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LEGAL FOCUS

Booted out for what you do when logged in?

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With the rise of technology and ever-growing popularity of social media, it is easier than ever for employees to share their updates, feelings and opinions online, whether they are related to their personal or professional life. What if these posts go viral and cause deliberate or inadvertent damage to the employer? What can employers do when it comes to disciplining employees who engage in such online conduct?

Some case examples

HR professionals handle workplace grievance and complaints on a regular basis, but in *Crisp v Apple Retail (UK) Ltd* [2011] ET/1500258/11, an employee thought it appropriate to post a number of sarcastic comments about his job and his employer on his Facebook. While his posts were private and were only accessible by his Facebook friends, a fellow employee (also his Facebook friend) became aware of these comments and reported the matter to the employer. Investigation and disciplinary hearing ensued, and the employee was eventually dismissed on the grounds of gross misconduct. When considering whether such dismissal was justified, the UK Employment Tribunal agreed with the employer that a post on Facebook can be easily forwarded to another and the employee had no control over how his comments might be copied and passed on, even though his privacy settings restricted access to the page to his "friends" only. As such, the employee did not have reasonable expectation of privacy in respect of his comments on Facebook. The Tribunal further acknowledged that the employee has right to freedom of expression, but considered it just and proportionate for the employer to limit such freedom when such expression interfered with the employer's image and core values, the importance of which had been made known to the employee in the employer's policies and trainings. As a result, the dismissal decision was held to be fair.

What if the social media posts have nothing to do with the employer? Can an employer still dismiss an employee? The short answer, at least based on English case precedent, would be yes it is possible. In *Game Retail Ltd v Laws* [2014] UKEAT/0188/14, the employee in question operated a Twitter account, which followed and was followed back by a number of the employer's game stores, each operating a separate Twitter account by its respective store manager. One of these store managers subsequently reported to the employer that the employee's tweets were "*offensive, intimidating, racist and anti-disability*" and an internal investigation ensued which identified a total of 28 problematic tweets. These tweets were all unrelated to work (e.g., the comments were made against various groups of people such as dentists, drivers, golfers etc), but the employer decided to dismiss the employee because the employee's Twitter account and his offensive tweets, albeit private and personal, could be seen by employees and customers of the employer's game stores through the "following" activities. The employee was initially successful in challenging the termination decision, but the English Employment Appeal Tribunal concluded that dismissal could be within the "*range of reasonable responses*" by an employer and therefore remitted the case back to the

Takeaways for Employers:

With these in mind, it remains for us to remind employers to consider the following actions in respect of the potential impact and consequences of its employees' social media activities:

- Employers should make sure they have appropriate social media policy in place. Such policy should set parameters as to how work or company-related comments may be made, and specifically remind employees that their private conduct and behaviour may still have an impact on the employer and will therefore be monitored as appropriate. Regular training sessions should also be held to make sure employees understand the requirements of the policy, and appreciate the potential consequences of breaching such policy.

- Having appropriate privacy notifications and monitoring guidelines will definitely assist. Given the potential involvement of personal and private accounts will become relevant, employers should consider the appropriate extent of any monitoring activities and ensure that any data collected should be reasonably necessary for the purposes to be achieved. Specific consent should be sought from employees in appropriate cases.

- As matters can escalate in a split second, HR professionals should prepare in advance and work with all relevant stakeholders and teams (e.g. IT, marketing, PR/Communications, Legal and Compliance and Operations/Securities) to put in place a robust framework for management of social media related crisis.

- Subsequent investigation into these matters can also be challenging. We recommend HR professions to roll out or to regularly check and update an employer's whistleblowing policy, investigation guidelines and policy. Matters should be considered on a case-by-case basis.

Employment Tribunal for reconsideration. A key consideration by the Employment Appeal Tribunal was that the employee's Twitter account could not be positioned as purely private, given how the employer's game stores were following his tweets and the employee was fully aware of this.

Hong Kong SAR Position

Unlike in the UK, there is no unfair dismissal regime in Hong Kong. In the absence of special circumstances leading to the potential application of anti-discrimination ordinances (e.g. because of the content of the social media posts or the personal circumstances of the employee in question), the main consideration for Hong Kong employers will most likely be whether there are valid reasons to justify a summary dismissal decision pursuant to section 9 of the Employment Ordinance. Given the high threshold that an employer will need to meet in order to justify summary dismissal, the other applicable consideration will be the statutory and/or contractual right to terminate an employment relationship by notice or payment in lieu of notice. In this regard, section 32K of the Employment Ordinance will apply to employees with at least two years of service, where an employer may minimise statutory severance payment obligation where a valid reason for termination (other than redundancy) exists. The scope of section 32K is wide and an employer may terminate an employment by "*any reason of substance*" – a sufficient impact on the employer's reputation, even if the social media posts in questions were not entirely related to work, could be sufficient.

In case an employee raises any challenge to an employment decision based on privacy consideration (e.g. under the Personal Data (Privacy) Ordinance) or freedom of opinion and expression (e.g. under the Hong Kong Bills of Rights Ordinance or the Basic Law), employers in Hong Kong may expect similar approach to be taken by Hong Kong courts. The court will consider whether such rights and freedom can legitimately be limited to protect an employer's business interests, and an employee's challenge will unlikely be straightforward. The employer may additionally rely on its existing privacy and monitoring policies insofar as they relate to an employee's use of social media to the extent it impacts the employer, or whether any exemptions from data protection principles under the Personal Data (Privacy) Ordinance may apply.

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