Anti-social media

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Will social media lead to a new wave of dismissals, asks Helen Crossland?

The unprecedented growth of social media has changed the face of business. Platforms such as Facebook , Twitter and LinkedIn have become essential marketing tools for organisations, which can reap dividends by increasing their profile, contacts and customers. But employees? use of social media can also put them on a legal collision course with their employers. Personal and professional lives now intertwine thanks to the dominance of IT in both, as well as increased time spent at work and the expectation that some staff will have to deal with work matters out of hours.

A well-drafted social media policy can be instrumental in setting benchmarks for employees

The press regularly entertains us with accounts of employees finding themselves in hot water by tweeting colourful insights about their boss or posting snapshots of a wild night out when supposedly laid up in bed with flu.

From a legal perspective, social media has prompted a new breed of claims, not only from employees' candid posts about their work and private life, but by publishing confidential work information, or things that could damage their employer's reputation. Employees can also come unstuck by persistently tweeting or posting updates in work time, which may call into question their productivity and their value to the company.

Misuse of social media by employees during or outside work can therefore create serious risks for businesses, and may also constitute gross misconduct. An employer is in a prime position to commence disciplinary action where an employee has misused social media, whether during office hours or outside work.

Case studies

There are now numerous cases in which employees' inappropriate use of social media has been ruled by an employment tribunal as justifying dismissal.

In one such case, an employee made derogatory comments about his employer on Facebook, which included 'that?s why I hate my work ... its not the work its the people who ruin it nasty horrible human beings' (sic) and 'on standby tonight so only going to get half pissed lol'.

In this case, the tribunal was satisfied that summary dismissal was within the reasonable

range of responses. It is not always as clear-cut as this, however. In another case, an employee was found to have been unfairly dismissed for posting the following on Facebook: 'I think I work in a nursery and I do not mean working with plants.' The tribunal found that the comments were 'relatively minor' and there was nothing to suggest the employer had suffered any embarrassment, or that its relationship with clients had been damaged. The employee, who had a clean disciplinary record, had immediately apologised for her conduct as well.

Social media policy

The lesson to be gleaned from the above is that each transgression must be assessed on the basis of the facts and considered holistically. That said, a well-drafted social media or communications policy can be instrumental in setting benchmarks for employees' use of these channels and will also bolster an employer's ability to act when a member of staff deviates from those rules.

Viewing data that is obviously personal does not constitute acceptable monitoring

While some employees' roles may never bring them into contact with email or the internet at work, a communications policy can still cover the use of social media by staff on their own devices, and also apply to social media use outside of work hours. Disciplinary policies should be used in tandem with social media and communications policies, and match stated examples of misconduct or gross misconduct.

In any situations involving misdemeanours with the use of social media, the employer must conduct any disciplinary procedure in accordance with its own policy or the Code of Practice from the Advisory, Conciliation and Arbitration Service (Acas) . Any offences should be handled consistently in order to avoid claims of disproportionality, of there being a 'witch hunt' to dismiss a particular employee, or of unfair leniency.

But where an employee is found to have made derogatory or offensive comments, conducted themselves in a way that has or could have damaged the organisation?s reputation, or breached company policy by excessive personal use of social media during work time, dismissal is likely to be a justifiable sanction.

Are employers free to snoop?

It has been well publicised that employers have free rein to view employees' personal messages on work equipment and to use any damning discoveries against them. However, this is not strictly true. Evidence obtained by chance or that at face value may reasonably be considered work-related ? for instance, messages that are found on the company?s email system or on an account permitted by the employer for business use ? can be used by the organisation, provided that it has a policy permitting its internet and email facilities to be monitored.

Viewing data that is obviously personal, such as that found on an employees' password-protected email account, does not constitute acceptable monitoring and could amount to a breach of privacy. An employer is also permitted to read postings on social media that are accessible to the public or where the employees' connections include colleagues and work contacts.

The employer's position will always be strengthened, however, if it has a written policy stating that use of its internet and email facilities is monitored and this policy is actively communicated to staff.

In addition, employers may wish to consider taking the following steps:

- blocking access to social networking websites from work computers to reduce risk to IT systems from breaches of security, viruses etc. and preventing employees? use of social media in work time;
- imposing a blanket ban on using personal mobiles or devices during working hours: the gain derived from this needs to be weighed against creating a potentially unhappy and disaffected workforce;
- allowing employees to use social media at work with certain restrictions;
- allowing staff to access permitted internet sites from computers in designated areas only, such as the canteen, and during defined periods, for instance, lunchtimes and before and after work;
- training employees about internet and security issues, as some may not appreciate how their actions could bring the organisation into disrepute; they may also not know how this can embroil their employer in a legal claim, where their social media posts amount to defamation, discrimination or harassment of a colleague or business contact, or where they have divulged commercially sensitive or confidential information; and

- ensuring that users understand how IT system privacy settings work so that they do not inadvertently make company information known more widely than intended.

A balancing act

When addressing the use of social media by their staff, employers must be careful to temper their duty to protect their business with entrusting employees to behave responsibly when they use social media.

All staff enjoy a right to privacy and freedom of expression, but the law will back employers where an employee's conduct undermines the business or the unwritten relationship of trust and confidence between the parties, provided that the evidence for such has been lawfully obtained.

Employers should not ignore the possible damage that employees' misuse of social media can cause. However, this can for the most part be managed and controlled by educating employees and maintaining an effective communications policy.

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Further information

- Related competencies include Conduct rules, ethics and professional practice and Managing people
- This feature taken from the RICS *Construction* journal (June/July 2016)