



**BRODIES**<sup>LLP</sup>

**APSE Seminar – Social Media**  
**Practical applications that work for frontline services**  
**Keeping it Legal!**

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# Today's Session

- Context:
  - 3 out of 4 consumers now have an active Facebook account
  - 98 % of councils are using some form of social media (BDO Survey – May 2013)
- The risks of social media use
- Key issues to consider and manage
- Common pitfalls and essential safeguards

# Types of Social Media

- Blog (e.g. Twitter)
- Social and Business Networking Site (e.g. Facebook, LinkedIn)
- Digital Media Sharing Site (e.g. YouTube)
- Wiki site (e.g. Wikipedia)
- Virtual World (e.g. Second Life, Second Life Work)

WORDPRESS

TypePad

Blogspot

Squarespace

Bebo

MySpace

Flickr

WIKITRAVEL

ActiveWorlds

INSTAGRAM

A Small World

Del.icio.us

Digg

Doostang

Friendster

Geni

Newsvine

Plaxo

Tumblr

Yammer

Glogster

# Social media – a positive business tool

- Positive public image
- Environmental and low cost
- Internal
  - Efficient way to share information, knowledge, best practice
- External
  - Networking opportunities
- Recruitment tool

# Does social media use increase legal risks?

- A common perception is that there are significant risks – we have seen high profile press reports on issues arising from use of sites like Facebook
  - E.g. “11 DWP civil servants sacked and 116 disciplined for using Twitter or Facebook – The Guardian 9 January 2013”
- Fear of legal / reputational fallout is a common blocker to successful use of social media as a business tool
- Blocking access is no longer the answer due to widespread access - now only 1 in 3 local authorities block access as compared with 1 in 2 last year
- Social networking can easily blur the line between professional and personal relationships – which can lead to legal claims! However, the risks can be managed

# Key issues

- Recruitment
- Harassment
- Misconduct
- Copyright and IP
- Defamation

# Risks: Using social media in recruitment



- Wall
- Info**
- Photos
- Notes
- Friends
- Subscriptions

## Find friends

- Best friends
- Colleagues
- Classmates

## Krystal Ball

Has worked at Big Bank Lives in Edinburgh, United Kingdom From Edinburgh, United Kingdom  
Born on 23 July 1992 Add your education information Edit Profile

### Education and work

Edit

Employers



Big Bank

Share your experiences



Add your school information

### Philosophy

Edit

Religious views



Scientologist

Political Views



A little bit of everything



- 1 in 4 HR Managers reject candidates due to their social media profile, regardless of other selling points
- Useful Tool – wide exposure at low cost
- ACAS Guidance
  - Use at least two recruitment channels
  - Encourages employees to review their privacy settings

- If information on social networks used to reject candidates, then an inference of discrimination can be drawn if that information refers to a 'protected characteristic' e.g. marital status, sexual orientation, age, religious beliefs or ethnic origin
- Ensure your recruitment process and paper trail bears up to scrutiny

## Risks: Employee Misconduct

- Misconduct typically:
  - Inappropriate behaviour exposed through social media; or
  - Derogatory comments about the workplace/colleagues posted on a social networking site.

- **What's different?**
  - Expectation of privacy
  - Sources of information/evidence may be found outwith the workplace
  - Employee's explanations might be harder to verify
  - May be scope for wider communication, especially if the post or video goes 'viral'

- **What's not?**
  - Fair process still needs to be followed
  - Process should follow clear policies and procedures
  - Evidence needs to be documented
  - Mitigation must be examined

## Investigation and disciplinary

- Fairness and/or reasonableness will depend on the circumstances of each case
- Factors taken into account could include:
  - Seriousness of the conduct
  - Whether confidential information has been disclosed
  - Risk of reputational damage
  - ‘Cyber-bullying’/harassment

## Seriousness of conduct

- **Young v Argos Ltd**
  - No more than “workplace gossip or routine criticism of an employer”
- **Teggart v TeleTech UK Ltd**
  - Lewd and vulgar comments disseminated among co-workers
- **Dixon v GB Eye Ltd**
  - Abusive comments posted while suspended



## Disclosure of confidential information

- **Zaver v Dorchester Hotel Ltd**
  - Terms & Conditions of employment stressed duty of confidentiality
  - Breach of confidentiality – viewed as gross misconduct
  - Blog mentioned names of colleagues and of hotel



## Damage to employer's reputation

- **Whitham v Club 24 Ltd t/a Ventura**
  - “I think I work in a nursery and I do not mean working with plants”
- **Taylor v Somerfield Stores Ltd**
  - 20-second YouTube clip
  - 8 views over 3 days
- **Gosden v Lifeline Project Ltd**
  - Forwarding offensive e-mail

## ‘Cyber-bullying’ and harassment

- **Teggart v TeleTech UK Ltd**
  - Conduct amounted to harassment under employer’s Dignity at Work policy, Code of Conduct and Disciplinary policy
- **Otomewo v Carphone Warehouse Ltd**
  - ‘Frape’ could be harassment

## Let's take an example...

- *“Having a rubbish day at work. Anycity Council’s Social Work Department is a total mess under the new director’s leadership, that’s why so many people have left recently. Brian Smith’s just dodgy!”*

## Disciplinary: framing the allegations

- **What is the allegation?**
- **Conduct:**
  - Reputational risk – *“Anycity Council...”*
  - Disclosure of confidential information – *“so many people have left recently”*
  - Cyber-bullying/harassment – *“Brian Smith’s just dodgy!”*
  - Malingering – *“having a rubbish day”*

## Human Rights – employee defence?

- **Article 8 ECHR**
  - Right to respect for private and family life
- **Article 10 ECHR**
  - Right to freedom of expression

## Disciplinary process: evidence and sanctions

- **Severity of sanctions**
- ACAS guidance warns against ‘knee jerk reactions’ - weigh up the consequences of the action
- **Considerations:**
- Has the information been removed?
- If so, for how long was the posting public?
- Has there been any public complaint/reaction?
- Do comments pose an *actual* reputational risk to the employer? – **Smith v Trafford Housing Trust**

## Disciplinary process: evidence and sanctions

- Mitigation
  - What has the employee said during investigation/ disciplinary meetings?
  - Was the act out of character, is there an underlying issue?
- What is the quality of evidence (i.e. hard copies)?
- Ensure, as far as possible, that sanction imposed is consistent

# Risks: Claims of harassment from staff

- Local authorities can be liable for harassment of employees if this occurs ‘in the course of employment’
  - Unwanted conduct because of a ‘protected characteristic’ that has the purpose or effect of violating dignity or creating a hostile, degrading, intimidating, humiliating or offensive working environment.
- Personal Facebook / twitter accounts where employees are ‘friends’ with colleagues
  - Wall posts? Tagging? Friend requests?
  - Opinions on sexuality, race, religion and political belief?
- Ensure harassment / E & D policies cover online behaviour



## Risk: Stress at work claims

- Bullying / harassment resulting in a stress related illness
- All employers have a duty of care to protect the health and safety of staff in the course of their employment
- Online conduct by staff, customers and other third parties can lead to stress related illnesses.
- Ensure there is a clear process for raising issues and investigate complaints

## Risks: Copyright and IP

- **Database ownership**
  - Copyright and Rights in Databases Regulations 1997
  - Property rights will exist in the data base if there has been a “*substantial investment*” in obtaining, verifying or presenting the contents of the database
  - Reg. 15 – database belongs to its maker
  - Reg. 14(2) – where a data base is made by an employee “*in the course of his employment, his employer shall be regarded as the maker of the database, subject to any agreement to the contrary*”

- **Copyright Designs and Patents Act 1988**
  - Copyright may exist in a database as a “literary work”
  - Section 11(1) – author of the work is the owner of the copyright
  - Section 11(2) where work is made by the employee in the course of his employment the employer is the owner, subject to agreement to the contrary
- **Pennwell Publishing (UK) Ltd v Ornstein 2007**
  - Contacts on employer’s computer system belonged to the employer not the employee
  - employer able to rely on database rights

- Copyright arises automatically in any original written or artistic work – no test of quality
  - E.g. posts, tweets, profiles, blogs, photos
- Copyright in works created by an employee in the course of their duties belong to an employer
- If copyright is infringed and the post was made by an employee in the course of employment, the local authority employer may be liable.
- Re-use of content posted online depends on terms and conditions of website
  - Twitter, LinkedIn and Facebook allow for re-posting

# Some other risks and common pitfalls

- Defamation
- Data protection breaches
- Loss of confidential information
- Failure to deal with inappropriate online behaviour by staff
- Failure to deal with customer postings
- Ignoring employee unrest
- Assuming that 'surfing' leads to a loss of productivity

## Essential safeguards – employee use

- **Social Media Policy – the first line of defence**
- Define acceptable and unacceptable use
- Set clear limits if use is permitted at work (**Grant & Ross v Mitie Property Services UK Limited**)
- Ensure policy links in, and is consistent, with other policies (e.g. equal opportunities, disciplinary, IT acceptable)
- Set out sanctions and link to disciplinary policy
- Ensure the policy is communicated effectively to employees
- Remind employees that social media activity is not necessarily private

## Essential Safeguards: employee use

### Protection over and above the basic policy?

- **Express reminders**
  - Specific 'zero tolerance' memos
  - Reminder of express contractual terms (i.e. confidentiality)
  - Monitoring
- **How far should an employer's guidance go?**
- Advice on venting frustrations online and 'social exclusion'?

# Essential safeguards: copyright and IP risks

- Separate personal and professional online profiles
- Clarify organisation's policy on copyright, online etiquette and brand name use
- In particular, make clear the “course of employee” ownership principle



# Essential Safeguards – Third Party Use

- Establish terms of use on posting of information
- Prohibit postings that are defamatory, discriminatory, offensive, threatening or in breach of copyright or IP
- Disclaim liability for acts of third party users relating to postings
- Allow company to remove posts at its discretion
- Ensure comments are monitored and issues are dealt with quickly

# Conclusions

- Ensure you have clear guidelines in place for staff and third party use
- Ensure there is top down buy in
- Ensure there is no expectation of privacy
- Raise awareness and provide training
- Deal with issues arising through social media use, both in working time and outside it
- Ensure your policies are subject to regular review



*“Your brand is what people say about you when you’re not in the room...”*

**Jeff Bezos, Founder of Amazon**