

# Social Media on the Job: An exploration of the potential legal consequences of employees' social media activities during the course of employment.

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## ABSTRACT

This paper examines the current interplay between the actions of harassment and defamation and the nature and characteristics of social media specifically towards addressing the issues surrounding the growing usage of social media by employees during employment. It argues that with the legislation and provisions we currently have in place in the U.K. many problems are likely to arise for employers and employees alike as usage continues to rise.

## Keywords

Social media, Twitter, Facebook, Weblogs, Employment Law, Harassment, Defamation

## 1. INTRODUCTION

Social media has quickly become a huge world phenomenon with the uptake across the world being in the hundreds of millions. The term encompasses a range of different Web services from weblogs to video-sharing sites to social networking sites to micro-blogging sites. Amongst the most valuable and most used are the likes of Facebook, Twitter, YouTube as well as the weblogging platform WordPress [12][14].

There are a number of reasons why they have become as popular as they have including sociological and technological. The way in which we behave online and see ourselves has changed as we have moved from passive observers taking from the wealth of information online to individuals contributing to that online content, whilst the development and spread of broadband has allowed us to be online for longer than ever before [3][12][29].

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Research has found that individuals are spending a lot of their lives online on one of the various social media sites and platforms with a significant proportion doing so numerous times a day and in particular during the traditional working hours; 9 a.m. to 5 p.m. Along with doing so whilst at work, work life has become so entrenched and entangled with individuals' personal lives that many are weblogging and social networking about their jobs [24][29].

Employers have started to encourage their employees to engage with social media because of the benefits for their companies as well as for the individual employees [24][29]. This however has the potential to cause problems some of which have already started to occur where employees have misbehaved whilst using social media. This in turn has led to cases of unfair, constructive and summary dismissals and problems for both employers and employees which have to be addressed as employees' social media activities continue to grow and are likely to do so in the future [14].

This paper presents initial research into the legislation that currently exists and how it relates to social media and the potential problems presented with the applicability of the legislation to social media. The first section provides a brief exploration of social media in particular highlighting some of the employment cases that have arisen. The subsequent section explores harassment and defamation with the following section analysing the problems created by the characteristics of social media highlighting the inconsistencies that currently exist. This is followed by concluding remarks.

## 2. SOCIAL MEDIA

This section starts off with a brief history of social media and then focuses on the cases that have already arisen in the employment context as well as employment social media uptake.

### 2.1 History

#### 2.1.1 Social Networking

The first social networking site to look like what we now regard as a social networking site was

SixDegrees, launched in 1997. The site allowed individuals to create profiles, list friends and traverse across friend lists. Whilst all of these services existed individually previous to the site, SixDegrees was the first to bring them all together in one place but it failed in 2000 with the primary reason seeming to be that it was too far ahead of its time [3].

Subsequently Friendster was launched in 2002 and whilst popular it was overtaken by MySpace with the latter being an avenue individuals who were not able to get the freedom they wanted on Friendster. Since 2008, the site has faced continuing decline being overtaken as the premier social networking site by Facebook [3].

Facebook was developed in 2004 by a student at Harvard University with the intention of being a closed network in which they could socialise with one another [3][29]. The site subsequently opened itself up to other universities, High Schools, and then professionals and now pretty much anyone can join the site. There are now in excess of 600 million users on the site (as of February 2011) with a growth rate of about 4% every month<sup>1</sup>.

### 2.1.2 Micro-Blogging

The most popular micro-blogging service by far is Twitter with the site having more than 200 million users worldwide [14]. It allows individuals the chance to say pretty much anything that they want provided that they do so in 140 characters or less. The site was launched in the summer of 2006 with it allowing individuals the chance to send messages (tweets) to a network of associates (followers) from a variety of devices [14][32].

There are about 65 million tweets being sent every day at a rate of about 750 a second. The site's popularity continues to rise as from spring 2009 to spring 2010 there was a 1000% rise in terms of the number of unique visitors on the site with almost 600,000 new accounts created daily<sup>2</sup>.

### 2.1.3 Weblogging

It is difficult to pin point exactly when it was that the first weblog was created but the term "weblog" was coined in December 1997 with 'weblog' being subsequently broken down to 'blog' by 'we blog' [22]. The modern weblog evolved from an online diary where an individual could keep a running account of their personal lives but have since evolved to be an avenue for an individual to talk about pretty much anything [14][22].

Technorati is the biggest and most well-known weblogging statistics finder and tracker and it has found that since 2002 there have been more than 133 million blogs indexed with 85% of Internet users reading weblogs and 35% spending 10 hours or more

a week on their weblogs. The uptake of blogs is continuing to rise with more than 120,000 new weblogs being created every day<sup>3</sup>.

### 2.1.4 Video-Sharing

The most popular video-sharing website on which users can upload, share and view videos is YouTube. The site was created in 2005 but became massive towards the end of 2006 with Google announcing that it had acquired the site for \$1.6 billion [20]. The site has become so popular that 35 hours of videos are uploaded every minute, with more than 13 million hours uploaded in 2010 and playback reaching 7000 billion last year<sup>4</sup>.

## 2.2 Why People Use Them?

The reasons why these various sites and platform are used are both generic to all social media sites and specific to the various types.

### 2.2.1 Generic

Social Media allow individuals the opportunity to form and join new communities [15]. To an extent our communities were restricted by physical boundaries but now we are able to meet new people and form new communities and to do so around the potentially most specific things [9] like an enjoyment of a particular television character or a particular sportsman.

Furthermore, they allow the opportunity to express oneself leave a tangible and potentially every lasting mark on society [30]. It is suggested that all people want to leave a lasting impression and be noticed which is something that would be difficult and only possible by those with the resources and opportunities. However the nature of social media is such that essentially anyone can use them and try and leave their mark [9].

The way in which these sites and services work has become a lot simpler and easier which has not turned people away as it used to [12]. Weblogs have evolved from static homepages which were awkward to use and required a degree of technical knowledge [3]. This in turn put many potential bloggers off however they have now become easy to use and anyone can become a blogger regardless of their technical knowledge [12].

### 2.2.2 Specific

Social networking sites allow individuals the opportunity to primarily maintain relationships with individuals that they already have relationships with in the physical world [3][9]. Whilst there may be the odd time that an individual builds a new relationship with an individual that a person does not know, in the vast majority of cases this is not case. They allow for the maintenance of ties with acquaintances (weak ties) better than was possible previous to their existence with these weak ties being invaluable [13].

<sup>1</sup>Facebook Statistics Page, 2011.

<sup>2</sup> Sysomos Inc, 'Twitter Statistics for 2010: An in depth report at Twitter's Growth 2010 compared with 2009', Sysomos Resource Library December 2010.

<sup>3</sup> Technorati, 'The State of the Blogosphere 2010'.

<sup>4</sup> YouTube Press Room Statistics Page, 2011.

These weak ties are actually crucial to us in helping to build our networks and for this purpose they are more important than the strong ties that we have [13]. The existence of the likes of Facebook allow us to better maintain the weak ties that we have where it would be very difficult to do so through mobile phones or other approaches [15].

Weblogs and micro-blogs allow individuals to have their thoughts and views read by potentially millions across the world [14][23][30]. In contrast to a social networking site, the audience is not limited to those that an individual knows and therefore could be anyone online.

Weblogs, specifically, have become popular in large part due to the opportunity afforded to individuals to expand their communities and find people who are interested in the same thing that they are [21][22]. The reasons have been categorised into five groups; documenting one's life, providing commentary and opinions, expressing deeply felt emotions, articulating ideas through words and forming and maintaining community forums [23].

In terms of micro-blogging services specifically, the fact that they are limited to a specific number of characters means that individuals are able to write posts quickly and often without the need for spending lots of time on composition [18][21].

The services are particularly popular as a means of obtaining news and information with the above meaning that news can be disseminated faster than traditional mediums [18][19]. Finally, political activists use micro-blogging services because other more traditional mediums of dissemination are blocked or the speed being key [21].

Finally, video-sharing sites allow users the opportunity to create and alter content, amongst other things, and receive feedback and in turn therefore better their work [20].

## 2.3 Usage in Employment

### 2.3.1 Employment Uptake

Employers have also started to encourage their employees to use these various social media in the employment context as they begin to appreciate the value to their businesses [24]. From a company perspective, social networking fan pages, video – sharing sites and weblogging and micro-blogging services allow the company to put up promotional and advisory videos, answer questions and queries and provide reviews and general feedback on products and company related matters [8][29].

Kodak has used the entire range to help it with instructional videos on how to use products, promote future products and use a social networking fan page to talk to people about recently released products and weblogs to answer queries and questions that customers have [16].

From the individual employee's perspective, engaging in social media under the company banner allows

them to provide a more personal tone when communicating with customers than methods like e-mail [24]. Robert Scoble was one of the first proponents of employees' weblogging as a means of conveying a human voice to the company and found it helped with sales [29]. They can also be used to communicate internally and been successful [17].

As well as encouraging employees to use social media whilst at work for professional matters, many employees are using social media whilst at work for their personal usage [24], which has resulted in problems.

### 2.3.2 Employee Dismissals

There have been numerous examples of employees being disciplined and dismissed for what they have done with one of the most prominent being that of Catherine Sanderson. Sanderson was dismissed by her employers for the contents of her weblog with her employers contending that her actions had brought her employment into disrepute [27]. The Employment Tribunal (ET) concluded that her employers had failed to provide her with guidance as to what she could and could not discuss and accordingly awarded her £30,000 for unfair dismissal [27]. Joe Gordon was dismissed for similar reasons and once again the ET held that the decision to dismiss was unfair in light of the fact that Gordon offered to stop weblogging entirely [1].

There have also been cases of employees being disciplined which have subsequently caused problems further afield. Chez Pazienza, who was disciplined for posts on his weblog, contended that the decision to discipline him when others who acted the same had not was the uneven treatment of individuals in similar circumstances and therefore breached mutual trust and confidence [21]. Pazienza resigned and claimed to have been constructively dismissed with the courts upholding the decision [21].

A Chrysler employee was dismissed because of a foul mouthed rant on Twitter that, despite being deleted quickly, was picked up by thousands of users in the Twittersphere [2]. A Twitter user was even dismissed before being officially hired for stating that she would have to weigh up the balance between the money and commute and hating her job [25].

There are countless cases of employees being dismissed for what they have written on Facebook. In the U.S., Virgin Atlantic dismissed 13 cabin crew members for remarks made about the airline's passengers on the site [26]. An Australian hairdresser was dismissed and subsequently won a claim of unfair dismissal for remarks she made about her employers on the site [10] with the same occurring in the U.K. as a 16 year old moaning about her employment on the site saying that her job was "totally boring" [5].

These cases are very much just the tip of the iceberg of the problems of employees' social media activities but with the usage of social media continuing to rise, it is clear that greater clarity needs to be brought to the way in which social media is tackled to prevent

further problems from arising for employees and employers alike.

### 3. LEGAL ISSUES

A number of legal issues that could potentially arise through employees' social media activities exist and the most interesting are harassment and defamation both of which are discussed subsequently.

#### 3.1 Harassment

##### 3.1.1 Definition

Harassment is a particularly difficult tort to define but it is commonly understood as behaviour intended to disturb or upset that is repetitive [28]. It covers a wide range of offensive behaviour including racial, religious, and sexual harassments and acts like stalking and bullying amongst others.

The working definition adopted is provided under the Protection from Harassment Act 1997 (PHA 1997) as "A person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other"<sup>5</sup>. The key here is the fact that there must be a course of conduct on the part of the individual before it can be said that they are guilty of committing an act of harassment.

##### 3.1.2 Legislation

The Protection from Harassment Act 1997 is one of four pieces of legislation in place in the U.K. to try and tackle the tort; Malicious Communications Act 1988, Communications Act 2003 and the Public Order Act 1986 but the PHA 1997 is the most important.

#### 3.2 Defamation

##### 3.2.1 Definition

The law of defamation is the mechanism by which the law attempts to reconcile the competing interests of freedom of expression and the protection of individual reputation. Published matter will be defamatory if it conveys an imputation that tends to lower the claimant in the estimation of the right thinking members of society generally or causes others to shun or avoid the claimant or expose the claimant to hatred, contempt or ridicule [7][28].

##### 3.2.2 Legislation

In the U.K., a cause of action for defamation arises as a matter of common law but it has been modified in a number of important respects by the Defamation Acts 1952 and 1996 as well as being heavily influenced by the European Court of Human Rights (ECHR) through the Human Rights Act (HRA) 1998.

The key is that a cause of action arises where the publication is made which is subject to its own limitation period. Publication in the U.K. occurs at the point at which the defamatory remarks are seen and read as opposed to the point at which the statement is

produced; the 'multiple publication rule'<sup>6</sup>. As a result, every time a defamatory remark is read a new cause of action potentially arises which in principle means that an individual who makes a remark could be tried for it numerous times and potentially infinitely.

#### 4. ANALYSIS

This research presents the findings into the way in which the current legislation and case law that govern defamation and harassment interplay with the problems posed by the nature and characteristics of social media. The analysis is carried out through an exploration of U.K. legislation and provisions. The particulars and characteristics that make social media unique from the Web and viable scenarios are considered.

Given that it would be impossible to present the entire body of legislation surrounding harassment and defamation in this paper, the central themes of both, discussed above are considered in turn.

##### 4.1 Harassment

Harassment is primarily addressed in the U.K. through the PHA 1997 with the key provision that the individual being charged with harassment must have carried out at least two acts of harassment for it to be regarded as a course of conduct. For there to be a course of conduct in relation to a single person it must involve conduct on at least two occasions in relation to that person or in the case of two or more people, conduct must occur on at least one occasion in relation to each person<sup>7</sup>. The courts have stressed that where a single victim has only had one act of harassment committed against them, they would not be able to bring a claim forward<sup>8</sup>.

The courts have started to see cases that have involved social media in harassment campaigns. One of the first in the U.K. was in 2007 in which a postgraduate student who worked at the University of Kent's library was made the subject of a Facebook group calling for him to be beaten up by other students because of what they perceived to be his harsh approach at the library [4]. The group was shut down and the case went no further.

The following year the more serious case of Hurst came forward in which an ex-husband waged a campaign of harassment against his ex-partner which included amongst other things physical acts like delivering post to her house [31]. Hurst looked at his ex-partners Facebook photos which she said made her feel uncomfortable and therefore caused her to have to change her Facebook privacy settings. In this instance the judge did not feel that there was

<sup>5</sup> Protection from Harassment Act 1997, s1(1).

<sup>6</sup> The roots of the rule stem from the 19<sup>th</sup> century case of the Duke of Brunswick v Harmer in which the Duke's agent brought a back issue of a newspaper published 17 years earlier. The Duke himself was time barred from bringing a libel and so he sent his agent to get a copy with a new time period starting from the purchase.

<sup>7</sup> Protection from Harassment Act 1997, s7.

<sup>8</sup> *Janvier v Sweeney* [1919] 2 K.B. 316.

sufficient evidence for the prosecution to be able to prove the Facebook harassment took place [31].

In Houghton the court did find that there was sufficient evidence to establish that harassment occurred on Facebook. Here a teenager waged a campaign of harassment against her fellow student for four years which included physical and verbal assaults [6]. Houghton threatened to attack the victim making the statement on the victim's friends Facebook profile which was subsequently seen by the victim. The court found that there was a sustained course of conduct on the part of Houghton and that the Facebook threats were a part of this course [6].

What we have started to see therefore is that the courts are prepared to explore the issue of harassment via social media and so far Facebook but I think that there are still potential problems going forward. In these instances, the usage of social media for harassment was a part of other more traditional methods. In both the Hurst and Houghton cases, Facebook was used in conjunction with physical acts and verbal threats in the latter case. In no cases thus far however has a course of conduct been carried out on social media alone.

Given the remarks made in Hurst and Houghton it is not possible to say the approach the courts would take. In Hurst as well as looking at his ex-partners photos, the defendant decided to 'poke' her and made a friend request. He noted in proceedings that in his opinion Facebook friends was not really that serious as he stated 'Chris Moyles has a million Facebook friends, does he know them all intimately?' [31]. The suggestion here was that actually such actions could not really be regarded as being that serious and to be intimidating. In the same instance the judge here noted that in his opinion the victim had through her creation of her Facebook profile implicitly invited individuals to get into contact with her [31]. He suggested that social media was by its very nature social with the intention that individuals get into contact with others with the implication potentially that a course of conduct solely carried out via social media would not be enough.

At the same time courts have previously stressed that given the serious nature of harassment where unsure they would err on the side of finding the accused not liable<sup>9</sup>. However conversely the courts will look at each individual case based upon its own merits and therefore trying to establish a precedent type approach may not work<sup>10</sup>; a campaign including threats of physical violence made solely on Facebook may be regarded as sufficient where as deciding to 'poke' the victim may not. There is not a body of work on the issue of what conduct is substantial enough to be regarded as harassment and what acts the court will regard as not being enough and therefore it is suggested that it will be a matter of individual examination by the court.

There appears to be a lack of clarity and certainty as to what a court would do in such a scenario with the comments made suggesting heavily that they do not regard social media being that serious [11]. At the same time given the way in which individuals are starting to spend more and more of their lives online and interacting with these social media [3], the chances of a campaign of harassment being carried out solely on social media, without traditional methods, are greater than ever [11] and this is something that the courts will have to consider in the near future.

## 4.2 Defamation

As was highlighted previously, the key to the U.K. provisions on defamation is the fact that every time a defamatory statement is seen a new publication occurs. A new cause of action arises every time the statement is read which possess a number of potential problems for life with social media.

Micro-blogging makes this a real problem as in theory an individual could make a remark on their Twitter account which could in turn become quickly adopted by somebody else and they re-publish that statement to an audience of potentially millions. Key to Twitter is the fact that individuals are able to retweet what others say on their pages as a means of spreading news, opinions and information even wider a field than was initially intended [18][21]. This is great for spreading information to as many people as possible but could have the potential to cause problems in the scenario considered here.

In such a scenario who would be held liable? The original remark maker? The individual who retweeted it? The pair of them jointly and the same? Or the pair of them but with greater liability attached to one above the other. Key to being held liable is proving that the individual made the publication to a third party<sup>11</sup> which on the face of its both did and therefore both may be held liable individually.

The initial statement maker would potentially use the defence of unintentional publication. The historical underpinning of the defence is that a letter sent directly to a defamed person is not published merely because it is intercepted and read by the person<sup>12</sup>. The statement maker may contend that retweeting is analogous to the interception of post for the modern age. It is a statement that is meant to be made which has been intercepted by someone that it has been directed to and read. However it has recently been held that where the defendant had knowledge that the letter would likely be opened and read by a third party, the defence was not available<sup>13</sup>. An individual who tweets may well have a reasonable expectation that their tweets will be picked up read and posted by others and therefore the defence not available to the original statement maker.

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<sup>11</sup> *Webb v Bloch* (1928) 41 CLR 331

<sup>12</sup> *Powell v Gelston* [1916] 2 K.B. 615.

<sup>13</sup> *Berezovsky v Michaels* [2000] 2 ALL E.R. 986, 998. .

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<sup>9</sup> *Lau v DPP*, The Times, March 29, 2000

<sup>10</sup> *Conn v Sunderdland CC* [2007] EWCA Civ 1492.

In terms of the retweeter, he could argue that as he has not actually written the words himself, just copied those of others, he should not be held liable. There was a suggestion by Collins that where an individual copies an email of another and forwards it on, he should not be held liable for its contents [7]. As a result, the retweeter may argue that as he has done no more than copy the original tweet, he should not be held liable for it. However an individual can be held liable for a defamatory remark through association<sup>14</sup>. The fact that he the statement appears under his name, with his avatar made lead to the conclusion that he is associated with the remarks regardless of them having not actually been written by him.

The court will also look at the extent to which both were aware of the defamatory nature of the remarks made and retweeted. There has been recent suggestion that the court should take heed of the knowledge that the defendant has of the remarks as often things are said without appreciating and to hold a person liable every time something is said could lead to the opening of the floodgates<sup>15</sup>. In light of this the extent to which either knew in what they were saying may be considered by the courts.

It would appear that either the original statement maker or the retweeter could be held liable individually with the validity and applicability of the defences being unclear. With both being potentially liable, a court may decide to hold just one and in doing so look at the potential audience.

In a recent decision concerning a defamatory email, the court noted that as the email was not seen by as many individual as the claimants had initially inferred, the damage caused potentially not as great and therefore damages awarded less substantial [7]. The same approach was adopted in a recent case concerning a YouTube video made by employees of a British supermarket. The court held that the decision to immediately dismiss them was unfair in light of the fact that the video had a very small view count<sup>16</sup>.

It would appear therefore that in deciding whether one should be held liable above the other, the court may well have regard to the number of followers each has. However it may be argued that the number of followers that an individual has is not as important as the nature of those followers [18]. The power of an influential twitter personality is potentially far greater than a number of others but how can one compare the influence of a Twitter personality.

The court may hold the two liable jointly and severally; both liable to the same extent. It has previously been held that the same material existing on numerous parts of a website are regarded as different publications and therefore the two held liable for each remark<sup>17</sup>. This would appear to be

correct approach however the court have traditionally in cases of defamation looked at the extent of the damage caused by the remark and therefore would be inclined to hold one more liable than the other which comes back to the issue of followers discussed above. At the same time, what would happen if the remark were retweeted by another individual so now therefore are three with such a scenario being potentially being infinite.

It is clear to see that there are number of scenarios as to who should be held liable with both potentially able to be held liable individually and jointly. The original remark maker may be able to contend unintentional publication but its applicability in this scenario may be difficult, whilst the retweeter may contend that he has done no more than copy the words of another. However he could be held liable through association whilst in holding both liable the court would no doubt have regard to the number of followers each has and it is suggested that this is not really that helpful. The influence of those followers is more important and this is something that is impossible to measure. It is clear to see therefore the problems that arise with something as simple as retweeting and defamation and social media interplay.

## 5. CONCLUSION

The analysis highlights the way in which inappropriate social media usage has the potential to cause uncertainty in the cases of harassment and defamation. There is a lack of certainty as to what would happen if a course of conduct were carried out solely on social media and whom would be held liable for a defamatory remark retweeted, which have the potential to cause problems for employees and employers alike.

Employers are already being held liable for their employee's harassment whilst there is a growing judicial trend in holding employers liable for defamatory remarks made by their employees, when done so during the course of employment [7]. As highlighted previously, the separation between private and personal lives is beginning to wear down and with employees using social media during traditional working hours, employers are going to be held vicariously liable for than ever before. This has the potential to cause problems with cases of dismissals, like those in the cases previously discussed, needing to be addressed.

The technical characteristics of social media are such that they have developed and presented new problems for the law that have not previously been considered. In light of the growing usage and uptake of social media in the employment context and the potential consequences, establishing policies that can address these are crucial and very much needed and therefore continued research required.

## 6. FURTHER RESEARCH

Continued research is required to try and appreciate the problems that technology underpinning social media presents that have not yet been considered in order to develop appropriate policies. The biggest

<sup>14</sup> *Hird v Wood* (1894) 38 Sol J 234.

<sup>15</sup> *Bunt v Tilley* [2007] 1 WLR 1243.

<sup>16</sup> *Taylor v Somerfield*, Unreported, case no: S107847, 24 July 2007.

<sup>17</sup> *O'Shea v MGN Ltd* [2001] 1 EMLR 542, 550.

problem however is that technology develops far quicker than the law does and can keep up with and therefore solutions that are both certain and flexible need to be reached.

Future research will explore the potential ways in which the employee governance of social media can be tackled away from the current traditional static policies that we have in place. At the same time, further exploration of the technology is required in order to try and establish what the future will hold.

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