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Here Today, Gone Tomorrow ... Social Media in the Workplace – Managing Your Workforce to Protect Your Reputation

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Biography

Linky is a Partner at Edwin Coe. She has a wealth of experience and advises on a full range of employment issues for established corporate clients and senior executives in both regulated and non regulated industries. She has provided strategic advice on a number of successful team moves within the communications and financial sector acting for both the poaching competitor and the individuals being approached.

Linky understands that when a business or a senior executive has an employment related issue, it frequently requires immediate and urgent attention and Linky is consistently praised by clients for her speed of response and turnaround time. Her client base encompasses a broad range of industry sectors including financial services (from senior executives in substantial financial institutions to owner managed hedge funds), professional services (including legal, architectural, accounting, recruitment, consultancies), local authorities, PR and advertising, manufacturing and retail companies.

Linky has both Employment Tribunal and High Court experience and has obtained and resisted a number of High Court injunctions to enforce or resist post termination restraints and to protect confidential information. She also advises on data protection, commercial agents and the Conduct of Employment Businesses and Employment Agency issues.

Linky is a member of the Employment Lawyers Association and sits as a part time Employment Judge. She has appeared on ITV and Channel 4 and is a regular speaker at conferences on employment issues.

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Abstract

There is no doubt that most businesses use social media to help with brand building, fostering collaboration and communication, as way of recruiting new talent, improving employee engagement and driving innovation. But there are also risks. This article looks at how a business should manage its workforce in the context of social media to avoid damage to the reputation of the business.

Introduction

Whilst the management of the business reputation is a concern for employers, the legal risks in addressing matters with staff can be complex.

Where staff make derogatory comments on websites, which directly relate to work and/or colleagues, it is easy to see why a dismissal of the employee would be fair. For example, a high street store dismissed one of its employees for posting onto a

social networking site, “I work at [name of store] and can’t wait to leave because it’s s&*t”. The result was dismissal for gross misconduct.

Nonetheless, damage to reputation by the employer cannot simply be assumed. In the case of *Taylor v Somerfield* which is an unreported case from July 2007, the Claimant had been dismissed for bringing the company into disrepute when he posted video footage on YouTube which had been filmed on a mobile phone, showing two colleagues hitting each other with plastic bags and generally horsing around one of the Somerfield depots.

The employer did not dismiss for horsing around in the warehouse (presumably because it was during a legitimate break and was of an innocent nature) but rather because the employee posted a video of it on YouTube. Somerfield asserted that this brought the Company into disrepute. The Employee who was dismissed, issued proceedings for unfair dismissal and the Tribunal found in his favour.

The Tribunal noted that the only way in which Somerfield could have been identified from the video was from the colour of the uniforms and the plastic bags. Furthermore, the video was only on YouTube for three days and on closer analysis, it seemed the video had only been viewed eight times, three of which were by Somerfield managers investigating the disciplinary offence!

This case makes it clear that the extent of the ‘publication’ will be relevant and consideration of the actual, rather than the speculative, reputational damage needs to be considered.

Where a business is concerned that an employee’s conduct on social media outside of work has brought the Company into disrepute, the position is rather more problematic. If the conduct impacts on the employee’s ability to undertake their job or where the conduct is inconsistent with their professional role, then a dismissal is likely to be fair. But where the conduct is just ‘unpalatable’ rather than impacting on the employee’s ability to do their role, care must be taken before dismissing or disciplining for reputation reasons.

One case which gives an insight into the line that the Tribunals will take in these matters is the case of *Smith v Trafford Housing Trust* [2012]. Mr Smith was demoted because he had posted his views on his Facebook page about gay marriage, which he didn’t support. When he was demoted, he resigned and brought a breach of contract claim. He won. In finding in his favour, the Court specifically referred to the following: the fact that no reasonable reader of Mr Smith’s Facebook page could think that his comments were made on behalf of the Trust (although the Trust was mentioned on his Facebook page as his employer); that his views were expressed moderately and were his personal views expressed on his personal Facebook page over a weekend; and fundamentally, the fact that Mr Smith’s Facebook page was clearly for non work related purposes and it had not acquired a work related context.

Contrast that case with the case of *Gosden v Lifeline Project Limited* [2009]. The facts of the case were a little convoluted but in broad terms, Mr Gosden had sent an

email to a friend of his who worked at a client of his employer. The email was sent from Mr Gosden's personal email account to the friend's personal email account but it was marked in the subject heading, "It is your duty to pass this on!" It was an email that contained sexist and racist comments.

The friend did pass it on which is how it came to be in the client's email system and eventually a complaint as to its contents was made and the email and its author came to be reported to Mr Gosden's employer. Mr Gosden was dismissed by his employer for having brought the Company into disrepute with their biggest client and for breach of their equal opportunities policy. He brought a claim for unfair dismissal and lost.

This case is a warning for individuals who circulate such emails in private with little thought for where they may be sent on, but it is interesting to note that the Tribunal was more concerned with the fact that Mr Gosden had no control over where it may be sent on, rather than the fact that the subject heading urged people to send it on. Whether or not it may have influenced the final decision or not is hard to assess but Mr Gosden didn't help himself by firstly denying that he sent the email and then denying that it was in any way offensive.

What should be done?

The case law that is now developing on the question of misconduct over social media both at work and privately, time and time again, demonstrates that those employers with well considered and comprehensive social media policies are best placed to protect the interests of the business when issues arise. As a minimum, suitable and proportionate policies should be put in place.



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