

#birdsandthebees: a 'green cross code' for using social media

Introduction

I recently wrote a piece for The International Forum for Responsible Media and Education Technology Magazine called #birdsandthebees. My inspiration for this came from the fact that all of us know about the birds and the bees and that we go to great lengths to debate sex education at school and educating our children about the pit falls of doing things when they are younger that could potentially impact upon their prospects when they are older.

This got me thinking about online health. I run a PSE module that includes a session on managing your online presence. It staggers me every time when I realise how unaware my students are of the potential implications that their posts, tweets, comments or pictures could have on their career prospects. So I suppose I'm on a bit of a campaign to protect our online health through education.

More of this in a little while.

During this session I'm going to cover 3 things:

1. The social media landscape, which will hopefully give you an idea as to the context in which you, your employees and your future employees exist.
2. Some employment law cases involving the use of social media by the employee. At this juncture I'd like you to think what you would have done in these circumstances (I should add a caveat here that I am not an employment lawyer, so I'm looking at these from a media lawyer's perspective)
3. Make recommendations to educate employees / future employees on using social media sensibly.

The social media landscape: statistics to provide perspective

The reach of social media is best illustrated by some very revealing statistics about some of the best known social media platforms in contrast to the most popular 'traditional' media outlets:

The New York Times 2013 print and digital circulation was approximately two million, enabling it to proclaim that it was the "*#1 individual newspaper site*" on the internet, with nearly thirty-one million unique visitors per month.

In contrast, YouTube has one billion unique visitors per month which, to put things into perspective equates to thirty times more than the New York Times, or as many unique visitors in a day as the [New York] Times has every month.

According to WordPress' statistics, it hosts blogs written in over 120 languages, equating to over 409 million users viewing more than 15.8 billion pages each

month. Consequently, users produce approximately 43.7 million new posts and 58.8 million new comments on a monthly basis.

Twitter states that it has 320 million active users (80% of which use its mobile applications) and normally 'takes in' approximately 500 million Tweets per day, equating to an average of 5,700 Tweets per second. It has more visitors per week than the New York Times does in a month.

Similarly, Tumblr hosts over 170 million microblogs and, with 300 million visits per month, enjoys ten times more than the New York Times.

According to Facebook, as of September 2015, it had 1.55 billion monthly active users, 894 million of which use their mobile applications to access the platform on a daily basis.

Late 2013 saw Instagram's global usage expand by 15%, in just two months, to 150 million people. The latest statistics show that it now has over 400 million active users.

LinkedIn's current membership is 400 million.

These established platforms are only the 'tip of the social media iceberg'. Pinterest continues to grow rapidly, as do emerging platforms, such as Snapchat and WhatsApp.

What does this mean for society, business and your employees and future employees?

The availability of social media, and the fact we can be constantly connected to these platforms via our mobile phones or tablets, means that they have become an extension of us. This means that what were once casual comments or expressions of emotion, such as anger or frustration, or immature remarks, jokes or pranks, that would have been kept private, or perhaps fleetingly shared with a man and his dog at the pub, and then equally as quickly forgotten, have now become formalised and permanent. The fact that we are constantly connected to social media, and that we have perhaps lost the ability to distinguish online from offline life, means that these 'moments', borne out of emotion, frustration, or just lack of experience, in the click of a mouse, or flick of a finger, are publicised for the world to see – potentially permanently: in other words, we're substituting offline conversation for tweeting and posting - for many people (including your employees), social media platforms have not just replaced the written word; they have become a substitute for the spoken word.

I think you'd agree, if we were judged by some of the things we've said or done offline, out of perhaps, anger, frustration, immaturity, naivety, youthful over-exuberance or peer pressure, we might not be in a job. However, this is now the world we live in. Consequently, as we'll see in a moment when we look at case law, people are being judged on what they post online, either during their

younger years, and/or out of a work context.

The well-known case to illustrate this point is that of Paris Brown. At 17-years-old, Paris was the first Youth Police Crime Commissioner. However, after just 6 days, she resigned from her role over comments she had posted on twitter dating back to when she was as young as 14-years-old that could be interpreted as being homophobic and racist. In an interview, she admitted of having 'fallen into a trap of behaving with bravado on social networking sites', but denied she held these views. A Google search for 'Paris Brown' today still lists, within the top five results, a Daily Mail article from 2013 calling her 'foul-mouthed' and 'offensive'. Thus, the stigma attached to these comments could follow Paris for the rest of her career.

Paris' predicament, and the damage that using social media irresponsibly can do is something that I am increasingly aware of as a University Lecturer. In my role I work closely with large employers, who in turn work with my students. Without exception, when I ask them whether they look at candidates' online activity before deciding whether to offer an interview, they have all admitted they do, even if this is done unofficially, without the knowledge of their Human Resources department. Indeed, in 2013, research carried out by the Chartered Institute of Personnel and Development found that 2 out of 5 employers look at candidates' online activity or social media profiles to inform their recruitment decisions. More recent research, presented by the University of Paris-Sud at the Amsterdam Privacy Conference 2015, suggests that around 75% of employers use social media to screen candidates. However, based on my experience of working with large companies, as many organisations do not officially use social media for this purpose (but do so unofficially), I would suggest that these figures are conservative, and are likely to be higher.

Equally, ACAS (Advisory, Conciliation and Arbitration Service) reports that dismissals concerning employee use of social media is on the rise and recognises that users of social media are oblivious to the risks generated by their relationship with it, and the way in which it blurs the lines of private and public life.

It's these statistics that I, and I know you, want to avoid – for your employees, your reputation, and of course the cost and hassle associated with disciplinary and tribunal proceedings.

Case law

At present there are two branches of case law. I'd like you to think how your business would react, and if your social media policies, if you have any in place, would have been able to cover or cope with these scenarios.

Branch 1

This branch involves cases where hostility has been directed towards the employer or brand, colleagues and/or customers. Therefore, these cases are not particularly problematic, as they often involve a much clearer breach of the terms and conditions of employment and/or social media policies than the branch 2 cases, which we'll look at next.

Crisp v Apple Retail Case No. ET/1500258/2011

Crisp (claimant) worked in an Apple Store. He posted derogatory statements on Facebook about Apple and its products. The posts were made on a "private" Facebook page and outside of working hours. One of his colleagues, who happened to be a Facebook "friend", saw the comments, printed the posts and passed them to the store manager.

What do you think happened?

Outcome: Crisp was dismissed for gross misconduct. The tribunal determined that the Facebook posts were not truly private and could in fact have been forwarded on very easily, with Crisp having no control over this process. It also commented that although the dismissal might seem harsh, taking all of the relevant factors into account, and bearing in mind the importance of image to Apple, which had been made clear in its social media policies and training, the dismissal did not fall outside the range of reasonable responses in all the circumstances available to Apple.

Preece v JD Wetherspoons plc (2104806/10)

Preece worked as a manager at a Wetherspoons pub in Runcorn. 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, 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.

What do you think happened?

Outcome: Following the daughter's complaint, Wetherspoons instigated disciplinary proceedings on the grounds that Preece's 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). 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. During the investigation Miss Preece had claimed that she had made the comments in a fit of anger, but 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 by the tribunal. 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 fair.

Teggart v Teletech UK [2004] IRLR 625

Using his computer at home, Teggart posted a Facebook comment about a female colleague that said: "Quick question who in TeleTech has [X] not tried to fuck? She does get around!" A number of people posted comments in response to this message. In response to his colleague's request to remove the post, Teggart posted another comment on Facebook that said: "[X] can go and suck donkey dick ... LOL." Again, a number of individuals made comments.

Teggart was eventually dismissed and brought a claim for unfair dismissal. The tribunal found that his behaviour amounted to gross misconduct, which I think we'd all agree it clearly did, and he had brought Teletech into disrepute. This is a slightly more troubling decision, as his comments had nothing to do with the company and didn't impact upon his ability to do his job.

This brings me on to branch 2...

Branch 2

ACAS has recognised that a growing body of employers are disciplining their employees, not only for online expression critical of the organisation, but also for *'using social media to express views which employers do not wish to be connected with their organisation'*. So, in other words, employees are being subjected to disciplinary proceedings based on expression which may have little or no direct connection to their employer. Equally, it may be difficult to identify objectively how the expression, or reaction to it, undermines the employee's ability to do their job.

Examples of this branch are, rather worryingly, readily identifiable in the media:

1. In May 2013 The Daily Mail reported that a trainee accountant was suspended by her employer following reaction to her tweet in which she stated: *'definitely knocked a cyclist off his bike earlier - I have a right of way he doesn't even pay road tax #bloodycyclists.*

2. In September 2013 The Independent and The Daily Mail ran a story on an interview by the Oxford student newspaper, Cherwell, for its Shark Tales online TV programme, which is available on YouTube. The interviewer interviewed a young man, who was clearly very drunk on a night out in Oxford. The man described himself as being a 'city lad'. When asked what this meant he replied "I fucking love the ladness. The ladness is just basically fucking people over for money". It turned out that this young man was a trainee solicitor at the Magic Circle law firm, Clifford Chance. The firm subsequently commented publicly that his job was in jeopardy.
3. In December 2013 The Telegraph reported that a PR executive was dismissed following public outrage at her tweet, which said: "*Going to Africa. Hope I don't get AIDS. Just kidding. I'm white*".

There has also been some very interesting case law:

Smith v Trafford Housing Trust [2012] EWHC 3221 (Ch)

Smith was demoted for expressing the view, on Facebook, that same sex marriage in church was "an equality too far".

In this case Smith was successful in claiming breach of contract against his employer. However, the court noted that the outcome would have been different if Smith had promoted his view in the workplace, or if it had been expressed in more intemperate terms, so as to cause genuine offence to colleagues on Facebook. This is much more in line with branch 1, because either eventuality would have breached the employer's social media policy, thus justifying the demotion.

However, in Gosden...

Gosden v Lifeline Project Ltd 2802731/2009

Gosden forwarded an offensive email, while at home, from a private account to the private account of an acquaintance who worked for Lifeline's largest client. This acquaintance then distributed the email through the Lifelines' client's email system.

Gosden's contract of employment specified gross misconduct as, among other things, '*any act which is or is calculated to or may damage the company's reputation or integrity*'. The speculative 'may' in the term of the contract meant the clause was particularly wide. This allowed the tribunal to find that Gosden's conduct – the act of forwarding an offensive email - was something that '*might damage Lifeline's reputation and integrity*'. This was the case even though it was Gosden's acquaintance who distributed the email through Lifeline's client's email system. Further, Lifeline could not clearly identify how the act had, in fact, damaged their reputation and integrity!

This second branch is particularly problematic from a doctrinal freedom of expression perspective, extended discussion of which is beyond the scope of this session. Suffice to say, academic and practicing lawyers are wrestling with these issues.

Regardless, both branches animate the need for unambiguous social media policies to be in place, and for clear advice and guidelines to be made available to employees. This is particularly the case with branch 2. I believe we will start to see more and more case law around the issue of employees' right to freedom of expression in situations where there is not a clear connection between the expression and the employer, colleagues or customers/clients.

Suffice to say, in both *Crisp v Apple* and *Preece v JD Wetherspoons*, the existence of robust policies supported the employer's claim. However, they also protect the employee, as they clearly know where they stand and what is expected of them.

Recommendations

From an employer perspective you should all have social media / online policies in place and integrated in to your contracts of employment. These policies should be very clear as to what behaviour is expected of employees online, both within a work context and privately. As a minimum they should set out what conduct would amount to gross misconduct, and would therefore result in a dismissal. My suggestion, based on Preece and Gosden, and these are only ideas (and should no way be seen as me giving you legal advice), is that this includes any act which is, or is calculated to, or may damage:

1. the employer's reputation or integrity;
2. the reputation or integrity of the employer's clients/customers/suppliers or any individual/company etc that is associated with the employer;
3. the reputation or integrity or breach the privacy or cause harassment or distress to colleagues/clients/customers/suppliers or any individual/company etc that is employed by or is associated with the employer.

Policies should also make it clear that employees will be accountable for their online activity, both at work and at home should the employer feel that it reflects badly upon them, even if the activity does not necessarily relate to the employer directly, or impact on the employee's ability to do their job. Equally, employees should know that they can speak to HR about their online activity, and ask questions if they are concerned about what they have published or what others have published.

I would also recommend publicizing a 'green cross code' for social media use. I have written one which has been published by Inforum, Education Technology and, in February, Changeboard.com:

- **(P)**Remember that everything you put online has the potential to be seen by anybody and everybody, and that it can be **PERMANENT**.
- **(A)**Before posting, tweeting, sharing, texting or uploading think about your **AUDIENCE** and how it could affect them and/or their opinion of you and others, now and later on.
- **(U)**If you are still **UNSURE** ask for a second opinion from somebody you trust. Equally, if you receive a text, tweet, message or picture that you are **UNSURE** about tell somebody you trust.
- **(S) STOP AND THINK** what impact your online activity may have on your privacy or reputation, or the privacy or reputation others. Remember **(P)**.
- **(E)**If you are uncomfortable with anything that's been tweeted, posted, shared or uploaded **END** your involvement immediately and tell somebody you trust.