Managing social media and data in the workplace

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Welcome

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- Introduction – **Richard M Fox**
- Monitoring employees' activities on social media – **Moira Campbell**
- Who owns your employees' professional social media accounts? – **Jennie Atefi**
- Subject access requests and tactics for responding to them – **Adam Lambert**
- Transferring personal data to third parties and protecting your employees' data – **Andrew Solomon**
- Case study

- **Please note:** we have included a quick guide to data protection for employers in your pack with useful action points for you to consider

Employees and social media – balancing an employee's right to privacy against an employer's right to protect its reputation online

Moira Campbell

Employees and social media

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Some statistics:

- Facebook has c1.49 billion monthly active users.
- LinkedIn has c364 million users.
- Twitter has c316 million users.
- Instagram has over 3 million monthly active users.

Benefits vs reputational risks

- Promotional opportunities vs mistakes – BBC journalist inaccurately tweeting “Queen Elizabrth (sic) has died”.

Vicarious liability

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Otomewo v The Carphone Warehouse

- Employer found vicariously liable for sexual orientation harassment, where an employee posted offensive comments about his manager on Facebook.
- "In the course of employment".
- Defence – taken all reasonable steps to prevent the employee from engaging in discrimination (relevant policies in place).

Monitoring employees in the recruitment process (1)

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Using social media to screen potential candidates

- **Issues** regarding accuracy of information, invasion of privacy and potential discrimination claims.

Practical tips:

- Separate process for equality monitoring and interviewing.
- Advise candidates in advance as to what social media vetting is carried out in the recruitment process and give employees the opportunity to comment on the accuracy of any findings *(Information Commissioner's Employment Practices Code)*.
- Consider carefully which sites and searches are appropriate and whether they are fair or proportionate to the role taking into account the required skills *(ACAS Advice and Guidance on Social Media)*.

Monitoring employees in the recruitment process (2)

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Practical tips continued:

- Ensure you have clear rules and procedures in place and apply them consistently.
- Use social media screening as late on in the recruitment process as possible *(ACAS Advice and Guidance on Social Media)*.

Social media and disciplinary action

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Fair Dismissals:

- *Gill v SAS Ground Services UK Limited* – Facebook post provided evidence of employee performing other work whilst signed off on sickness absence – ET held dismissal for gross misconduct was fair.

- *Crisp v Apple* – ET held that Apple was able to fairly dismiss an employee who had posted derogatory comments about Apple and its products on Facebook. Apple made clear in its policies and training materials that protecting its image was a "core value" and that making derogatory comments on social media was likely to constitute gross misconduct. ET held that the right to respect for private life was not engaged and the employee had no reasonable expectation of privacy under these circumstances.

Social media and disciplinary action (2)

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To the contrary…

- *Alan Blue v Food Standards Agency* – dismissal for liking a Facebook comment about his line manager being attacked with a chair found to be unfair.
- Employer's social media policy was limited to conduct at work.
- No evidence of any reputational damage from the incident.
- The employee had an exemplary performance record.

Using the same social media platform for professional and personal content

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Game Retail Limited v Laws

- Employee's Twitter account was followed by work contacts, employee did not use Twitter restriction settings so his tweets were publically visible by default.
- Employee posted 28 offensive and abusive non-work related tweets and was dismissed for gross misconduct.
- EAT overturned the ET's decision that the dismissal was unfair. ET failed to take into account the number of work related followers. The fact the employee failed to apply privacy settings to the tweets was relevant to the finding that Mr Laws' tweets could not be considered to be private.
- The focus is on the audience as well as the content.

EAT guidance

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Game Retail Limited v Laws and *British Waterways Board v Smith* – ETs are likely to take the following points into account, when deciding whether a dismissal in relation to social media usage is unfair:

- Is there a social media policy in place? (If so, what is the content of it?)
- The nature and seriousness of the alleged abuse.
- Whether there have been any previous warnings for similar misconduct in the past.
- Actual or potential damage to employer.
- Whether the posts had a sufficiently work related context.
- How the information is obtained by the employer (generally in these cases information was obtained from employee tip offs or genuinely publically available information).
- The audience of the post.

Practical tips

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Employers should:

- Ensure you have a social media policy in place and that it is communicated to employees.
- Include examples of what is/is not acceptable behaviour both within and outside of the workplace/working hours.
- Deal with breaches of social media policies consistently with how you deal with breaches of other policies (discipline where appropriate).
- Implement targeted and thorough training to raise awareness of harassment, bullying and discrimination at work.
- Remind employees to use and check regularly the privacy settings on their social networking profiles.
- Be clear in your disciplinary policy that any offensive, defamatory, discriminatory or other comments on any social media network may result in disciplinary action that may lead to dismissal.

Practical tips (2)

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Monitoring Employees:

- Only monitor employee usage of social media:
  - where it is necessary to prevent legal or defamatory acts;
  - insofar as it is necessary for a specific purpose;
  - insofar as the extent of the monitoring is proportionate to the potential harm of the activity it is intended to prevent; and
  - in a transparent way so that the employees are fully aware of what the employer monitors, how and why they go about it.
- Ensure you have the right to reasonably monitor the employee's social media usage in the employee's employment contract and your social media policy.
- Do not carry out covert monitoring unless there are exceptional circumstances whereby there are grounds for suspecting criminal activity or equivalent malpractice.

Who owns your employees' professional social media accounts and the business contacts in them on termination of employment?

Jennie Atefi

What are the risks to an employer arising out of employees' professional social media accounts?

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- Professional social media sites are popular with employees and employers alike. They help employers to:
  - identify prospective customers or clients
  - receive introductions or referrals
  - discover information about customers or clients
  - maintain relationships
  - increase visibility
- But there is a risk for an employer that, on termination, those contacts will follow the employee to his or her new employer.

Who owns LinkedIn accounts?

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- LinkedIn's terms and conditions
- There is no case law which deals directly with the question of who owns LinkedIn accounts. However:
  - *Pennwell Publishing (UK) Ltd v Ornstien*: If business contacts are stored on the employer's computer system they are the property of the employer.
  - *Hays Specialist Recruitment (Holidays) Ltd and another v Mark Ions and another*: The Court allowed the employer's application for pre-action disclosure of emails to the employee's LinkedIn account from its computer network and for documents demonstrating the employee's use of the contacts he uploaded.
  - *Whitmar v Gamage and others*: The employer was granted an injunction which required that it be given exclusive access, management and control of certain LinkedIn groups.

What can an employer do to protect itself?

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- Employment contracts
- Social media policies
- Settlement agreements
- Involvement in the establishment of social media accounts
- Restrictive covenants
- Databases of contacts made during employment

Subject Access Requests (SARs) - tactics for dealing with them

Adam Lambert

SARs - introduction

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- Not employment legislation
- Right of access to “personal data”, the purposes of processing it, sources and recipients
- The employee pays £10
- The employer gets to search through thousands of emails
- Litigation tool

Delay

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- “Promptly” and no more than 40 days
- Ask for money
- Identity checks
- Clarification of scope of search?

Early assessment

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- Quick acknowledgement
- Allocate resources
- Assess where data is realistically going to be held
- Consider why the request has been made and the effect it could have (but try to do so under legal privilege)

Carrying out searches

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- "It will never be reasonable to deny access to the requested information merely because responding to the request may be **labour intensive** or **inconvenient**" (ICO Code of Practice)
- "The Employer should be prepared to make **extensive efforts** to find and retrieve the requested information" (ICO Code of Practice)
- "He [the Information Commissioner] will not require organisations to take unreasonable or disproportionate steps to comply with the law on subject access" (ICO Code of Practice)

Sifting through documents for disclosure

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- Bombardment approach
- Discerning bundle approach
- Spreadsheet approach

Grounds for removing documents

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- Not personal data
- Third party confidentiality
- Privilege
- Management forecasts and negotiations

Presenting response – explanatory letter

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- Be professional
- Overview of steps taken
- If the employee refused to narrow parameters, say so
- If thousands of emails have been reviewed, say so
- Don’t focus on what is not disclosed
- Assume the employee will disclose the letter to the ICO

Dealing with complaints

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- Ask the employee what they believe is missing
- Avoid engaging in correspondence with the employee that goes beyond a search for personal data
- Respond promptly to ICO correspondence and showcase your professional approach
- ICO has limited resources – looking for blatant failure
- Possible Court action

Transferring employees' personal data to third parties

Andrew Solomon

Transferring employees' personal data to third parties

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- When things go wrong:
- Fines from the Information Commissioners Office (ICO) - Instant Cash Loans Ltd dba 'The Money Shop'
  - Civil proceedings - CR19 v Chief Constable of Northern Ireland
- Outsourcing HR and payroll functions
- Mergers and acquisitions
- Group reorganisations and cross border transfers
- Employment Practices Code (ICO)

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