LEVY & McRAE
SOLICITORS AND NOTARIES PUBLIC

Social Networking and Employment

In the United Kingdom, police officers have different employment rights to other employees due to the nature of their employment. They cannot, for example, raise a claim of unfair dismissal. Despite this, recent developments in Employment law, particularly in relation to the use by employees of 'social networking' websites, may be of concern to police officers.

The term 'social network' covers a variety of popular websites such as Facebook, Twitter, Bebo, Myspace and Youtube. Unknown to many, the term even covers websites such as Yahoo! Answers and Gumtree. These websites allow individuals to interact with friends, family and even the greater public. The question is can social networking lead to a reason for dismissal of an officer?

The UK Position

There is a growing body of case law in the UK in relation to this area of law as a result of the increasing number of employees finding themselves in difficulty with their employers as a result of postings made on the various social networking sites.

In *Apple v Crisp (November 2011)* the Tribunal upheld Apple's dismissal of Crisp, an employee, who had posted derogatory comments about the company on his Facebook page. Apple did have in place a Social Media Policy which prohibited any commentary on Apple products or any critical comments about the brand itself. Crisp contended that his comments were private as they were only visible to his friends but the Tribunal held that because his friends could easily copy and share the comments, they could not be considered protected communications. In these circumstances, the Tribunal held that Apple could limit the right of its employees to freedom of expression where it was for the purposes of protecting its commercial reputation.

In *Preece v JD Wetherspoons plc* ET2104806/10**,** the claimant, a Mrs Preece, was employed by JD Wetherspoons plc (**"the Company"**) as a manager at the Ferry Boat Pub. Mrs Preece had agreed to the Company's E-mail, Internet and Intranet Policy under which the Company reserved the right to take disciplinary action should the contents of any blog, including pages on websites such as Facebook, be found to cause disrepute to the organisation, staff or customers. During a shift at the pub, Mrs Preece became the subject of both verbal and physical threats from a group of customers. The customers were subsequently asked to leave the pub with the children of the customers in question later making abusive calls to the pub.

That evening, whilst still on duty, Mrs Preece discussed the incident on Facebook and referred to one of the customers in question as a "hag". Colleagues of Mrs. Preece, as friends of hers on Facebook, were able to view her page and thereafter responded to the comments made by Mrs Preece. An individual subsequently complained about the comments and following a disciplinary investigation Mrs Preece was dismissed. Mrs Preece then raised a claim of unfair dismissal against her employer.

The Tribunal was satisfied that the dismissing officer held a genuine belief, on reasonable grounds, that Mrs Preece had entered into a Facebook discussion whilst on shift making many offensive and inappropriate comments in relation to the customers. Furthermore, the Tribunal also accepted that her comments could be read by a number of people. Mrs Preece maintained that her actions did not amount to an act of gross misconduct as the comments posted were private and restricted. As the comments were not visible on her public profile she argued that the comments were visible only to her friends and accordingly, were not in the public domain. She therefore contended that she could not be held to have brought the Company's reputation into disrepute.

The Tribunal found Mrs Preece's belief to be irrelevant and held that the comments she made were in the public domain. It was noted that Article 10 of the European Convention on Human Rights relating to freedom of expression did offer a defence to the claimant but that in the present circumstances, the right of the employer to protect its reputation outweighed any right the claimant may have in respect of freedom of expression.

In *Gosden v Lifeline Project Ltd* **ET/2802731/2009,** Mr Gosden was employed by Lifeline Project Limited (**"Lifeline"**), a charity assigning employees to HM Prison Service (**"HMPS"**). When off duty, Mr Gosden forwarded an offensive email from his home computer to the home computer of a Mr Yates, also employed by HMPS. Mr Yates then forwarded the email to another colleague at the workplace and it subsequently entered into the HMPS computer network. Lifeline dismissed Mr Gosden after concluding that he was guilty of gross misconduct as he had caused risk to Lifeline's credibility. Mr Gosden subsequently raised an action of unfair dismissal against Lifeline but was unsuccessful on the basis that Tribunal held that the risk of forwarding the email to one of Lifeline's biggest clients was reasonably foreseeable to the employee and could potentially cause disrepute.

The Tribunal did consider the application of Article 8 of the Human Rights Act which provides for everyone to have the right to respect for private and family life, home and correspondence. The issue of concern was whether the email was private and to be seen by Mr Yates only. The Tribunal held that the email was intended to be passed on as it encompassed at the bottom, *'It is your duty to pass this on'*. Consequently, the email was found not to be confidential.

This particular case highlights how the underlying intention of the employee's comments, even if they appear to be private, can lead to such comments being regarded as public and contrary to confidentiality.

Other Jurisdictions

The law in other jurisdictions is similarly adapting to the ever-imposing issue of 'social networking'.

The consequences of an employee posting material online and the employer's discovery of the material are becoming increasingly apparent in the USA. In one particular case, a sheriff deputy was dismissed after the discovery of information on his Myspace page. Many other cases involving different sectors of employment have similarly dismissed employees as a result of posting material online. The objective of these dismissals was to protect the organizations concerned and any confidential information and employers are advised to ensure that a "social media policy" or something of similar effect is in place, in order to justify the dismissal of employees who post comments online which are detrimental to their business. Employees should therefore be aware that even if they believe that their social network profiles are private they may still be considered to be in the public domain for the purposes of employment law.

In Iceland, regulations are in place to impose confidentiality obligations on police officers. The regulations concern information on persons' private circumstances that should ideally be kept secret; information regarding police working methods; and planned police measures and provide that such information should be confidential and not made known to the public. It is reasonable, therefore, to assume from these regulations that instances of comments made by officers in relation to their work or conduct on social networking websites will not be tolerated.

Police Officers

Scottish police officers' obligations in respect of conduct are set out in the Police (Conduct) (Scotland) Regulations 1996. Regulation 4 provides that an act or omission of a constable shall amount to misconduct if it amounts to the conduct described within the Regulations. Such conduct includes actions likely to bring discredit on the police force, and discredit to an employer and bringing them into disrepute seems at the forefront of the case law which acts as a warning.

An indication of the treatment Scottish police officers could face in the event they fall foul of the pitfalls of posting on social networking websites can perhaps be taken from a Freedom of Information request carried out by the Press Association in England and Wales into disciplinary action taken against police officers in relation to their use of Facebook. The results of the request, as reported in *The Telegraph*[1] newspaper, showed that approximately 160 police officers faced disciplinary action as a result of postings on the social networking site.

Conclusion: What do these developments mean for police officers?

The risks of posting material on a social networking website are becoming more and more apparent.

[1] The Telegraph online report dated 30 December 2011

Employees can attempt to distinguish and justify the material that they have posted on a social networking website as being within a 'private' conversation and not visible for others to see on the public domain. In the general context of employment law, however, this distinction has been shown to offer little protection where the employer is able to demonstrate that the posts of the employee have either had or were likely to cause a detrimental effect to the employer's business.

In the specific context of police officers, it is therefore very likely that a conduct hearing or Police Appeals Tribunal would take a stern view of the conduct and the police officer concerned could be condemned and dismissed as a result of causing disrepute to a force, with little opportunity to provide a defence or litigate against the decision thereafter. Accordingly, police officers must be encouraged to take care when engaging in social networking of any sort even the most inconspicuous of remarks made to a friend could cost the officer in question his job.

Further Information from:

peterwatson@lemac.co.uk
0141 307 6860