

Facebook and social media: saving on the cost of a private investigator

It has been a while since we wrote and I can only say it is because June has been the month for dealing with disciplinary issues. Both of us have been deep in realms of investigations, witnesses, minutes and hearings: a time consuming but often rewarding part of our job. One of those disciplinary issues dealt with an employee who posted something stupid on Facebook. Considering how relaxed most people are about sharing the intimate details (and photos) of their lives through the social media they use, we thought it might be a good idea to write a bit about social media and the problems it can cause in the work place.

An employee called in to work and explained that she was suffering from a migraine and that she would not be coming into work that day. Shortly after, the employee boasted on Facebook that she was throwing a sickie and wanted to see what friends were around to meet for a drink a bit later in the day.

With our help, the employee was invited to a disciplinary hearing to explain herself. The employee was subsequently dismissed for gross misconduct. During the disciplinary meeting, the employee complained that the company had clearly infringed her human rights because her Facebook privacy settings meant that only her friends could see her posts and not friends of friends or everyone. For her, this meant that the company must have breached her privacy settings in some way. Unfortunately for the employee, she had forgotten that her manager was one of her Facebook friends who received a notification by email of the employee's updated status and promptly called us.

This is not the first time we have been asked to assist with sorting out a problem that an employee has caused through posting inappropriate messages or photos on Facebook. A few years ago, we were asked to advise in a situation where an employee had posted sexually graphic photos of herself and then complained that colleagues were sharing these photos around the office (and presumably elsewhere) forgetting that some of those colleagues were also Facebook friends. Nevertheless, the employer had to step in to stop the gossip and teasing and help the employee get over what must have felt like a walk of shame.

A recent example of the problems of social media is *Preece v JD Wetherspoon plc*, an employment tribunal case that found it was fair to dismiss an employee who had made inappropriate comments on Facebook about two customers. What seems to have been helpful in this case was that the employee made the comments while at work, using the company's computer and her comments were in breach of the employer's e-mail and internet policy, which specifically referred to use of media such as Facebook while at work. The disciplinary procedure also listed as gross misconduct, acts that affect employee or customer relations or brought the company's name into disrepute.

So is there any expectation of privacy for your Facebook profile? The EAT's decision in *Pay v Lancashire Probation Service* 2004 ICR 187 suggests that the answer is no. In this case, the EAT held that a probation officer who specialised in the treatment of sex offenders could not rely on the Human Rights Act in support of his unfair dismissal claim when he was dismissed for his involvement in sadomasochistic activities publicised on the Internet. The claimant had put photographs of himself engaged in such acts in the public domain, and they therefore fell outside the protection of Article 8.

Employees often confuse personal and private. Quite simply, if you decide to publicise your personal life on the net, your personal life is no longer your private life.

For employers, all these cases highlight the importance and usefulness of having a properly drafted policy regarding the use of social media that includes explanations about proper and improper use. It is also helpful to explain to employees that it is inappropriate to use social media like Facebook or Twitter to express frustration in the workplace.

A sensible policy will include:

- Employee use of IT resources generally
- Confidentiality and how this applies to social media tools
- Intellectual property and how this applies to social media tools
- Prohibition on harassment and bullying
- Prohibition on discrimination
- Prohibition on negative comments about the company, clients and colleagues
- You may also want to ensure that there is a prohibition on negative comments about the competition
- A reminder that when you use social media tools such as Facebook, you are making public what you are doing, 'public' being the operative word

It is easy to get very excited about prohibitions on what can and can't be said, but take some time to think about the restrictions you really need to impose on use. If you are overly restrictive, you may be creating a problem for yourself because employees do not take the policy seriously.

If you are going to introduce a social media policy, it will be helpful also to discuss it with your employees and make sure that your managers understand how to use it effectively.

If you would like help with drafting a social media policy or have come across similar cases, please let us know.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at: info@employease.co.uk.

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