



## **SOCIAL MEDIA IN THE WORKPLACE**

---

**JASON SEARLE**

**Barrister**

**St John's Buildings**

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 swiftly 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 by naming a client – a high profile serial killer. 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. Like it or not, 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 recent research, 72 per cent of FTSE 100 companies had an official Facebook page, 55 per cent had got an official Twitter account, 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. 1,490 million Facebook

users worldwide can't be wrong. According to Facebook, 35 million users update their status every day, 65 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.
9. In March 2012 the news media reported on companies in the US asking job applicants for their Facebook passwords. How would you advise a (UK) client if they complained to you that they were asked for their Facebook password by their (potential) employer? Would your answer be different if the employer was an emanation of the state (bodies which have been made responsible for providing a public service, where the service is under the control of the state and the body has special powers)? What if they were asked to remove an individual, or individuals, as LinkedIn contacts?

### **Reputational damage to an employer**

10. 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.

11. 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.
12. 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.
13. 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? ACAS’s own Social Media policy reminds employees of their existing obligations and tells them ‘don’t do anything online that you wouldn’t do off-line’.

### **Breach of confidentiality**

14. 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.
15. 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. They should be advised that every post online is in the public domain even with privacy settings or if a group is marked ‘closed’.

### **Time wasting**

16. 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**

17. 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.
18. 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**

19. 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.
20. 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**

21. 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 (45% US and 27% UK employers do), 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.

### **Risk Management**

22. 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.
23. 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. There is, of course, an overarching obligation on every employee to not behave in such a way as to bring the organisation into disrepute.

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

24. 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”.

25. 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.
26. Employers must have an internet use and a social media policy. They must keep up to date on employment law developments in this area. The three key concepts of intent, privacy and the role of third parties in social networking have not yet been tested. For example; can an employee be held liable for a third party’s post on the employee’s wall which is defamatory about a manager at work? If not, does the employee become liable when he has left the offensive post on his wall rather than remove it upon discovery?
27. Note that the ACAS research paper from 2009 entitled ‘Workplaces and Social Networking’ makes nine recommendations and number three is simply this:

*‘Recommendation 3: The policy on internet/social media use need not be complicated – the main message that online conduct should not differ from offline conduct, with reference to existing conduct guidelines, may suffice’.*

---

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

## Reasonableness

28. 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)). The Employment Appeal Tribunal has recently approved this approach.
29. 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 realised that he had breached the social 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?

30. 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.

31. 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.
32. 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**

33. 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.
34. 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**

35. 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. Note that both BT and HMRC have not banned the use of social media in the workplace. They take the view that it is healthy to allow a policy of 'reasonable use'.

### **Befriending staff**

36. 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. It is not difficult to imagine a scenario where accusations of favouritism, or worse discrimination, are founded upon the fact that a

manager has elected to accept certain friend requests but not others. In the education industry teachers are forbidden from befriending pupils on social networking sites and advised to consider carefully the implications of befriending ex-pupils and parents.

### **Ownership of contacts**

37. 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.

### **A reasonable expectation of privacy**

38. We all enjoy the right to respect for private and family life under Article 8 of the European Convention on Human Rights. Any Tribunal is obliged to take account of this right under the Human Rights Act 1988. Where the employer is an emanation of the state then the right is directly enforceable. Note though that even where the employee has a reasonable expectation of privacy that may be properly countered by an argument that the employer is entitled to use the information to protect rights of its own, for example its reputation (Art 8(2)).
39. For a recent example of balancing the rights of the parties see the ET case of Crisp v Apple Retail UK Limited<sup>3</sup>. C posted derogatory comments on Facebook about his employer and their products. He argued that the post was restricted to his friends list only and was therefore private by reason of his security settings. The ET held that C could not have a reasonable expectation of privacy as there was always the risk that a friend could repost or pass on his post (as they did – to his employer). Note also that

---

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

<sup>3</sup> ET/1500258/2011

the ET dealt with C's claim that he also had a right to freedom of expression (Art 10 ECHR) by finding that the employer's response was proportionate.

40. Also, consider the recent High Court case of Smith v Trafford Housing Trust<sup>4</sup>; a breach of contract claim by a Claimant demoted for making comments on Facebook expressing his personal views on gay marriage. Some of the points may well assist claimants in Facebook cases. In finding that the demotion was a breach of contract, the Court held that:

i) No reasonable reader of Mr Smith's Facebook wall could rationally conclude that what he wrote about gay marriage was posted on the Trust's behalf. This was based on a reading of the wall as a whole, which included posts about sport, food and motor vehicles. It was clear that Mr Smith used Facebook for personal and social, rather than work related purposes.

ii) Encouraging diversity in the workforce inevitably involves employing persons with widely different religious and political beliefs and views, some of which, however moderately expressed, may cause distress among the holders of deeply held opposite views. Such distress or offence is a necessary price to be paid for freedom of speech. Mr Smith's moderate expression of his personal views, on his personal Facebook wall at a weekend out of working hours, could not sensibly lead any reasonable reader to think the worst of the Trust for having employed him as a manager.

iii) Facebook had not acquired a sufficiently work-related context in this case to attract the application of the employer's disciplinary policies (even though those policies did to some extent cover conduct outside working hours and on Facebook). The Court distinguished this case from one of a targeted e-mail sent to work colleagues, or a case where work colleagues are invited to the pub for the purpose of religious or political promotion outside work; as Mr Smith's Facebook friends had each made a choice to be his friend on Facebook and so to seek his views.

---

<sup>4</sup> [2012] EWHC 3221 (Ch)

- iv) Mr Smith's postings on gay marriage were not, viewed objectively, judgmental, disrespectful or liable to cause upset, offence, discomfort or embarrassment. Nor were the manner and language in which he expressed his views.
41. As touched on earlier, the safest stance to adopt is to assume that all posts are in the public domain. I suspect that an individual will only have a claim to privacy where the communication is in a private message akin to an email message and even then only if it is between two people. It is possible to privately message a friend on Facebook. Mr Smith's Facebook wall page identified him as an employee of the Trust. He had 45 work colleagues among his Facebook friends, including at least one who was offended by these comments. His wall was accessible by not just his 201 Facebook friends, but by friends of friends.
  42. Those using Twitter and LinkedIn can expect to get very short shrift running any arguments on privacy rights, particularly if their employer is in their network or a follower.
  43. ACAS has produced some Guidance Notes on Social Networking (see their website<sup>5</sup>), offering tips on how to manage the impact of social networking on managing performance, recruitment, disciplinary and grievance issues. There is also an excellent section on How to Draw Up a Social Networking Policy, including practical tips and an explanation of the legal considerations involved.
  44. 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. It seems to me that employees need to protect their privacy and employers need to develop a thicker skin and not be so sensitive to criticism. "Most employers wouldn't dream of following their staff down the pub to see if they were sounding off about work to their friends" as Brendan Barber, the General Secretary of the TUC, commented in a case where an employee was dismissed for

---

<sup>5</sup> <http://www.acas.org.uk>

calling her job 'boring'.

### **Evidence Gathering Tool**

45. It is increasingly common for parties concerned with employment law disputes to refer to evidence taken from social networking sites. To date, the most commonly referred to has been Facebook. In intelligence terms this is 'Open Source Information'. In *Novak v Phones 4U Ltd*<sup>6</sup> HHJ McMullen QC held that entries on Facebook made seven weeks apart, but involving the same employees and the same subject matter (the claimant's industrial accident and subsequent time off work), could arguably be said to be part of a 'continuous act'. He identified the interesting question of 'whether the act continues throughout the period when a Facebook entry was up'? However, determination of whether leaving up a notice (whether physically or electronically, for example, on Facebook) constitutes a continuing act for the time it is visible or accessible, was not necessary for the purposes of this appeal.

### **EAT refuses to give guidance**

45. In the recent Employment Appeal Tribunal case of *The British Waterways Board v Smith*<sup>7</sup> the appeal tribunal rejected the employer's suggestion that the court give guidance on social media dismissals. In short the EAT were satisfied that such dismissals remain within the established principles of ordinary unfair dismissal jurisprudence. The employee was dismissed after the employer found that he had made offensive comments on Facebook and had indicated on Facebook that had been drinking whilst being on standby.

"The Respondent urges that we take this opportunity to provide general guidance and has set out potential points that it considers may assist the ETs of the future. With respect to the industry undertaken in this regard, we decline to do so. No doubt some of the points we are urged to lay down by way of principled guidance will be relevant in many cases. For example, whether the employer has an IT or social-media policy; the

---

<sup>6</sup> UKEAT/0279/12, [2013] EqLR 349, EAT

<sup>7</sup> UKEATS/0004/15/SM



nature and seriousness of the alleged misuse; any previous warnings for similar misconduct in the past; actual or potential damage done to customer relationships and so on. In truth, however, those points are either so obvious or so general as to be largely unhelpful. The test to be applied by ETs is that laid down in Jones<sup>8</sup>; that is, whether the employer's decision and the process in reaching that decision fell within the range of reasonable responses open to the reasonable employer on the facts of the particular case. That test is sufficiently flexible to permit its application in contexts that cannot have been envisaged when it was laid down. The questions that arise will always be fact-sensitive and that is true in social-media cases as much as others. For us to lay down a list of criteria by way of guidance runs the risk of encouraging a tick-box mentality that is inappropriate in unfair-dismissal cases".

**JASON SEARLE**

**October 2015**

**St John's Buildings**

**T: 0161 214 1500**

**E: [clerk@stjohnsbuildings.co.uk](mailto:clerk@stjohnsbuildings.co.uk)**

**W: [www.stjohnsbuildings.co.uk](http://www.stjohnsbuildings.co.uk)**

---

<sup>8</sup> Iceland Frozen Foods Ltd v Jones [1983] ICR 17