SOCIAL MEDIA AND EMPLOYMENT LAW

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1. Introduction

The rise of social media generally has been well documented. The use of social media during the working day or outwith the wording day *but affecting an employee's work* is leading to numerous employment law issues.

A recent survey stated that 55% of those asked in the UK admitted accessing social media sites whilst at work. The figure for those accessing social media sites outwith the working hours will of course be considerably higher.

Whilst there are many apparently novel legal issues that arise as a result, in most cases the issue is an old form of (bad) behaviour committed in a new way and can be dealt with relatively easily.

I have divided this short talk into three sections. I will start with the main employment issues that arise in relation to recruitment then consider the issues during the employment relationship and then at the end of the employment relationship.

2. Social Media and Recruitment

A recent survey suggested that approximately 45% of employers currently review the profile of potential candidates online before making the decision as to whether to invite the candidate to interview or whether to recruit the candidate.

No doubt this figure will rise considerably over time and there may well come a point in time when an HR Adviser could be disciplined if they do not advise a manager to review online information about a candidate!

Two interesting issues arise.

The first is that if the candidate's application is no longer progressed then the potential employer should be careful that they have not been guilty of an act of discrimination which could result in a Tribunal claim. If, for example, the candidate sent in their CV without mentioning their age, nationality, religion, etc but then after looking at social media sites the employer became aware of these characteristics and for that reason rejected the candidate, there is at least a risk that the candidate could successfully claim that they have been subjected to an act of discrimination. This would be particularly marked if two candidates were short-listed for interview and A had better skills and qualifications for the job than B but then A was suddenly rejected for the job and it was difficult to see the logic for that rejection given that A had better skills, qualifications and/or experience for the role than B. There is nothing wrong with "distinguishing" (or rejecting) a candidate who is simply unsuitable or who does not have the necessary skills, qualifications and experience. However, it is potentially unlawful to reject a candidate *by reason of* their race, ethnic origin, nationality, age, sexual orientation, disability, sex, pregnancy, religion or philosophical belief etc. In such a circumstance the candidate could raise a Tribunal claim under the Equality Act 2010 against the potential employer even although they have never been employed by them.

A second issue that arises at the recruitment stage is when a candidate is under enforceable post-termination restrictive covenants in terms of their contract with their previous employer. On occasion, the contract with the previous employer requires the candidate to disclose to the potential new employer the details of the restrictions that the candidate is under. There comes a point where in certain industries (for example sales and recruitment) it would be amiss for the HR Adviser to fail to ask the candidate whether they are under any contractual restrictions that would continue after their exit from their employer. This may well have a bearing on whether they are suitable and also what level of pay, etc would be appropriate. If the reality is that there is a very clearly worded restrictive covenant that prevents the candidate from dealing or soliciting in relation to certain defined client groups, then it will be dangerous for the new employer to be involved in allowing the candidate (once employed) to breach these restricted covenants. If for example, the candidate comes to the interview boasting that the whole of their "Linked In" contacts is available for the new employer to exploit then the potential employer should ensure that there are no relevant restrictions.

3. Employment Law Issues During Employment

There is apparently no end to the variety of methods that employees get "caught out" by social media use. I think I can usefully divide the main areas of concern into five categories.

1. Misconduct – Excessive Use

If an employee is spending too much time on social media activities when they should be working, then this may well be misconduct in itself (although this will depend on what the policy of the employer is on this topic). This is analogous to an employee who is simply not fulfilling their duties due to talking or simply walking around the office. The issue is the (deliberate) failure to carry out the tasks that they are employed to do. Whilst unlikely to be gross misconduct in terms of most policies, this would most likely be a conduct matter which if repeated on several occasions could result in dismissal. Often this issue does not however stand alone and it is part of a list of behaviours of an employee.

2. Misconduct/Gross Misconduct – Inappropriate Viewing

If a work computer is used to view pornography or share such images or other such material (and in the presumption the disciplinary policy classes such as gross misconduct) this may well result in a fair dismissal. If there is any issue of minors being viewed this is a very serious matter. The Company should not "touch the computer in question and call the Police immediately.

3 Harassment

If social media is used as a tool to harass another employee then this has very serious implications for both the employee and the employer. This could well amount to gross misconduct and the employee (after a full and fair procedure) may well be fairly dismissed. There may be criminal issues that arise, particularly in relation to the Protection from Harassment Act. The employer could be seen as vicariously

liable for the actions of the employee unless they have a clear policy as to appropriate use that clearly states that harassment in any form is not acceptable. The issue is most common where there has been either sexual harassment or racial harassment, etc. It must be stressed that the bar is often drawn at a relatively low level. The joke "e-mail" which is either sexist, racist, etc that is forwarded on by whatever means may in itself be an act of harassment. This may be the case even if the "victim" on the face of it appears (at the time) to go along with the "joke".

The American position is more sympathetic to the private nature of posts made on social networking sites by employees. A decision by the National Labor Relations Board (NLRB) outlines this approach. NLRB has ruled that the dismissal of 5 employees because of unpleasant tweets that they had posted about a colleague was unlawful. The NLRB determined that these acts were not grounds for dismissal of the employees and ordered their reinstatement within the company, with payment of any back pay also due.

4. Misconduct – Exposing Dishonesty

There are numerous examples surfacing as to ways that employees get themselves "caught out" in relation to the blurring divide between work and private life. There are a whole host of employees who have stated to their employer that they are unable to work for a certain reason and then their Facebook or equivalent profile reveals that the reason stated is inaccurate. This is just one of many such examples under this heading.

5. Misconduct – Damaging Company Reputation / Private Activities incompatible with his role and responsibilities

Again there are a host of examples of employees being caught out under this category. In the case of Pay –v- UK [2009] IRLR 139, Mr Pay was a probation officer working predominately with sex offenders. He was dismissed after his employers discovered that he was involved in activities including the merchandising of products connected with bondage, domination and sado-masochism and that he performed shows in hedonist and fetish clubs. There were photos of his activities available on the internet. The Employment Tribunal dismissed his complaint of unfair dismissal. Mr Pay brought proceedings against the UK in the European Court of Human Rights. He founded on Articles 8, 10 and 14 of the European Convention and in particular he claimed that the dismissal breached his right to privacy and to enjoyment of rights and freedoms without discrimination on the grounds of sex etc. He claimed that his dismissal constituted discrimination on the ground of his sexual orientation. The ECHR declared the application inadmissible and that the complaints under the Articles were manifestly ill-founded. The ECHR did state that even if Article 8 was engaged, any interference with Mr Pay's right to perform in these club's was in pursuit of a legitimate aim by the employer, namely protecting the employer's reputation. Mr Pay's job involved working with convicted sex offenders and it was important that he

gained and maintained their respect. Furthermore, his role required him to have the confidence of the public and victims of sex crime in particular. The employee owed a duty of "loyalty, reserve and discretion." and this had been breached

4. Employment Law Issues on Leaving Employment

One issue is when the employee should be asked to update their Linked In profile to say that they have left the employment. Having a hard and fast rule may not be appropriate. The downside for the employer is that this may immediately draw attention to hundreds of connections that the employee is leaving and joining a competitor before the employer has had a chance to speak to the clients to attempt persuade them to stay.

Another issue arises in situations where an employee is resigning and then claiming constructive unfair dismissal. If they do so, but still maintain on their Linked In profile that they are still employed by their former employer can this be used against them as evidence that they were not truly resigning in response to a material breach of contract? This will depend on the circumstances and it would certainly be a cross-examination question to ask of the employee at Tribunal. It will also depend on the policy of the employer on the issue.

An interesting and largely un-litigated area concerns employees leaving employment and in particular the issue of whether the employee can legitimately use social media as a means of transferring certain information relating to the employer's business. Given that very few employers at present have clear policies on this issue, we revert back to the general principles that have applied in previous circumstances.

Take for example a salesman who works for company A and entertains dozens of customers each month at company A's expense. The salesman then diligently enters these customers' details into Linked-In and sends invitations to those customers. They join up to the salesman's profile as connections. This is all done and in fact encouraged by the employer (on the face of it).

The first issue is whether the connections should be regarded as *the employer's* confidential information once they are connected to him on Linked-In. Are the connections both the employer's property as a database and/or confidential?

Section 30(1) of the Copyright and Rights and Databases Regulations 1997 (the Database Regulations) (Si 2003/2501) confirms that for the propriety right to exist in a database there must be a substantial investment in obtaining, verifying or presenting the content. Section 14(1) confirms that where a database is made by the employee in the course of his employment, his employer is regarded as the maker of the database, subject to any agreement to the contrary. The complicating factor here is that by joining Linked-In, the employee makes a contract *with LinkedIn as an individual*. The software does not belong to the employer. It could be argued that by knowingly allowing the employee to enter data on LinkedIn, the employer is making an "agreement to the contrary" such that these Regulations do not mean that the employer owns the database.

The matter is complicated further in that the LinkedIn connections of the Salesman will include both personal contacts such as University friends and business contacts perhaps gathered during more than one employment. So even if the database is not the property of the employer is it the case that the information stored on Linked-In is confidential?

The issue then arises as to what happens if the employee leaves the employment and then "uses" the contacts against the interests of the employer. There are various ways that this can occur and the leading case in this area which considers some of the issues that may arise is that *Hays Specialist Recruitment (Holdings) Limited & Others –v- Mark Ions, Exclusive Human Resources Limited* case – [2008] EWHC 745 (Ch). The first thing to note is that this is not an Employment Tribunal case and it is only a preliminary ruling by the High Court on a specific issue as to whether or not certain documents should or should not be released in terms of the English Civil Procedure Rules. However, there is some commentary that is of relevance.

During his employment, Mr Ions was encouraged by his employer to join Linked-In "an on line business orientated social networking site". Hays argued that during his employment Mr Ions then intentionally transferred certain details relating to business contacts into his LinkedIn account (particularly at the end of his employment relationship when he knew he was leaving and setting up his own company). Mr Ions had worked for Hays from January 2001 and had restrictive covenants in his contract. Mr Ions had accepted that he had uploaded the addresses of business contacts to LinkedIn while he was employed by Hays and did not suggest that he had any of the business contacts except as a result of his employment with Hays. The Judge later held that given that he had been a full-time employee for Hays for over 6 years it was very unlikely that he had gained many of the contacts outwith his work with Hays.

On 18th May 2007, Mr Ions incorporated a new entity being Exclusive Human Resources Limited. He did not dispute that he intended to carry on that entity as a competing business once he left Hays. There may be nothing untoward in setting up a legal entity but as soon as there are positive actions which go against the interests of a current employer then issues arise. Mr Ions gave notice on 8th June 2007 of his intention to leave Hays and he made no secret of his intention to set up a competing business. His employment continued for 28 days into July 2007 but he was not permitted to work with Hays during that period. It was later discovered that on 18th May 2007, Mr Ions had sent invitations to at least two candidates of Hays to join his professional network – LinkedIn. The allegation was that on or around 18th May 2007, Mr Ions began a campaign of migrating confidential client and candidate contact details from Hays' confidential database to his own personal account at the web facility LinkedIn. Mr Ions' solicitor made the usual arguments that he had been encouraged to use LinkedIn and much of the information was intrinsically part of his own knowledge base having been gained over many years of experience in the business. His argument that what he had done was with Hays consent and that once uploaded and once invitations to join his network were accepted, the information ceased to be confidential because it was accessible to a wider audience through his network.

The Judge held that Hays had reasonable grounds for considering that it *may* have a claim against Mr Ions as regards the transfer of information concerning clients and applicants by uploading it to his LinkedIn network while he was still employed by Hays *and with a view to its subsequent use by him in his own business*. Mr Ions' solicitors stressed that it was not Mr Ions action of uploading the e-mail addresses to Linked-In but the invitees' acceptance

to become connections which resulted in the information becoming available on his network and it was not then confidential but publicly available. The Judge stated that this argument broke down at the first stage. If the information was confidential, it was Mr Ions actions in uploading the e-mail addresses which involved a transfer of information to a site where at least the details of those who accepted his invitations would be accessible by him after his employment has ceased. The evidence suggested that he may have done so, not for the benefit of Hays but for the benefit of his post-termination business.

Another argument run by Mr Ions was that none of the information concerning the identity of clients was confidential because contact details are regularly available from published directories. The Judge stated that this may be true as regards most clients although he could not be confident that it applied to all contacts as some used their home e-mail addresses or their personal e-mail address.

The application before the High Court centred on whether or not certain communications and information via the LinkedIn site ought to be disclosed to Hays prior to court proceedings being raised. The test that had to be looked at by the Judge was whether or not in any subsequent proceedings, the documents or classes of documents would be within the class of documents that Mr Ions would have to disclose under the standard disclosure rules. Hays needed to show that it was more probable than not that the documents were within the scope of the standard disclosure rules with regard to the issues that would be likely to arise.

The Judge took the middle ground and stated that Mr Ions' whole database of client and candidate contacts may well contain many individuals that have had no contact with Hays. Mr Ions was not required to disclose his entire database to prove the negative that he had not acted in breach of his restrictive covenants. Furthermore, the Judge took into account that Mr Ions had deleted his Linked-In account in October 2007 (after receipt of a letter from Hays' solicitor dated September 2007). In the end, a much reduced list of specific contacts with specific clients was ordered to be disclosed.

5. Conclusion

Ultimately, a balance needs to be struck between the use of social media as a networking tool for both employers and employees and the prevention of an employee using these sites to the detriment of their employer whether their use is in the private sphere or in relation to their employment. Further consideration needs to be given to determining the extent that employers should be able to rely on content appearing on an employee's personal networking site and the extent to which anything said on a social networking site should be able to be used in the employment sphere.

Employers should have a clear policy on the use of Linked-In and similar social media services. Such should specify what is expected of an employee and in particular, what is expected to happen in the event that the employee leaves the employment. Furthermore, care should be taken to have carefully worded restrictive covenants in place for key employees.