the applicant was dismissed after he was found guilty of disseminating pornographic material via the company's official email facility. It was alleged that the claimant had on two occasions used the company's official email facility to disseminate pornographic material to various individuals in the company as well as to external third parties during office hours. In affirming his dismissal, the Industrial Court held, inter alia, that the claimant had performed immoral acts within the company's premises by way of disseminating pornographic materials using his official email. The claimant had also brought the company's image into disrepute as he had used the company's official email to transmit pornographic materials to third parties. In dismissing his application for judicial review against the award of the Industrial Court, Ahmad Nasfy Yasin JC stated: 'The Applicant contended that the punishment was not warranted and is unduly harsh. In this regard, I am the view that

the employer is the best person to judge the seriousness of a misconduct committed by an employee and accordingly, the appropriate punishment to be noted out.'

Again, in *Kelana Sidek v Petronas Maritime Services Sdn Bhd*,¹⁸ the claimant was dismissed for abusing the respondent's office computer assigned to him namely, retaining pornographic material in the office computer and further, sending the pornographic materials to numerous staff of the respondent. The Industrial Court affirmed the dismissal of the claimant as the misconduct committed by the claimant was serious enough to warrant a dismissal. In *Rajakumar Somasundaram v Bursa Malaysia Berhad*,¹⁹ the charge against the claimant was for storing pornographic materials on his office computer. These materials had also been circulated amongst the company staff via email. Likewise, in *Yahya Mat Wazir v Petroliaam Nasional Berhad (Petronas)*,²⁰ the claimant was dismissed when he was found guilty of sending an email via company's facility, to the complainant, an employee of the company, which had amounted to acts of sexual impropriety. Lastly, in *Azami Ahmad v Bluescope Steel (Malaysia) Sdn Bhd*,²¹ the claimant was dismissed after he was found guilty for knowingly retaining and distributing pornographic material using the company's email, in breach of company policy.

Internet Misuse or Abuse: Sending email with derogatory and vulgar language to senior officers

Apart from assessing or browsing the prohibited websites and disseminating the obscene materials to third party, an employee should refrain from making offensive or derogatory comments directed at superior, co-worker or any person in the workplace. The use of obscene, vulgar, rude or discourteous language in an email against a superior, co-worker or any other person in the workplace is inexcusable and is in stark contrast to the values of a civilized society besides creating a hostile work environment. A worker who makes an unfounded remark about the company or its employees may harm the image and integrity of the company and hence, ought to be avoided at all costs.

14 [1998] 1 MLJ 153 at 159

15 [2013] 3 ILR 664.

16 [2013] 3 ILR 502.

17 [2011] ILJU 68 (IC); [2011] 1 ILR 567 (IC), [2012] MLJU 452 (HC).

18 [2011] 1 ILR 155.

19 [2015] 3 ILR 162.

20 [2015] 2 ILR 201.

21 [2009] ILJU 27; [2009] 1 ILR 433.





In *Monash University Sunway Campus Malaysia Sdn Bhd v Zuriati Zulkifli*,²² the claimant in her emails had belittled, ridiculed and discredited the company staff who had disseminated emails informing the University staff about the 'Employee Benefits - ING Insurance' and 'Sunway Petting Zoo - Staff tickets.' In fact, the claimant had in the past been sending emails which were rude, insulting and disrespectful. She was issued a written warning and a reminder not to do so the same. Despite the above, the claimant continued to send such emails and this include the subject matter of the charges in this case. The Industrial Court held, inter alia, that such persistent conduct of the claimant and her disregard to the instruction of the employer goes to show that she was uncontrollable and also disruptive to the industrial harmony at the workplace and thus, the University was justified in dismissing the claimant.

Again, in *Chippac Malaysia Sdn Bhd v Wan Ghazulee Wan Mohd Zain*,²³ the claimant was alleged to have sent an email to the other workers in the organisation belittling the good intentions of the company on its 'Employee Stock Purchase Plan'. He was found guilty of the charges level against him and was demoted. The Industrial Court held, inter alia, that the right to demote a workman pursuant to a finding of guilt of the charges of misconduct was a form of disciplinary action open to the employer under its inherent right to impose the most appropriate punishment. Consequently, the company's decision to demote the claimant could not be made subject of a claim for constructive dismissal. The claimant therefore failed to prove that he was constructively dismissed by the company.

In *Amran Ambodai v Telekom Malaysia Berhad*,²⁴ the Industrial Court held, inter alia, that the email disseminated by the claimant as per the second and third charges contained statements which were defamatory in nature against the company and its senior members. It was further stated that had the said email become viral, it would have adversely affected the image of the company as a major player in the telecommunication industry in Malaysia and would have indirectly impacted on the company's revenue. Again, in *Aliah Annamma Abdullah v Manpower Staffing Services (M) Sdn*

22 [2008] 2 LNS 1114.

23 [2012] 4 ILR 336.

24 [2014] 2 LNS 1209.

Bhd,²⁵ the claimant had sent an email to COW-1, a senior officer, where her statement in the email was an attempt to lower COW-1's reputation and credibility as the Human Resources Director of the company. The Industrial Court held that the claimant's actions amounted to insubordination and he had made baseless accusations against her superior which was contrary to employer-employee relationship.

In *Malaysia National Insurance Bhd v Ratnawati Mohamed Nawawi*,²⁶ the claimant was dismissed after he was found guilty of having uttered derogatory and vulgar language against her superiors while chatting with her colleagues. The Industrial Court held, inter alia, the punishment of dismissal meted out against the claimant was unjust. It was stated that although the words used were vulgar and derogatory, the said words were not hurled at the faces of the superior officers concerned. It would only amount to gross misconduct if these words were uttered inter-praesentes (face to face) which was not the case here.

Again, in *Ruyati Adanan & Anor v Etika Insurance Bhd*,²⁷ the first claimant and the second claimant, an assistant manager and vice-president corporate and financial services, respectively were issued show cause letters for allegedly abusing the company's email facility. They were alleged to have casted aspersions and undermined the authority of the senior management of the company by using derogatory, disparaging and offensive language. Relying on Ratnawati Mohamed Nawawi's case, the Industrial Court held that although the words used in the said emails had been derogatory but since it had not been hurled at the face of the senior manager, it does not amount to gross misconduct. Thus, the company had failed to make out the misconduct that had justified the claimants' dismissals. Accordingly, their dismissals had been without just cause and excuse. Finally, in *ULF Ernst Keil v Siemens (M) Sdn Bhd*,²⁸ the claimant was dismissed after he was found guilty of emailing to the company's customers of his dissatisfaction with his immediate superior. The company found that the claimant's acts rather unbecoming of the claimant and a serious misconduct that he had communicated internal matters to its customer.

25 [2014] 2 LNS 1189.

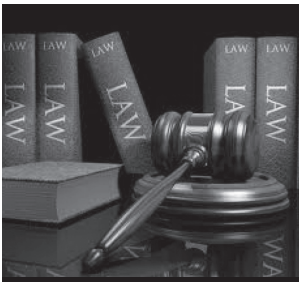
26 [2007] 1 ILR 189.

27 [2010] 2 ILR 36.

28 [2015] 1 ILR 73.



Article



Article

In light of the foregoing, it is noteworthy that today many organisations have provisions on internet access policy in their employment handbook which provides, inter alia, that internet access should be limited to job-related activities and thus, personal use of it is prohibited. It further provides that the company reserves the right to monitor, record and review the use of its information systems such as the email traffic, internet access and internet based communications. The company is also empowered to monitor access to or distribution of all data which enters the company network, undertakes software audits to ensure compliance to licensing obligations and also the review of any other information stored on company computers. Breach of the company's internet access policy could result in disciplinary and/or legal action leading up to and including dismissal from employment. Further, the employee may also be held personally liable for damages caused by any violations of this policy.

Conclusion

The internet facilities and company-provided telecommunication equipment's should not be used for transmitting, retrieving or storing any communications that is defamatory, discriminatory, harassing or pornographic in nature. Workers should not use the company internet facilities to infringe the company and third party copyright or

intellectual property rights. Likewise, they should not use company emails to distribute political, violence, obscene, profane, racist, defamatory, fraudulent or harassing messages. Misuse and abuse of workplace internet facilities may expose the employer to various legal risks such as breach of copyright, abetting sedition, failure to provide safe place of work or defamation suit, among others. Hence, in order to prevent liability the employer must take prompt action against the errant employee who has violated the company's internet policy. Using company's computer and internet facilities for any of the following purposes may warrant dismissal if found guilty namely, viewing, downloading or sending pornographic materials, sending hate e-mail or slanderous letters containing words which damages the company's reputation, downloading protected music/software files, uploading illegal materials to a public website, hacking or cracking passwords and viewing illegally gained access to a network, among other things.

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