Social Media and the Workplace

David Hunt | December 2011

Whether it is Facebook, twitter, YouTube, myspace or even now Google Plus, there is an ever growing wave of social media available via the internet, which has brought a new set of issues to the workplace.

A significant number of employers now block employee access to social media. However, even invoking a blanket ban will not prevent employees from posting comments relating to their employer, work, colleagues, clients and customers, for example using a personal smart phone or home computer, if that is what they are set upon doing. This article examines a growing number of Tribunal decisions in relation to the use (and misuse) of social media before drawing out some common themes.

The most recent decision of the Employment Tribunals is *Whitham v Club 24 Limited t/a Ventura* (ET1810462/2010) in which Mrs Whitham was Ventura's team leader for its Volkswagen / Skoda account. Following what presumably had been a hard day at work, she posted comments on Facebook stating that she worked in a nursery *"and I do not mean working with plants".* This prompted a comment that suggested that she worked "*with a lot of planks*". Mrs Witham responded *"2 true xx".*

Unfortunately for Mrs Whitham, two of her colleagues were also Facebook "friends", and they reported her comments to her manager. Ventura had a policy in place warning employees of the risks of posting information about their work on the internet and they suspended Mrs Whitham and commenced disciplinary proceedings.

Despite Mrs Whitham apologising for her actions in writing, she was dismissed by Ventura, on the basis her comments could potentially damage Ventura's reputation and could put Ventura's relationship with Volkswagen / Skoda at risk. Mrs Whitham appealed but, despite the manager dealing with the appeal having some concerns in relation to the original decision to dismiss, her appeal was rejected.

The Tribunal subsequently held that Mrs Whitham had been unfairly dismissed finding that dismissal was not a reasonable response in the circumstances. The Tribunal was particularly surprised by Ventura's belief that the comments might jeopardise its relationship with Volkswagen / Skoda given that Mrs Whitham had made no reference to either car company and no evidence had been put forward supporting the view that the relationship could have been damaged. Finally, the Tribunal also found that insufficient weight had been given to Mrs Whitham's unblemished employment record.

In *Preece v JD Wetherspoons plc* (2104806/10), Miss Preece worked as a manager at a Wetherspoons pub in Runcorn. Miss Preece was subjected to abuse at work by two customers and then received abusive telephone calls from, what is believed, one of the customer's daughters. Having done so, Miss Preece, whilst on duty, posted derogatory comments about one of the customers, in particular on Facebook. In doing so, she believed that the comments could only be seen by 50 or so of her 600 plus Facebook friends. However, they were seen by the customer's daughter, who complained to Wetherspoons.

Following the daughter's complaint, Wetherspoons instigated disciplinary proceedings on the grounds that Miss Preece's alleged actions were in breach of its internet policy (Wetherspoons' policy warned employees about posting comments which could lower its reputation or the reputation of colleagues or customers and its disciplinary procedure stated that any failure to comply with that policy could constitute gross misconduct). Miss Preece was subsequently dismissed with Wetherspoons concluding that her actions had lowered its reputation, breached its internet policy and breached the duty of trust and confidence. Whilst during the investigation Miss Preece had claimed that she had made the comments in a fit of anger, there was evidence from the content of her Facebook page that she had been joking with friends when she made the comment. Her mitigating arguments in this respect were therefore not accepted.

Whilst the Tribunal stated it would have issued a final written warning, it could not substitute its own view and held that the decision to dismiss did fall within the range of reasonable responses open to Wetherspoons and that the dismissal was accordingly fair. The Tribunal also found, in response to Miss Preece's claims around freedom of expression, that Wetherspoons' decision was justified under Article 10(2) of the Human Rights Convention given the risk of damage to its reputation.

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In *Benning v British Airways* (ET2703528/2010), Mr Benning was dismissed after he was found to have posted derogatory footage and comments on YouTube in relation to a British Airways colleague. British Airways dismissed Mr Benning for gross misconduct on the basis that he had breached its data protection, social media and bullying and harassment policies. The Tribunal found that his dismissal was fair and that it had been reasonable for British Airways to reject Mr Benning's submissions that the posting had been made by his brother (based on the delays in him raising this as a defence and based on the content of the YouTube account, which were consistent with it being Mr Benning's account).

In *Taylor v Somerfield* (unreported), Mr Taylor posted on YouTube footage of colleagues fighting with plastic bags whilst at work. Somerfield dismissed Mr Taylor on the grounds that the posting of the footage brought Somerfield into disrepute. However, the Tribunal disagreed and found the dismissal to be unfair. They based their finding on the fact that, unless you happened to recognise the colours of the staff uniforms, there was no obvious connection between the footage and Somerfield and, in any event, the footage had only been viewed by eight people (three of whom were Somerfield managers involved in the disciplinary proceedings) before being taken down three days after being posted.

Common themes?

Whilst the above cases are first instance decisions of the English Employment Tribunals and not therefore binding, it is possible to identify some common themes.

Employers will clearly be in a far stronger position where they have clear policies in place in relation to employees' use of social media and where the ramifications of any breaches of such policies are spelled out. Helpfully, ACAS has recently added a section to its website dealing with **social media issues** and providing suggested guidance to assist employers in drawing up a policy.

It is also clear that where an employer is alleging that an employee's use of social media sites risked damaging its reputation or its relationship with a client it will need to show that it took steps to assess the level of that risk and present evidence as to any damage caused. The *Preece* case above can arguably be distinguished from the *Whitham* case (also above) on the basis that the customer had actually complained about the comments and damage had therefore arguably been caused.

Whilst not an issue necessarily raised in the above cases, it is also worth considering the human rights aspects of these issues: how the right (under Article 8) to respect for your private and family life is relevant. It is unlikely, in my view, that employees posting comments on social media sites will have any great success in trying to run privacy arguments. However, even if a genuine issue in relation to privacy were to arise, it is clear that this may still not prevent the employer from taking action.

An example of this is the case of *Pay v the United Kingdom* ([2009] IRLR 139) (whilst not a social media case, the issues were similar to those which might arise in a social media context). Mr Pay was dismissed as a probation officer working with sex offenders, following allegations that he was involved in sado-masochistic sexual activities. He complained to the European Court of Human Rights that his dismissal infringed his rights under the Convention to privacy. However, the ECHR held that the interference with his Article 8 rights was, in this case, justified given the nature of his work and the fact he worked with sex offenders.

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