

Employment Rights Update

December 2010



This month we take a look at Facebook and the implications for Employees.

The use of Facebook and other networking sites has significantly increased over the past year or so, with many people using such sites on a daily basis. As of July 2010 Facebook had more than 500 million users.

The potential influence of such sites cannot be ignored. In 2007 the NUS launched a “viral campaign” on Facebook against HSBC after it proposed introducing interest charges on its student accounts. Threatened with organised demonstrations at their branches the Bank backed down.

The Facebook phenomenon has, as reported in the press, led to issues for employees and their employers. Once users are registered on the site they may disclose much about their day-to-day life and are able to access significant pieces of information about others. For an employer this means potential access to information which provides them with an insight into aspects of their employees' private lives. Employers may decide that such information is damaging to their business (in reputational terms) or inconsistent with their expectations of how their staff conduct themselves.

There are essentially two issues which an employee may face: the use of Facebook during working hours; and the nature of the information posted on the site in or outside working hours.

The availability of Facebook and other sites during office hours will often depend on the employer's general policy relating to internet access. Some have simply banned all access to such sites

(including TfL despite the then mayor – Ken Livingstone - having his own profile).

Others will significantly restrict access. The employee should be informed, in cases of restricted access, exactly when they are able to access such sites. The TUC guide – *Facing up to Facebook* – advises employers to view Facebook as simply another means for an employee to organise his or her social life. It further suggests that access should be allowed during break times provided use does not interfere with an employee's work or damage the reputation of the business. Data Protection regulations also mean that employees must be made aware that private use can be intercepted and monitored.

Other employers may well see social networking (described by some employers as “*social not-working*”...) sites as assisting their business from a marketing point of view and for maintaining customer relations. However, it is still important that there are clear policies in place dealing with the sort of business information that can be posted on an individual's site and an employee must be careful about what is posted.

A private profile may impact on the employment relationship and this was highlighted by a report that an Inspector with the police in Bedford was prevented from being promoted to Chief Inspector as he had a written warning on file arising from information posted on his Facebook profile that the police deemed inappropriate. In June 2008, 18 Metropolitan Police Officers were disciplined after they had made jokes, on their Facebook profiles, about crashing cars and injuring pedestrians.

Employment Rights Update

December 2010



The issue raises questions as to whether it is fair for an employer to discipline an employee, and indeed possibly dismiss for gross misconduct, if the employer sees material on an individual's profile that it deems inappropriate.

Most people would say that what they do in their private lives is no concern of their employer. However, it is important to bear in mind that the courts and tribunals have upheld dismissals arising out of an employee's behaviour outside work. For example: -

Mathewson v RB Wilson Dental Laboratory Ltd [1988] IRLR 512

In this case the EAT upheld a finding that a dental technician had been fairly dismissed following his arrest during his lunch hour for being in possession of a small amount of cannabis. The Tribunal and EAT accepted that it was irrelevant to consider whether there was an issue that the employee was possibly under the influence of drugs at work. Instead it was enough that the employer concluded that an arrest for a drugs offence might make him unsuitable for his job and that it could influence the behaviour of younger members of staff.

Pay v Lancashire Probation Service [2004] IRLR 352

In this case the EAT upheld a finding of fair dismissal where an employee was discovered to be involved in extreme sexual activities, footage of which he posted on the internet. The employer took the view (which was accepted by the lower and appeal courts) that such behaviour was incompatible with his role

as a probation officer, in particular given his work with sex offenders. Also of note in this case was the Employment Appeals Tribunal's view that material posted on the internet was in the public domain and so the individual was not protected by Article 8 of the Human Rights Act 1998 (the right to private and family life).

When considering whether a dismissal is fair a tribunal is likely to take into account the level of seniority of the employee. The more senior the employee, the more careful they should be about material posted online, not least given that a tribunal may be swayed by a "bad example" argument as in the Mathewson case.

Similar high standards may be expected of mid-level employees. The nature of the job will also be a factor (as in the Pay case.)

Of course, what the above cases illustrate is that there has always been a balance to strike between the private life of employees and their obligations towards their employer. That is true whether or not it relates to matters on- or offline. As the TUC guide points out, an employer is unlikely to follow an employee to the pub to find out what he or she has to say to friends about their day at work. Just because they can do something similar online does not mean that they should - but employees do need to take care when posting personal "statuses" referring to their employer or job. In February 2009 Kimberley Swann was sacked for describing her job as boring and in May 2009 a 16 year old was dismissed for posting a status update that he was "so bored" at work. The Company said his position had become untenable.

Employment Rights Update

December 2010



On 2 September 2010 Katie Furlong, a debt officer for Royal Bank of Scotland in Telford in Staffordshire received a call from her manager informing her that she was being laid off and would receive a severance payment of around £6,000 following the Bank's merger with Santander.

Moments later, Ms Furlong posted the following comments on Facebook:

"WoOOOOooooOooooHOoooOooOoo' it was pretty damn obvious something like this was coming. I'm neither stupid nor naive ... and honestly it is the best news ever as far as I am concerned!"

At 8.17pm, she added:

"I've just hung on by my fingertips to stick around long enough for a nice payout when they could've had me out long ago without a penny! More fool them! Haha! Xx."

She was reported to the Company and then following a disciplinary hearing, the bank dismissed Ms Furlong for gross misconduct for breaching the Company's "declaration of secrecy" - which meant she lost the right to claim severance pay.

She has presented a claim for unfair dismissal and is presently waiting for a Tribunal to hear her case.

It has been reported however that employers are also now relying on Facebook as a means of communicating with employees. On 30 April 2010 Chelsea Thompson was sacked via Facebook when this was posted on her wall:

"hiya Chelsea its elaine from work. sorry to send you a message like this but bin tryin to ring u but getting no joy. I had to tell the owner bout u losin that tenner coz obviously the till was down at the end

of the day. She wasn't very pleased at all and despite me trying to persuade her otherwise she said I have to let u go. I'm really sorry. if you call in in the week with your uniform I'll sort your wages out. Once again I'm really sorry but it's out of my hands. Elaine xx"

It's clear that as Facebook continues to grow in popularity that the role it plays within the workplace will also increase. There have been no reported Tribunal decisions yet regarding a "Facebook dismissal" but one is surely imminent.

It is also of note that in January 2008 a Cambridge University admissions tutor indicated that he checked the profiles of potential students on Facebook. It is highly likely that some prospective employers do the same.

We welcome your feedback on our Employment Law Update. Please feel free to email us with any comments or suggestions for improvement to jayne.phillips@morrishsolicitors.com

-

For further information, please contact our Employment Rights team at -

Morrish Solicitors LLP

on

0113 245 0733

-

Please visit our website

www.morrishsolicitors.com

or see our Employment Rights blog

morrishsolicitors.blogspot.com