

Social Media: Case Study

Golden Leaver LLP has recently advised two clients about the use of social media by their employees in circumstances which might amount to gross misconduct.

Case 1

In the first case, the employee of a client was found to have made offensive comments on Facebook about her manager and these were discovered because another senior employee was a Facebook 'friend' of the author. The employee had not named her employer or manager, but the messages were accessible by friends including other employees and customers of the client who knew where the employee worked and could easily guess the identity of the person being complained about.

The employee had used her own computer and posted the comments in her own time, but this did not prevent the employer taking exception to the comments and pursuing disciplinary action on the basis that the employee's actions were capable of bringing the company into disrepute (a ground of gross misconduct under the disciplinary procedure) while also being deeply offensive to the manager in question. Of particular concern were responses from the employee's Facebook friends, including aggressive suggestions posted by the employee's partner.

At the disciplinary hearing, the employee's two principal defences were that:

- the comments were posted in her own time, on her own computer and on her Facebook page. As far as she was concerned therefore, her comments were private and none of her employer's business; and
- she was not able to control, and should not therefore be held responsible for the responses to her postings.

The issue of privacy was also considered in the recent case of *Gosden v Lifeline Project Limited* in which the Employment Tribunal decided that it was fair to have dismissed an employee who sent an email containing racist and sexist comments from his home computer to the home computer of a colleague who in turn forwarded that email to the computer system at their workplace. In that case, the Tribunal found that no privacy attached to the email from Mr Gosden on the basis that this was a chain email that asked recipients to pass it on.

Although there is no express right to privacy in the UK, Article 8 of the Human Rights Act does provide a right to private and family life. However, as with *Gosden*, the fact that our client's employee had used her own computer and sent the comments outside working hours did not prevent the employer deciding that, by posting the comments on Facebook where they could be accessed by any number of her friends, the messages were clearly not intended to be private.

As for the employee's second point, this demonstrates the disparity between an individual's expectations of privacy attaching to an email and the reality of how far information in that email can spread once it has been sent. The author has no control over what happens to their comments once they are posted and to claim they should not be held to blame for any responses it receives is naive.

In this first case, the employee was not surprisingly dismissed for gross misconduct.

Case 2

The second case relates to where a client discovered that one of their employees was posting diary entries under an assumed 'nom de blog'. In one posting, he wrote that he was returning after a period of leave to work for "bastards and buttons", a comment our client took objection to and wanted to challenge through its disciplinary procedure.

In this situation however, we advised caution and an informal chat rather than immediately going down the disciplinary route. Even though there was no expectation of privacy and the comments in this case had a wider potential readership than the comments made by the employee in the case above, there had been no way of guessing the identity of our client's business and the prospect of our client's reputation being damaged was therefore minimal.

The use of social media is in many cases likely to be a force for good and many businesses are embracing the opportunities that a wider pool of potential contacts has given them, but there are traps for the unwary. The rate with which this area of communication is changing is outpacing existing attitudes to privacy and confidentiality. Employers who have not given sufficient thought to these matters may face uncertainty when things go wrong, and may also find themselves having to justify their responses in the Employment Tribunals or courts.

In both the cases above, neither client had the benefit of a social media policy and in the case of the Facebook employee, this deficiency was cited as a way of trying to prevent the employer from pursuing action. While that argument ultimately failed, the availability of a policy would have clarified the employee's responsibilities and given the employer the confidence that their actions were backed up by a formal procedure.

More information

Golden Leaver have produced an information checklist (which can be found on <http://www.goldenleaver.co.uk/newsletters.htm>) on the use of social media. We are happy to discuss the drawing up of a social media policy which meets your particular businesses needs, and if you would like to do so please contact Caroline Leaver - 020 3159 5172 or c.leaver@goldenleaver.co.uk.