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Employment briefing from Mishcon de Reya published in the July/August 2010 issue of The In-House Lawyer:

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- 400,000,000 Facebook fans can't be wrong

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Secrets and lies: the without prejudice principle



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IN MANY LEGAL DISPUTES, PARTICULARLY in the employment sphere, extensive use is made of without prejudice (WP) discussions. Discussions are WP if they are made in the course of a dispute between parties and represent an attempt to settle that dispute. While it is common for parties to make it expressly clear when discussions are WP and to record that fact in any documentation, it is good practice, not a legal requirement.

Generally, WP discussions are inadmissible as evidence in litigation. The principle behind the rule (as set out in *Unilever plc v The Procter & Gamble Co* [2000]) is that there is a public interest in avoiding unnecessary litigation. There is, therefore, a benefit in enabling parties to make concessions and proposals without the fear that everything they say will be used as a stick to beat them with in any subsequent trial.

In practice, there are two areas where parties may disagree about whether any discussions are WP. First, the requirement that there be a pre-existing dispute and, secondly, the principle that the WP precept cannot be used to conceal perjury, blackmail, or 'unambiguous impropriety'.

An employer that wishes to remove an employee and wants to make a WP offer of a settlement agreement, will not benefit from the WP rule if the employee is unaware that they are at risk of termination. In *BNP Paribas v Mezzotero* [2004], Ms Mezzotero raised a grievance about her treatment before and after her maternity leave. The employer's first response was to invite Ms Mezzotero to a meeting to discuss her situation. She was told that the meeting was to be WP. At the meeting, she was told her position was untenable and that it would be best for the business if she were to leave and that the bank would offer her a redundancy package. The Employment Appeal Tribunal (EAT) confirmed that the discussion was not properly WP, because at the time of the discussion, there was no pre-existing dispute that the parties could seek to settle. The lesson here for employers is to ensure that, before any WP discussion, the employee has already been warned that there is an issue – this should chime with good practice in the vast majority of circumstances.

The recent EAT case of *Woodward v Santander UK plc* [2010] has addressed the

thorny issue of WP discussions in the context of allegations of discrimination and whether that brought the discussions within the unambiguous impropriety exception, which would permit evidence of the discussions to be brought to the attention of the EAT. Diana Woodward had brought numerous claims against Abbey National in connection with her dismissal in November 1994 and those claims were settled in 1996 without any admission of liability. Having had difficulty finding work over the following years, Woodward formed the view that Abbey was interfering with her job search by giving unfavourable references, in retaliation for her earlier claim. Woodward commenced further proceedings against the bank for victimisation and under the whistleblowing legislation.

In the further litigation, Woodward sought to introduce evidence of the 1996 WP negotiations, in particular Abbey's refusal to agree to provide a reference as part of the agreement. Woodward's argument was that this refusal showed the bank had 'reprisal in mind' at the time of the negotiations and that all of the other evidence should be viewed in that context (as a matter of fact, the EAT found that the bank had not given any negative references, but had, inadvertently, failed to reply to one request). Woodward's counsel argued that the second limb of the decision in *Mezzotero* is that evidence of discrimination cannot be excluded by the WP rule and that a lower level of impropriety should be applied. The EAT decided that the benefits of the WP rules apply just as much (if not more) to discrimination cases and the WP exception for discrimination cases is the same standard as for other cases.

If WP evidence is to be brought into evidence, then the EAT must be satisfied that the impropriety is unambiguous. Blatant examples of discrimination will be admissible, but behaviour that can be read either way will, if made in WP discussions, remain inadmissible.

By Greg Campbell, partner, Mishcon de Reya.

BNP Paribas v Mezzotero [2004] UK EAT 0208/04/3003

Unilever plc v The Procter & Gamble Co [2000] 1 WLR 2436

Woodward v Santander UK plc [2010] UKEAT 0250/09/2505

400,000,000 Facebook fans can't be wrong



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THE WAY WE USE THE INTERNET HAS changed. It is no longer merely a digital reference library. As the internet has grown and the amount of information available has expanded, people have developed a new way of accessing this information in a way that is relevant to them. The 'new' internet, or 'Web 2.0', is a network of relationships where users interact and share knowledge with each other. Virtual friends become the custodians of knowledge, recommending products and services through their blogs and on other social media sites. By seeing what your like-minded friends find interesting, you are better able to decide what information you wish to 'consume'.

This change has been most evident in the exponential growth in popularity of Facebook. Facebook is now the second most popular site on the internet, after Google. It has around 400 million members and a third of all internet users will visit Facebook each day.

Businesses are realising that, to maintain or establish a competitive edge, they must learn how to harness Web 2.0. However, the Trades Union Congress has recently noted that employers are not yet sure how to respond to the challenges posed by social networking sites. It considers the UK's Facebook users to be 3.5 million HR accidents waiting to happen. So what could possibly go wrong? In this article, we look at some of the more common pitfalls and discuss ways in which they may be avoided.

EMPLOYEES' USE OF SOCIAL MEDIA

The way in which employers view their workforce's use of social media varies enormously. Some employers set aside a period during each day where employees are allowed to spend time on social networking, as they consider that this is good for the business. Others ban access to Facebook and similar sites outright. Most operate a 'fair usage' policy, where limited personal usage of social media sites is seen as being as acceptable as using the telephone for personal calls or sending personal e-mails.

In each case, though, implementing or restating a suitable usage policy is advisable to ensure staff awareness of the rules. Simply reminding staff of the policy may be sufficient to curb excessive use

and informing employees that their internet usage may be monitored is often effective in reducing the amount of time wasted in extended games of online Scrabble.

RECRUITMENT

An employer may be tempted to discover the 'real' story behind an applicant by checking that person's social networking homepages. However, there are several things to consider before doing so.

By visiting a website and by making decisions based on the data contained in that website, an employer could be in danger of breaching its obligations under the Data Protection Act (DPA) 1998, particularly if the applicant's profile contains sensitive personal data, such as their sexuality or religious or political beliefs.

Employers also run the risk of inadvertently discovering on an applicant's homepage that they have a 'protected characteristic', such as a disability or that they are from an ethnic minority. This could lead to claims of unlawful discrimination from unsuccessful applicants, if that applicant can show that prospective employer was aware of the information.

Employers should carefully consider whether they need to run 'Facebook checks'. They may decide to limit the checks to certain roles and only run the checks late in the process. If they do so, the applicant should be informed about the employer's intention to vet to avoid falling foul of data protection legislation. However, this will alert the applicant to the fact that the employer is likely to have obtained information about them that could be relevant in a discrimination claim.

The employer should therefore weigh up whether the advantages gained by vetting are worth the potential claims that may follow.

MISUSE BY STAFF

There have been numerous instances where the internet has been used as a tool in cyber-bullying, where individuals post bullying (and often discriminatory) comments online. Where this happens in the employment context, the employer could potentially be held vicariously liable for its employees' conduct and face significant claims.

The best way of protecting against such claims is to put in place a policy that deals with the conduct, to communicate this policy to employees, to train managers in relation to equal opportunities and harassment issues, and to take appropriate disciplinary action against the perpetrators. If an employer can successfully show that it has taken the above steps to prevent bullying from occurring, this will provide the employer with a complete defence against such a claim.

In addition to cases of cyber-bullying, there have been many cases where employees have been sacked for posting derogatory comments relating to their employer or to the customers of their employer. There have also been several dismissals in circumstances where an employee has given one reason for their absence to their employer (sickness or bereavement) and a very different, and more candid, account online (such as a hangover or unauthorised holiday).

USING AND OBTAINING EVIDENCE

While employers may use evidence gained from websites to support decisions they take about staff, employers should be careful how they obtain this information. The privacy settings of social networking sites may make it difficult for an employer to obtain the evidence by chance. They may be given it by the colleague of an employee, in which case that colleague may arguably themselves face liability for breaching the confidence of their 'friend'.

One way in which evidence may be obtained and abuse of the system may be controlled is through monitoring. If the employer decides to monitor internet usage, this needs to be approached with great care, as unlawful monitoring can result in custodial sentences and large fines. Under DPA 1998, monitoring must be proportionate, communicated to the employee and handled with appropriate technical safeguards. Under the Regulation of Investigatory Powers Act 2000, if an employer chooses to intercept communications in the course of their transmission, this must be done with the employee's consent. Under the Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, monitoring is only allowed where it is relevant to the business and

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for other specific reasons (which include monitoring to ensure that the system is being used appropriately and is operating effectively).

INFORMATION LEAKAGE

Derek Simpson, joint general secretary of Unite, was in the press recently for his use of Twitter during talks with British Airways. Many viewed his updates of the progress of the talks as inappropriate. Willie Walsh, the CEO of British Airways, said that it undermined his confidence in Simpson's intentions. This may have contributed to the breakdown in the talks at that time.

We have encountered instances of employees leaking information relating to their business, such as posts relating to the departure of senior members of staff that are made before the company has had an opportunity to announce this properly to its workforce or to the market. It seems that often, offending employees are thoughtless rather than malicious when gossiping online, but the damage to the business can be just as great.

To protect against this, employers should be careful to ensure that employees have entered into robust confidentiality provisions, which prevent them from posting sensitive information on websites and remind them of their obligations.

DATA THEFT

A growing proportion of cases of data theft have involved the misuse of social networking sites. Typically, employees invite some of the business's customers to be their contacts on sites such as LinkedIn shortly before leaving their employer, thereby retaining links with these customers post employment. This can be as effective as copying the database onto disk or e-mailing it to a private address and is arguably more damaging.

We have obtained injunctions against employees who have misused their employer's information in this way, but this process can be made very complicated if the employee has an account under a pseudonym and the service providers of the websites are based in other jurisdictions.

WHAT STEPS SHOULD EMPLOYERS TAKE?

Employers need to put in place well-thought-out usage policies that clearly express an employer's expectations. They should ensure that their contracts contain sensible confidentiality provisions, and robust and enforceable restrictive covenants. If employers decide to allow employees access to social networking sites, but are concerned that their employees may use them other than purely for networking purposes, they should consider requiring employees to set up work-only accounts, which they relinquish on termination of their employment.

Above all, employers need to recognise that the way in which the web is being used has changed. As with all significant technological advances, employers need to take steps to keep up with the changes.

By Will Winch, solicitor, Mishcon de Reya.

FACTS AND FIGURES

- Almost a third of all internet users use Facebook for around 30 minutes each day.
- Around 500 billion minutes per month are spent on Facebook.
- It is estimated that around 25% of all adults will publish a blog or upload video or audio onto a social media site.