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Friend or foe? Legal pitfalls in social media: the UK experience

Social media usage in the workplace has exploded in recent years. A University of Massachusetts study found that 83 per cent of Fortune 500 companies are active on Twitter[1] and the Pew Research Center found that 71 per cent of adults who use the internet are on Facebook.[2] Social media provides significant opportunities for businesses, allowing them to connect with customers and employees and promote their products and services more widely, including through social media profiles in which employees engage and through employees' own social media profiles. However, with the benefits come risks and challenges to both employers and employees, at all stages of the employment relationship. This article focuses on the position in the UK, although the issues and concepts are likely to apply in other jurisdictions.

Pre-employment/recruitment

When recruiting an employee, reviewing their presence on social media allows a business to vet the new recruit, either as part of a formal process or informally, giving them an insight into the employee's personality. A study commissioned for ACAS (a quasi-governmental organisation in the UK devoted to preventing and resolving employment disputes) found that 45 per cent of HR decision-makers said they were using social media tools in recruitment.[3] However, accessing an individual's social media profile means that, whether consciously or subconsciously, a business will be able to see personal information about the employee such as their sexual orientation, religion and their race or ethnicity, which would not ordinarily be requested through the application process. Aside from data protection considerations, taking into account such information in recruitment decisions could expose the employer to accusations of bias and discrimination claims if the applicant is unsuccessful.

During employment

Reduced productivity

Take a quick look around an office anywhere in the world and it is clear that the internet, and social media in particular, means that employees have more opportunities than ever to spend their working day browsing the internet and various social media feeds. Research sponsored by Facebook found that, on average, users of the social networking platform with smartphones access the platform 14 times a day,[4] much of which is likely to be during working hours.

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[1] See: www.adweek.com/socialtimes/fortune-500-twitter-2014/501026.

[2] See: www.pewinternet.org/fact-sheets/social-networking-fact-sheet.

[3] See: www.acas.org.uk/index.aspx?articleid=4478.

[4] See: www.nbcnews.com/technology/smartphone-users-check-facebook-14-times-day-study-says-1C9125315.

Judicial rulings in the UK have demonstrated the importance of drafting and publicising a social media policy so that employees have a clear idea of whether, and if so, how often and how much, it is acceptable for them to access social media at work. As part of the social media or disciplinary policy, it would be appropriate to expressly include excessive social media usage as a ground for disciplinary action.

In the unreported case of *Grant & Ross v Mitie Property Services UK Limited*, two sisters were dismissed for internet usage but the employment tribunal (the 'Tribunal') found the dismissals to be unfair because the employer's rules about when employees could access the internet were unclear and vague, in particular regarding what 'core working hours' meant. In addition, 'unauthorised overuse of the internet' was not listed as an example of gross misconduct in the disciplinary policy. Meanwhile, in another case, *McKinley v Secretary of State for Defence*,[5] the Tribunal found that it was excessive for an employee (who was in a senior position and in charge of the IT policy) to spend ten to 15 per cent of their working time surfing the web for personal use. However, with more and more individuals accessing social media via personal mobile devices, usage at work is becoming less visible, and is less easily controlled by employers, although some businesses may seek to monitor this or even restrict access to social networking platforms as part of their IT policy.

Offensive behaviour - public versus private

The growth in social media usage and the increasing number of different types of platforms can create confusion regarding whether posts on social media are public or private. In addition, many employers are encouraging employees to use social media as a networking tool, blurring the lines even further for employers. There is a balance to be struck between using social media as a business generation tool and minimising reputational risk. In addition, employees will argue that they have a right to freedom of expression and that their employer should not be able to control what they post on social media.

In *Smith v Trafford Housing Trust*,[6] an employee debated with a colleague by posting comments about same-sex marriage and religion on Facebook (which only his Facebook friends could see). The employer's policy prohibited employees from promoting religious and political views, and found the employee guilty of gross misconduct and demoted him. The employee brought a claim for breach of contract. The court held he had merely been explaining his viewpoint in a moderate fashion and that the provisions of the Code of Conduct or the Equal Opportunities Policy did not extend to such activity. The comments did not bring the employer into disrepute and it was clear they were not made on the employer's behalf. Essentially the employer had failed to consider the boundary between public and private - a situation will not be considered to be work-related simply because he identified his employer on his profile and he has colleagues as Facebook friends. Freedom of expression was also a consideration, the court holding that 'the frank but lawful expression of religious or political views ... is a necessary price to be paid for freedom of speech' (para 82).

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[5] *McKinley v Secretary of State for Defence*, ET/2302411/04.

[6] *Smith v Trafford Housing Trust* [2012] EWHC 3221.

The Employment Appeal Tribunal (EAT) came to a different decision in the recent case of *Game Retail Limited v Laws*.[7] Here, the communication was on Twitter, a more public forum than Facebook, and the employee was dismissed following tweets described as 'intimidating, racist and anti-disability' in his dismissal letter. The Tribunal had found the dismissal to be unfair as it was outside the band of reasonable responses. However, the EAT challenged that decision, despite the fact that: (1) no customers or staff claimed to have been offended; (2) there was no explicit reference to social media in the employer's bullying, harassment and disciplinary policies; (3) the tweets were not derogatory about the employer; and (4) there was nothing on the individual's account explicitly stating that they were on behalf of the individual's employer (though the individual followed, and was followed by many of the Twitter accounts operated by the employer's retail stores). Other factors considered meant it was possible for a third party to infer an association between the employee's Twitter account and the employer, and the employer was entitled to find the tweets offensive even if no one had actually been offended. Ultimately, the EAT emphasised the public rather than private nature of Twitter in coming to its conclusion.

Offensive behaviour - social media policies

In another case, *Preece v JD Wetherspoons plc*,[8] the fact that the employer had a policy reserving their right to take disciplinary action against employees whose social media posts damaged the reputation of the employer, its customers or staff was a factor in the Tribunal finding that the dismissal was within the band of reasonable responses. However, a well-drafted social media policy will not always justify disciplinary action in the UK. In *Walters v ASDA Stores Ltd*[9] and *Young v Argos Ltd*,[10] the employers both had a detailed social media policy including examples of unacceptable behaviour. However, the employees' offensive Facebook posts about customers and a colleague respectively were deemed not to meet the threshold of gross misconduct and so their dismissals were unfair.

Reputation

By its nature, social media allows individuals to share information quickly and easily. This may cause problems where that information relates to the business itself, not only in relation to damage limitation but also in terms of quantifying any ensuing loss to the business. Conversely employees may also suffer reputational damage where their activity on social media results in dismissal or some other disciplinary action.

In the unreported case of *Taylor v Somerfield*, supermarket employees posted a YouTube video of them playing and fighting with plastic bags. The employees were dismissed but the Tribunal found the dismissal to be unfair, noting that, unlike in Game Retail, there was no obvious connection between the employees and the supermarket chain, and that the video had only had eight 'hits' meaning the reputational impact was negligible.

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[7] *Game Retail Limited v Laws*, UKEAT/0188/14/DA.

[8] *Preece v J D Wetherspoons plc*, ET/2104806/10.

[9] *Walters v ASDA Stores Ltd*, ET/2312748/08.

[10] *Young v Argos Ltd*, ET/1200382/11.

In contrast, in *Crisp v Apple Retail (UK) Ltd*,[11] an Apple employee posted derogatory comments about the brand on Facebook and was dismissed for gross misconduct. The Tribunal found the dismissal to be fair, highlighting the importance of a social media policy and noting that Apple's policy was clear and its terms had been communicated from induction, and the company had drawn its employees' attention to the fact that making derogatory comments in social media was likely to constitute gross misconduct.

Post-employment

Following termination of employment, social media - and in particular LinkedIn - provides an opportunity for employees to exploit contacts and retain data that is acquired during their employment.

In the UK there is a developing body of judicial rulings in this area, recognising that electronic data is widely disseminated on an increasing number of mobile devices and recovery of employers' confidential information contained in this electronic data is becoming increasingly important. This is particularly the case where contracts with clients and customers require employers to recover data following termination of employment. The case of *Hays Specialist Recruitment (Holdings) Limited and Another v Ions and Another*[12] concerned an application for pre-action disclosure in relation to a potential claim regarding retention of confidential information and breach of post-termination restrictive covenants, in the recruitment industry. The court ordered pre-action disclosure in relation to LinkedIn contacts that the employee had transferred from the employer's database, although did not explicitly confirm whether these contacts represented the employer's property. In *Whitmar Publications Limited v Gamage and others*,[13] the court granted an injunction preventing three former employees from setting up in competition - one of the breaches asserted by the employer was that one of the employees had misused confidential information on LinkedIn.

Whilst the UK courts have wide powers to order retention, non-disclosure, preservation and deletion of information, court action is not undertaken lightly. It is time-consuming, costly and in the public domain, which from a commercial perspective will be far from ideal. For these reasons, an employer should consider appropriate preventative steps, for example, limiting the types of social media accounts employees can use for business purposes and retaining control of the passwords connected with those accounts. Unfortunately these types of steps will be unpopular with employees who increasingly regard social media accounts as 'their' profile, so the advantages of this approach must be balanced against the fact it is likely to discourage employees from using social media at all.

Conclusion

Various recent decisions from the UK courts demonstrate that there are many legal pitfalls for both employees and employers to navigate when interacting through social media. It is clear that issues arising from social media will continue to occupy the courts for the foreseeable future,

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[11] *Crisp v Apple Retail (UK) Ltd*, ET/1500258/11.

[12] *Hays Specialist Recruitment (Holdings) Limited and Another v Ions and Another* [2008] EWHC 745.

[13] *Whitmar Publications Limited v Gamage and others* [2013] EWHC

including the degree of connection between the employee's behaviour on social media and the employer and whether the activity is deemed to be public or private, including the privacy settings selected. For companies, a social media policy can be an important tool in setting expectations regarding appropriate behaviour and protecting the employer's position when disciplining employees. It should be remembered, however, that simply having a policy will be of less use where it is not promoted or enforced or where the behaviour falls outside the policy's restrictions.

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The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action. If you would like to discuss any of the issues raised in this article, please get in touch with your usual Olswang contact.