Happy media? Employment law, social networks and the workplace
Agenda

8.45am  Welcome and introduction

Social media policies, monitoring and disciplinary issues

**Melanie Lane**, Partner, Olswang LLP

Whose connection is it anyway? New approaches to employee competition

**Catherine Taylor**, Partner, Olswang LLP

The opportunities and challenges of social media - Twitter

**Seán Jones QC**, 11KBW

Crisis management: dealing with unlawful posts

**Ashley Hurst**, Partner, Olswang LLP

9.45am  Q&A session
Social media policies, monitoring and disciplinary issues

Melanie Lane, Olswang LLP
• Overview
• Leading UK cases
• Monitoring and vetting
• Drafting a social media policy
Social media policies, monitoring and disciplinary issues - overview

- Opportunities and challenges
- Where does professional life end and private life begin?
- Usual gripes more likely to be public

- “Excessive” v “personal” use
Social media policies, monitoring and disciplinary issues - overview

• Employment policies and procedures lagging behind
• But starting to catch up?
• Our survey:
  • two thirds of respondents have some sort of social media guidelines
  • none considered ownership of LinkedIn connections
Social media policies, monitoring and disciplinary issues – employee use and ACAS paper

• Initial focus on “work-bloggers” – Joe Gordon
• Now references to work on social networking sites
• ACAS research paper – two types of usage causing concern:
  • postings which reveal misconduct
  • postings of unwelcome views
Key recommendations:

- **Have clear policy** on internet/social media use, setting out acceptable/not and consequences of breaching (cross-referring to **disciplinary procedures**) - which does not need to be complicated

- **Draw up policy** in **consultation with staff**, to ensure fair and reasonable and to secure employee buy-in

- **Make sure policy** is properly communicated

- **Review policy** regularly

- **Keep up to date** with developments in employment law relating to social media

- **Consider how to reap the benefits** of social media!
Social media policies, monitoring and disciplinary issues – employee use and ACAS paper

• Blanket ban on employee usage not complete answer:
  • commercial benefits
  • unrealistic to ban in workplace?
  • impact of “personal” postings
• Vicarious liability – “in course of employment” – disclaimer limited value
• Can’t ignore – so regulate and educate!
Leading UK cases

- Only ET level decisions so far – not binding
- However, general themes:
  - Employers can generally rely on postings which reveal misconduct (Gill –v– SAS Ground Services)
  - Having clear social media policy assists employers (Crisp –v– Apple; Preece –v– Wetherspoons; Lerwill –v– Aston Villa)
  - BUT usual unfair dismissal principles apply – fair procedure, range of reasonable responses, consistent treatment (Bates –v– Cumbria County Council; Stephens –v– Halfords; Whitham –v– Ventura; Taylor –v– Summerfield)
  - Common for employees to run privacy/freedom of expression arguments – but ETs not sympathetic where risk of damage to employer's reputation (Pay –v– UK; Gosden –v– Lifeline Project; Crisp –v– Apple; Teggert –v– Telecity)
Privacy and freedom of expression

• ECHR:
  • Article 8: "Everyone has the right to respect for his private and family life, his home and his correspondence"
  • Article 10: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers"
• But qualified rights – breach may be justified on various grounds including protection of the reputation or rights and freedoms of others
• No direct effect, but interpretation
Monitoring employee use of social media

- Monitoring = processing personal data, so usual DPA principles apply
- However, no ETs refusing to consider evidence because in breach
- Breach duty of trust and confidence
- General trawling for information about employees would breach? But searching for name of your organisation would not?
- Our survey: one third of respondents said they monitored social media for postings about their organisation, including by employees
- Ideally preceded by risk assessment
Recruitment – vetting

• Vetting of job applicants via social media increasingly common – official or unofficial
• Claims in the US/proposed legal distinction in Germany
• Currently no UK legislation
• Issues for job candidates and employers (ACAS warnings)
• However, relatively rare (and difficult) for job applicants to bring discrimination claims
ICO Employment Practices Code

• ICO Code suggests:
  • only vet where particular and significant risks to others/where no less intrusive alternative
  • carry out at as late a stage as possible
  • tell candidates
  • use to obtain specific information
  • beware source of information and give candidates opportunity to make representations

• BUT regularly ignored in practice?
• Cases demonstrate value of clear, well thought through social media policy, backed up by training

• Needs to tie in with other terms and conditions, policies and procedures – as well as overall social media strategy


• E.g. Equal Opportunities/Harassment Policy – covers cyber-bullying?
ACAS recommends that a social media policy should cover:

- Business objectives
- Network security
- Acceptable behaviours and use for: internet and emails; smart phones; social network sites; and blogging and tweeting
- Data protection and monitoring
- Disciplinary procedures

It also recommends:

- Consultation
- Communication

Note: ACAS has also published guidance on social networking and .... managing performance; recruitment; disciplinaries and grievances; bullying; and defamation, data protection and privacy
Social media policies – our experience

• Employers have wildly varying approaches
• While some common elements, necessarily bespoke
• International scope?
• Cross-refer to mirror/replace/merge with communications policy
• Attempts to make employees personally responsible/include disclaimers
• Big brands more prescriptive, but urge honesty
• High emphasis on confidentiality
• Detailed instructions for permitted or encouraged use – separate guidelines?
• Employees encouraged to come forward with mistakes
• Policy should address employee competition issues
Whose connection is it anyway? New approaches to employee competition

Catherine Taylor, Olswang LLP
Social media and employee competition - agenda

- Overview of employee competition protection in the social media context
- Policy considerations
- 7 steps to enable use of social media and protect your business
Social media and employee competition – the law

• During employment
  • implied duty of fidelity
  • express terms

• After employment
  • (limited) implied duty in respect of confidential information
  • database rights
  • express terms – post-termination restrictions
Social media and employee competition – the law

- Social media = (fairly) new media – the law must adapt
- Traditional concepts in a new light
- Express terms important
Social media and employee competition – confidential information

- Lists of connections may be confidential information BUT … “in the public domain”
- Nonetheless include in the definition of confidential information
- Practical issues
Copyright and Rights in Databases Regulations 1997

- Data which is accessible electronically arranged in a systematic or methodical way
- Substantial investment
- During the course of employment
Social media and employee competition – “client connection”

• Legitimate interest protectable by post-termination restrictions
• BUT social media contacts – a much wider category
• Care in drafting definitions of clients, potential clients
Social media and employee competition – “solicitation”

• What constitutes “solicitation”?
  • re-connection
  • change of job status
  • posting of an article showing a new employer
  • connecting with a new employer
  • LinkedIn functions
• Include a “no dealing” restriction but ensure it covers indirect dealings
• Phonedog recruit Noah Kravitz as a blogger
• In addition to Phonedog’s corporate Twitter handle, he uses @Phonedog_Noah
• 17,000 followers
• Kravitz leaves, changes handle and continues to tweet
• Phonedog sues for loss of advertising revenue and incremental income from website hits
• Breach of confidential information, conversion and other US law claims
• No written policy = employer on tricky ground
Social media and employee competition – policy considerations

On commencement:

• Specify expressly who owns connections

• Take practical steps to reinforce on joining:
  • New/upgraded company branded social media page and/or
  • “snapshot” of existing social media page
  • ban use of other social media sites with business connection?

• Twitter handle not personal but company?

• Require passwords to be notified to employer

• Reinforce with policy during employment
Social media and employee competition – policy considerations

During employment:

• Emphasis in policy on employer’s investment and work-related use to capture connections under Database Rights

• Consider whether contacts should:
  • only be added to business related social media site
  • should also added to employer’s central database – practical issues

• Monitor social media usage via I.T. and use of corporate moles

• Remind users of the social media policy at regular intervals
On termination:

- Consider providing for:
  - removal of company connections; and/or
  - closure of company account; and/or
  - transfer of contact details to the employer; and/or
  - provision of password
Social media and employee competition – policy considerations

On termination:

- Good post-termination restrictions:
  - categorise connections/followers as confidential information
  - define solicitation
  - ensure there is a no-dealing clause
  - do not include “all connections”

- Corporate mole post-termination?
Social media and employee competition – practical points

1. Manage business’ expectations – not possible to stop an ex-employee having a social media page

2. What is your policy on social media? Dictates whether you specify employer social media only or a more relaxed approach

3. Formulate a clear, express policy on who owns connections at commencement of, during and after employment – keep in mind Database Rights

4. Training on and notification of the policy

5. Review your post-termination restrictions

6. Monitor usage during (and after) employment

7. Be ready to deal with issues on a bespoke basis in any compromise agreement
The opportunities and challenges of social media - Twitter

Seán Jones QC, 11KBW
History

- SMS – the unexpected hit of mobile telephony
- Restriction was its strength
- Its own culture: emoticons and txt spk
- Outrage in the Daily Mail
- Twitter was intended to be the SMS of the Internet
- Group messaging
- 2 key differences to SMS: broadcast and subscription
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<td>Creates Advocates and Evangelists</td>
<td>The Twitter Mob</td>
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Crisis management: dealing with unlawful posts

Ashley Hurst, Olswang LLP
Social Media Compliance Framework

Corporate Social Media Policy

- Employment Policies
- Employment Contract
- Employee Handbook
- Communications Policy
- Employee Social Media Policy
- Data Security Policy
- Data Retention Policy
- IT Policies
- Monitoring
- Crisis Response
- Training
Crisis response

- Effective monitoring
- Clear lines of reporting and escalation route
- Training and empowering key employees to respond appropriately to online complaints
- Knowing when to do nothing
- Surgical removal of material
- Establishing a crisis team
Internet Reputation Management
Key Stakeholders

Internal Team
- Senior Management
- IT
- In-house legal
- Comms team
- Investor Relations

External Advisors
- Legal Advisors
- PR
- SEO
- Monitoring
Action plan

- Step 1 – Identify key stakeholders and form a social media focus group
- Step 2 – Identify what your organisation wants to achieve through employee use of social media
- Step 3 – Identify the relevant social media channels
- Step 4 – Identify the key legal risks for your organisation
- Step 5 – Collect existing policies which may impact on employee social media
- Step 6 – Form a clear view as to the desirable/acceptable bounds of social media use and draft a strategy document
- Step 7 – Draft/amend social media and other policies as appropriate
- Step 8 – Form a crisis team
- Step 9 – Establish a training plan
Q&A session
Happy media? Employment law, social networks and the workplace

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