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## SOCIAL MEDIA IN THE WORKPLACE

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1. My motivation for drafting this piece has come about from recently having to advise in several cases involving the misuse of social media networks. The most shining example is of a Claimant who telephoned his boss to say he was unwell and then placed a status update on his Facebook wall that announced he was pulling a “sickie”, forgetting that his boss was a Facebook friend. The termination of his employment followed.
2. I have also had to advise a firm of solicitors about a secretary who, quite openly, announced on her Facebook wall that she was suffering at work on a Monday morning due to drugs misuse over the preceding weekend. To make matters worse she made derogatory comments about the managing partner and breached client confidentiality. There was no doubt that the employment relationship was irretrievably damaged.
3. Social media networks seem to be rather like ‘marmite’. You either love them or hate them. With contacts spread across the globe I have to admit that I fall into the former category. In any event, they are here to stay and will provide employment lawyers with a great amount of work.
4. So, what are the risks of any organisation allowing or encouraging the use of social media in the workplace?

### **Risks of social media use in the workplace**

5. Employment lawyers seem to spend a good deal of time warning of the risks posed by Facebook, Twitter and other social media perhaps without emphasising enough the opportunities presented by proper use of these immensely powerful tools. Companies large and small are adopting social media in increasingly large numbers.

## **Research Results**

6. In research published by media agency The Group in February 2011, 45 per cent of FTSE 100 companies had an official Twitter account, 25 per cent had got an official Facebook page, 39 per cent a You Tube channel and 12 per cent had a corporate blog
7. Debate will continue to rage on how corporates should harness social media. Individuals meanwhile are just doing it. 400 million Facebook users worldwide can't be wrong. According to Facebook, 35 million users update their status every day, 50 per cent of all active users log in everyday and 3 billion photos are uploaded each month. Twitter continues to grow exponentially. Blogging, particularly in the UK, is growing enormously.
8. Social media is not going to go away. Businesses need to adapt to using these tools to promote their businesses whilst protecting themselves at the same time. Employers are in a difficult position when it comes to regulating how their employees use social media because it impacts upon issues of fundamental importance, such as freedom of expression and privacy. There are several areas that cause difficulty.

## **Reputational damage to an employer**

9. This can be caused either whilst using social media at work using office equipment or in an employee's spare time on their own equipment. The old distinction between work and home is breaking down and an employer will be entitled to take disciplinary action against an employee who posts an inappropriate tweet or a scurrilous status update on their Facebook wall if it impacts upon the employer regardless of whether it is posted at home or at work, on the employer's equipment or the employee's. For instance, consider the Virgin Atlantic air hostesses/stewards sacked in 2008 for using Facebook to describe their passengers as "chavs" and saying the planes were full of cockroaches. That was a clear example of reputational damage to Virgin Atlantic.

10. If an employee “smears” its employer in such fashion, in or outside of work, disciplinary action is likely to be justified. However, consider the situation where an employee doesn’t mention his employer at all and tries to conceal his identity, as was the case in Pay v Probation Service, from 2003, which concerned a probation officer working with vulnerable people who ran a bondage business supplying equipment and sex performances in his spare time. He disclosed the fact of his outside business but not (unsurprisingly) its nature. He appeared in a photograph on the website wearing a mask. An anonymous fax was sent to his employer alerting them to his activities. They took disciplinary action and dismissed him even though there was no concern about his workplace performance because they took the view that his private activities were incompatible with his role working with sex offenders and might bring the Probation Service into disrepute. The Employment Tribunal held there was a possibility of reputational damage, although no actual damage was ever proved. Mr. Pay appealed to the Employment Appeal Tribunal and Court of Appeal and lost. He even appealed to the ECHR under Article 8 on the basis that his right to privacy had been infringed and lost there too because publishing his actions on a website had made them public. The important point from that case is that an employer seeking to rely upon reputational damage will have to demonstrate a real possibility of harm being caused.
11. Imagine instead if Mr. Pay had been a clerk in an insurance company or a worker in a call centre selling double-glazing. It would then have been much harder for his employer to demonstrate reputational damage by virtue of his private activities. If an employer can demonstrate reputational damage it can be a disciplinary matter and the sanction imposed must be within the “range of reasonable responses”, which is the test that Employment Tribunals use when deciding whether the employer’s actions were fair or not. In many cases it may be hard for employers to distinguish between their own anger at discovering an “incident” and demonstrating reputational damage.
12. The ACAS Code of Conduct on Discipline and Grievances requires employers to conduct a thorough investigation into allegations of misconduct and that is

particularly true where misuse of social media “out of hours” is concerned. Questions to consider include what harm was done, has the employee shown contrition, has the offending article been removed and is it likely to happen again?

### **Breach of confidentiality**

13. This is potentially very dangerous for a business. Not only does it encompass disclosing trade secrets and proprietary information (including any information subject to a non-disclosure agreement) but also client confidentiality or disclosures that could lead to a claim in tort for breach of confidence. Where professionals (such as solicitors!) are concerned, complaints to the relevant professional body may arise. It would not necessarily require an employee to act with malice, but could occur unintentionally; for example a salesman, delighted with his success, tweeting “just closed a big new deal with X” and thus breaching an NDA.
14. The common law incorporates an implied term of confidentiality into every contract of employment, and a savvy employer will require his staff to enter into a properly drafted contract of employment that expresses that implied term and expands upon it. Therefore an employee who does breach confidentiality may commit a disciplinary offence, which might even justify summary dismissal for gross misconduct. Employers need to make employees aware of the risks posed by unthinking disclosure as well as malicious or intentional release of confidential material.

### **Time wasting**

15. This is probably the main reason why employers ban Facebook and other social media platforms in the office. Facebook is accessed regularly by employees every day and that will amount to a lot of working time lost. Whilst it may be a simple and easily understood measure, it has two main drawbacks. Firstly, if personal use of social media is banned it does not present a positive image to prospective new (probably younger) employees. Would an employer

feel it reasonable to say that all personal telephone calls were banned? Secondly, if personal social media usage is banned it probably means an employer might struggle to utilise social media tools for its own promotional purposes as employees may feel it unfair that they could only tweet about the business but not themselves. Social media is about communication between individuals and is not about corporates broadcasting their news to the wider world (though that is a trap that many fall into).

### **Third party liability**

16. This encompasses a wide range of potential risks. In addition to the danger of unauthorized disclosure mentioned above there could also be liability to copyright holders if material (photos, music, writing etc) was reproduced without the proper consents. Another threat is from employees defaming others using the employer's social media platforms, perhaps by defaming a competitor or rival. There is a tendency for some people to write on social media as though they were speaking their mind, the effect of which may be enhanced by the fact that the comments are made to a computer screen rather than to another person's face. Blogging and tweeting, in particular, encourage strong opinions, and a controversial comment, especially if it involves a well known person or organisation, could get re-tweeted or copied very quickly and widely.
  
17. For instance, In February 2010 Vodafone UK suffered considerable embarrassment when one of its employees used the Vodafone UK account to post homophobic and sexist comments. Although the Vodafone incident did not give rise to litigation against the company (as far as I am aware), civil claims can arise with the real possibility at the end of the process of a claim for damages or the need to make a humiliating apology. The difficulty for management is to keep abreast of these situations: often they might be last to know by which time the damage has been done. The first step should be to get the offending comment removed as quickly as possible – often the employee will be the only one who can do that, especially if the comment was made on the employee's own blog, Facebook account or Twitter feed. If employees are

blogging about the work they do, giving opinions on developments in the sector, then they should be required to put up a disclaimer stating that their opinions do not necessarily represent those of the organisation for whom they work.

### **Liability to other employees**

18. Sadly bullying occurs in many workforces, either by line managers against more junior staff or amongst peers. Cyber bullying can be particularly insidious and can take many forms from circulating hurtful messages about an employee, to inappropriate or offensive jokes, cartoons and other material, to excluding someone from the social network. Being “sent to Coventry” can happen online as well as in the real world.
  
19. Employers face the risk of an aggrieved employee claiming that their employer knew it was going on, especially if a line manager were participating in these conversations or could have been aware of them, for instance because he was linked to them as a “Friend” on Facebook. A grievance might result or, even worse, a claim for bullying and harassment under the Equality Act 2010 (particularly if any of the offending comments were motivated on grounds of sex, race, disability, age, sexual orientation, religious or philosophical belief or matrimonial status) or under the Protection from Harassment Act 1997, where it is settled law following Majrowski v Guy’s Hospital NHS Trust that an employer can be vicariously liable for the actions of its employees. Claims under the Equality Act are not limited to the statutory cap on compensation that applies to unfair dismissal claims, so there is a risk of a substantial claim being made.

### **Liability to prospective employees**

20. The anti-discrimination legislation referred to above prohibits a person being treated less favourably because of any of the listed “protected characteristics”. If an employer uses Facebook to vet job applicants, discovers from an applicant’s page that they are gay and decides not to offer employment for that

reason, a claim may arise for sexual orientation discrimination if the applicant could make out a causative link between not getting the job and being rejected. On balance it may be best for an employer not to be “Facebook friends” with staff and not to scrutinise social media platforms to assist in the recruitment process to avoid the possibility of claims arising. German legislators are considering a new law that would ban employers from using Facebook to vet job applicants. That may well spread to this country, particularly if the EU decides to legislate on the subject, as may well happen late this summer when the EU Justice Minister, Viviane Reding, unveils a package of proposals on privacy and social media platforms, which is expected to include a “right to forget” whereby an individual can demand a social network removes information about him or her from its servers.

## **Conclusions**

21. How can an employer mitigate, if not remove, all these risks? There are two main ways, in my view, both inter-related. The first is education. Employees should be made aware of both the potential for social media and its risks. Too many people seem to get in front of a computer screen and belch out their innermost thoughts without considering the consequences. If employees will be using social media on behalf of their employer’s business they need to be told what is and is not acceptable usage.
22. Secondly, employers should have a well drafted social media policy or, at least, appropriate clauses about usage in contracts of employment. Policies should make clear what would constitute unacceptable usage.

## **Social media policies for the workplace**

23. Employers need to manage their employees fairly and consistently and this applies to how they respond to their employees’ usage of social media as much as to any other area. There is an implied term of trust and confidence in every employment contract and breach of it may amount to a repudiatory breach, enabling the employee to claim constructive dismissal. There is also an

implied term in every employment contract that an employer will provide reasonable support to ensure that the employee can carry out his/her duties without harassment or disruption by fellow employees (Wigan BC v Davies<sup>1</sup>), so a business can become liable to an employee being “cyber-bullied”.

24. One of the most significant objections that employers can face when disciplining staff is that they acted unfairly or inconsistently which can give rise to a claim for unfair dismissal and, possibly, a claim for discrimination. Compensatory awards in unfair dismissal claims are currently capped at £68,400, whereas in claims alleging discrimination or bullying/harassment on the basis of a person’s gender, disability, race, sexual orientation, age or religious/philosophical belief there is no such cap, so it could be catastrophically expensive.

### **Reasonableness**

25. When an employer takes disciplinary action it needs to follow the ACAS Code of Practice on Discipline and Grievances. An unreasonable failure by an employer to follow that process can lead to the compensation in unfair dismissal cases being increased by up to 25 per cent. The onus is on the employer to prove that it was reasonable in all the circumstances for it to rely upon the employee’s misconduct as a reason for termination (Employment Rights Act 1996, s 98 (4)).
26. In the area of social media use and abuse, there is plenty of scope for controversy. If the employer sets out clearly what is and is not acceptable and if the policy is implemented consistently and fairly it will reduce the chances of a successful claim by an aggrieved employee. But blind reliance on a social media policy will not be enough; the employer will need to act reasonably in applying the policy. In Stephens v Halfords Retail the employee had posted unfavourable comments on Facebook about the company’s restructuring plans but had shown contrition when he realized that he had breached the social

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<sup>1</sup> [1979] ICR 411

media policy, removed the comments straightaway and promised not to repeat his actions. He was dismissed but won his claim for unfair dismissal.

### **What should the policy contain?**

27. Microsoft's social media policy is minimalist: "Blog Smart". The Australian Broadcasting Corporation apparently has four elegant and succinct guidelines:

- Do not mix the professional and the personal in ways likely to bring ABC into disrepute
- Do not undermine your effectiveness at work
- Do not disclose confidential information obtained at work
- Do not imply ABC endorsement of your personal views

They encapsulate the major issues in a nutshell. However, for some businesses they may be too brief for comfort. Each policy should be drafted according to the needs of each business and, in my view, should have the aim of reminding employees that whilst their activities on social media might take place in a virtual vacuum, the consequences will be felt in the real world.

28. Probably the most important issue is to avoid **reputational damage** (see above). Policies should make it clear that disciplinary action will follow if an employee misuses social media either at work or after hours, on work-provided equipment (laptops, desktops or smartphones) or kit belonging to the employee. Employees should be made aware that abusive, threatening or defamatory communications will not be allowed, whenever posted. Privacy arguments are not likely to be successful; posting a status update is sending that message out into the public domain, even if the sender thinks it will only get distributed amongst their "friends". It is always difficult for an employer to impose disciplinary sanctions on an employee for out of hours incidents, but the nature of social media is such that once an item is posted, the damage is done.

29. The policy should fit in with the employer's other policies, such as the diversity policy. Most employers who have well-drafted employee handbooks

will have a policy confirming that the business is committed to equality of opportunity in the workplace. If a homophobic or racist comment would not be tolerated on the shop floor, why would it be in cyberspace?

### **Accountability**

30. If employees are tweeting or blogging on their own account about their industry or profession they should be asked to put a note on their profile to say that the views expressed are their own and don't reflect the business' own views. This may also be a good reason to have people tweeting in their own name even when tweeting on behalf of the business instead of on the corporate account – to minimise the likely embarrassment if something goes wrong.
31. The employee should be educated on the policy and asked to sign it to confirm they have read and understood it. In Preece v Wetherspoons a pub manager who suffered some very unpleasant verbal abuse at the hands of two irate customers posted some unpleasant remarks of her own about the customers which did not identify the pub or employer but allow the customers to be identified. She was dismissed and lost her claim at the Employment Tribunal because she had signed up to the social media policy which stated that disciplinary action would be taken where comments were found to lower the reputation of the organisation.

### **Workplace restrictions**

32. Unless there is some very significant reason to do so (such as where confidentiality is of the highest importance, perhaps in a price sensitive area in an investment bank), it is probably counterproductive to have a blanket ban on use of social media in the workplace. Usage might be confined to lunch-breaks to ensure productivity and bandwidth is not adversely affected, but any employer that purports to be modern and forward thinking will not look like that at all if it imposes a blanket ban. By the same token, if a business wants to use social media to promote itself, preventing employees' own personal use of the same tools is not going to look very forward thinking either.

## **Befriending staff**

33. Another thorny issue is whether line or senior managers should engage with employees on social media platforms, such as becoming friends with them on Facebook. Much will depend on the culture of the business but, on balance, it is probably best not to. This does mean that the employer will miss out on “intelligence” on what is really going on in the firm but it might be best not to be privy to that, or for it to be known that the employer knows it. Instead an employer would be wise to include a clause in the contract of employment imposing an express duty on all employees to notify management if they become aware of a breach of the social media policy.

## **Ownership of contacts**

34. Finally, what of the employee’s online contacts? Hays Specialist Recruitment Holdings v Ions<sup>2</sup> established that contacts made during the course of business for the employer will be confidential information and thus belong to the business when the employee leaves. That was a case on disclosure and Mr. Ions was ordered to disclose those contacts on LinkedIn that he had generated in his capacity as an employee. It is a grey area but the business will be in a much stronger position to obtain disclosure of such contacts if the social media policy makes it clear that such contacts belong to the employer.
35. The use and misuse of social media and how it impacts in the workplace is a thorny issue and one that will not be going away.

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<sup>2</sup> [2008] IRLR 904