

'Anti' Social Media

The explosion in the use of social media in recent years has changed not only the way that people view relationships but the way people work and interact in the workplace.

Facebook and Twitter feeds are 'news', blogs are turned into books and then multi-award winning movies, and LinkedIn is the only professional networking that some people do.

Whilst there are undoubtedly enormous benefits to the use of social media, whether privately or in the workplace, there are also the much publicised downsides. As long ago as 2006 when the social media phenomenon was beginning to emerge, the TUC described Facebook's then 3.5 million users as HR accidents waiting to happen! Since then we have all become familiar with employers checking out potential recruits via social media (and then not recruiting them); employers checking up on sick employees who are then caught out by Facebook postings detailing the preceding night's drunken activities; relationships (personal and professional) being made and lost via the internet - with blow by blow accounts being broadcast on a constant basis.

Once you sit down and think, the litigation minefield that employees using social media creates (whether inside or out of the workplace) is clear. Yet, many employers do not take sufficient steps to protect themselves or their businesses. Large



numbers of employers still do not have social media policies or guidance on using social media during working hours in place, and deal with any issues that arise on an ad hoc and inconsistent basis. There can be no doubt that employers need to be more proactive in protecting themselves from the hazards of social media.

Reputation Damage - Whilst almost every user of social networking sites recognises the risk of damage to their personal reputation as a result of postings - most of them give little or no thought to the potential damage they could cause to their employers. Rants about 'management' are commonplace - and with very little digging it is often abundantly clear who the 'management' is. Quite clearly postings in black and white disparaging either an employer or its' management team are

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The Bribery Act 2010

The Bribery Act 2010 ("the Act") received Royal Assent on 8 April 2010 and is due to come into force in April 2011. The Act consolidates the existing common law and statute, most of which has received heavy criticism.

The Act provides for four separate offences:

1. **Bribery** - it will be an offence to offer or give financial or other advantage with the intention of inducing that person to perform a "relevant function or activity" "improperly" or to reward that person for doing so;
2. **Being bribed** - it will be an offence to receive a financial or other advantage intending that a "relevant function or activity" should be performed "improperly" as a result;
3. A specific offence prohibiting the **bribery of foreign officials**; and
4. A **corporate offence** of failing to prevent bribery.

The offences of bribery and being bribed are not dissimilar in substance to the current law, albeit they introduce the central concept of "improper performance". However, the offence of bribing a foreign official and the corporate offence are complex and widely drafted. As drafted, the various categories of offence arguably catch certain types of normal business conduct, such as corporate hospitality or sending gifts. Whilst it cannot have been Parliament's intention to outlaw corporate hospitality in its entirety, companies of all description will now need to be wary of their

employees crossing the line and causing them to fall within the ambit of the corporate offence.

A company will be guilty of the offence of failing to prevent bribery if a person who performs services for or on behalf of it bribes another person. Employees, agents and subsidiaries will all be caught by this definition. The only defence available to the company will be to prove that it had in place "adequate procedures designed to prevent persons associated with the Company from undertaking such conduct". The key question will be determining what constitutes an "adequate procedure" and this is where much litigation is likely to arise.

The Ministry of Justice has published a draft consultation paper on the Government's proposed guidance on "adequate procedures" under the Act. The consultation paper sets out six principles for bribery prevention: risk assessment; top level commitment; due diligence; clear, practical and accessible policies and procedures; effective implementation; and monitoring and review. The final version of the guidance is expected in early 2011.

Whilst complying with these six principles will undoubtedly result in an additional compliance burden for companies, it is clear that appropriate internal policies controlling the actions of employees and agents will be vital. Whilst the consultation document emphasises that the requirements in respect of "adequate procedures" will vary enormously depending on the size of an organisation, this may be scant consolation. The paper also makes it clear that the ambit of any investigation by the authorities into whether "policies" and "procedures"

are adequate will be extremely onerous.

The Act raises the maximum jail term for bribery by an individual from 7 years to 10 years. A company convicted of failing to prevent bribery could receive an unlimited fine.

Companies need to start preparing for the Act coming in by carrying out risk assessments and due diligence exercises on all current business partners and operational arrangements. Companies should consider:

1. Including provisions expressly preventing acts of bribery in all employment contracts;
2. Introducing an appropriate hospitality and gifts policy to monitor levels of corporate entertainment and gifts;
3. Providing anti-corruption training to all employees; and
4. Ensuring there is an appropriate whistleblowing policy in place to enable employees to report corruption in a safe and confidential manner.

Whilst it remains unclear to what extent the Act will have an effect on normal hospitality, as the Magrath blog, HRspy points out "**If it looks like an elephant and smells like an elephant, chances are it's an elephant. Otherwise its probably just lunch!**"

HRspy is a light hearted blog from Magrath LLP specialist Employment Practice, uncovering the weird and wonderful world of HR. The blog is available at www.magrath.co.uk or you can follow us on twitter @HRspy.

Without Prejudice Discussions – Can Parties Speak Freely?

The Without Prejudice rule is an integral part of the litigation process. It is designed to ensure that communications between parties, providing they are genuinely made in the course of negotiations aimed at settling a dispute, are inadmissible as evidence in any subsequent litigation.

However, the rule must not be used as a 'cloak for perjury, blackmail or other unambiguous impropriety'. Whilst the exceptions of perjury and blackmail are clear, a question often put before the Courts is what amounts to 'unambiguous impropriety'?

Until this year, the leading case in which the exception was explored, was the case of *BNP Paribas v Mezzotero* [2004] IRLR 508. In this case, the employer had sought to use the protection of the without prejudice doctrine to announce a course of action to an employee that was clearly discriminatory.

Subsequently, it was suggested by the Court of Appeal in *Brunel v Vaseghi* [2007] EWCA Civ 482 that the need to get to the truth in discrimination claims outweighed the protection granted by the without prejudice rule.

That said, the Courts have been reluctant to peel back the cloak of without prejudice too often. Not least, it is recognised that parties could be inhibited from speaking freely if it is possible for either of them to comb through correspondence or discussions in order to point to words or actions in

support of an inference of discrimination.

In a case decided this summer, *Woodward v Santander UK Plc* UKEAT/0250/09 the EAT confirmed that the exception to the without prejudice rule should be construed narrowly 'less the exception overtake the rule'. It also usefully held that there was no particular exception that applied in discrimination cases, and for the cloak of without prejudice to be lifted, there needs to be clear evidence of abuse.

The EAT has clearly closed the door on the possibility that issues concerning discrimination constitute a special category in their own right when it comes to exceptions to the without prejudice rule. In discrimination cases, as with any other type of case, the threshold for a party seeking to establish that there has been impropriety is high. Merely drawing attention to matters from which an inference could be drawn is not enough. This means that, on the whole, parties will be free to negotiate in without prejudice discussions, without 'constantly

monitoring every sentence with lawyers sitting at their shoulders as minders'.

That said, however, care must be taken that the label is not used inappropriately, e.g. where there is not yet a dispute between the parties or the label is being used to deliberately cloak discriminatory assertions or behaviour. By way of example, an employer who was in dispute with a black ex-employee, could not use without prejudice to cloak an assertion that 'we do not want you here because you are black'. In such a situation there would clearly be unambiguous impropriety thereby allowing the employee to rely on the statement in open litigation.

However, it is clear that the Courts are reluctant for the label to be removed without good reason i.e. clear and blatant unambiguous impropriety examples. This will be helpful for employers seeking to settle cases without fear that comments made during them can be 'thrown back at them' in later litigation.



Compulsory Retirement Age to be Scrapped

Arguably, the practice of imposing compulsory retirement on employees as soon as they reach a particular age is less favourable treatment because of a protected characteristic (age) and unless objectively justified, would amount to unlawful discrimination under the Equality Act 2010.

Currently, employers can lawfully impose a default retirement age (sometimes referred to as a 'normal retirement age') of 65 on their employees. Provided the steps and procedures set out in the Employment Equality (Age) Regulations 2006 (the Age Regulations) have been followed an employer can lawfully dismiss an employee on retirement grounds, once that employee reaches the normal retirement age.

It is worth noting that during the consultation undertaken by the Department for Trade and Industry (now the Department for Business Innovation and Skills (BIS)) prior to implementing the Age Regulations, the original proposal was to either have a national default retirement age of 70 or to have no national default retirement age at all, and continue with contractual retirement provisions that were in use at that time. The response to the consultation was mixed, with 52% being in favour of a national default retirement age and 43% being against it. Only 24% of respondents to the consultation favoured the proposed default retirement age of 70. The Age Regulations were subsequently implemented with a national default retirement age of 65, on the basis



that this fitted with the economic and social realities of the UK and would be capable of being objectively justified. Part of the rationale for a default retirement age was to enable employers to plan succession and avoid the need to use capability proceedings to dismiss older employees.

The retirement provisions as set out in the Age Regulations have been controversial and the Government has now decided that they are unsustainable. Those opposed to the Age Regulations have pointed to the UK's growing aging population and the common lifestyle choice made by many to work beyond age 65 as justification for the abolition of the default retirement age. Given the current economic climate and poor state of most individuals' pension pot, the decision to work longer is now more than a lifestyle choice and is increasingly a necessity.

The progress through the Courts of the legal challenge brought by Age Concern in the High Court and the European Court of Justice (ECJ) on the basis that the Age Regulations were contrary to European Law highlighted these issues. That challenge was ultimately unsuccessful and the ECJ held that there were legitimate policy aims justifying the need to have a

default retirement age. However, it does appear that the case, as well as the pressure mounted on the government, particularly from Age Concern/Help the Aged, prompted the government's review of the Regulations and led to the announcement to phase out the default retirement age from 2011.

The proposal is to abolish the default retirement age with effect from 1 October 2011 with transitional arrangements which will allow employers to continue to use the current procedure until 1 April 2011, provided a notice of intended retirement has been served by that date (effectively six months notice). After 1 April 2011, employers will no longer be able to issue employees with a notice of retirement or compel employees to retire using the procedure set out in the Age Regulations.

Some commentators have pointed out that whilst many employees, aged 65 and over continue to perform their roles entirely satisfactorily, some become less productive and their ability decreases with their increasing age. The use of a default retirement age avoids the need to use capability proceedings in effecting the dismissal of individuals in these cases. From October 2011, any employer seeking to dismiss an older employee will need to follow a thorough performance management process, ensuring that it is implemented reasonably.

The removal of the default retirement age will have ramifications for employers as illustrated in the judgment in the recent case of *Rosenblatt v Oellerking* which considered whether a contractual compulsory retirement age of 65 was age discriminatory. The court held that on the face of it, such a policy

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considerably more damaging when they are in black and white for all and sundry to see! Not only does a discussion with ones friends in the pub leave no discernable evidence trail but the dissemination of its contents is normally limited to those present at the time.

Confidential Information – There is obviously the risk than an employee may deliberately or inadvertently post confidential information online. The likelihood of an employee posting client lists or other sensitive commercial data on a social media site is, one would hope, limited. The majority of employment contracts contain sensible confidentiality clauses – which if employees are reminded about from time to time will probably be adhered to. However, a significant risk factor for employers is the dissemination and potential drip feed of seemingly 'low grade' confidential information. Most employees recognise the value that 'big ticket' confidential information has and won't risk their employment by disclosing it – or at least not in a way that leaves an evidence trail for all to see. However, few realise the damage they can do to an employer by hinting at small snippets – such as their own department's "brilliant deal", "lousy quarter" or planned targets or marketing events.



Recruitment – Whilst most candidates give little thought to what has or has not been posted about them online, more and more employers are becoming wise to the benefits of googling employees, checking out their LinkedIn profiles and seeing what information can be gathered online. A survey commissioned by Microsoft in 2009 indicated that whilst less than 15% of recruitment candidates thought that their social media profile could have an impact on their job prospects, 41% of UK recruiters said that they turned candidates down based on social media profiles. The advantages of this information to an employer should not be underestimated – it is one of the few upsides to employees personal use of social media!

Discrimination - Employers should not underestimate the risk of an

employee exposing an organisation to potential claims of discrimination or harassment as a result of comments made online. Many employees count their co-workers as "friends" on networking sites – and give little consideration to how ill thought out comments will be construed by those reading them. The fact that the comments are made in an employee's own time may not give an employer much solace – they will almost certainly be used to support bullying allegations, or as evidence in discrimination claims. Mobile phones with social media applications take on a whole new level of risk in the hands of an employee on a night out! When, in addition to the above, one factors in loss of productivity from employees using social media during working hours and potential data protection issues, it is tempting to ban employees from using social media altogether. However, an employer should not forget employee's rights to privacy and freedom of expression. As the Employment Rights Act 1996 must be interpreted in a way consistent of the European Convention on Human Rights, the sanction of dismissing an employee for 'speaking his mind' could, subject to the content, be disproportionate – making the dismissal unfair.

Practice News

The Employment Practice has sustained a busy workload over the recent months.

We have seen a sharp increase in the number of clients requesting social media policies for their staff handbooks. As the likes of LinkedIn, Facebook and Twitter continue to grow in popularity, companies are paying more attention to the need for social media policies.

Magrath's first blog, HRspy has been launched and is available on our website www.magrath.co.uk or via our Twitter page @HRspy. We anticipate HRspy will provide an insight into the more unusual complaints and requests that we see, help to foster relationships with

people from all sectors of HR and Employment law, and provide a laugh or two along the way.

Much of our time recently has been taken up with the new Equality Act, as many clients are requesting in house training on the effect of the new Act and how their policies and procedures should be altered in light of the new legislation.

We have also seen a steady number of cases in the Employment Tribunal as well as several cases in the EAT, including an appeal against a finding of unfair dismissal.

In other news Adele Martins, partner in the Employment Practice, is quoted in a round table discussion article on

the phasing out of the compulsory retirement age which was published in Corporate International magazine. Adele also spoke at the Law Society seminar on the Equality Act, in early October.

On 10 November 2010 the Employment Practice will be hosting a mock Employment Tribunal at the Magic Circle Headquarters. This will focus on the new Equality Act and will give both existing and prospective clients an insight into the practicalities of a Tribunal hearing.

On 16 November 2010 Magrath LLP will also be hosting an ELA think tank on "Generational Differences".

Compulsory Retirement Age to be Scrapped

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was discriminatory, but that it could be objectively justified in certain limited circumstances. The court said that it would only be justified if:

- the contract (and provisions relating to the compulsory retirement age) have been collectively negotiated with a union or by a collective agreement;
- the employee in question is entitled to receive a pension so that they have replacement

income; and

- the use of the compulsory contractual retirement age has been widespread in the country for a long time without any effect on the levels of employment.

This case has serious ramifications for employers who seek to justify a compulsory retirement age after the default retirement age is abolished in October 2011 and it is anticipated that the change will lead to an increase in claims in the Employment

Tribunal. Employers implementing or applying contractual "normal retirement age" provisions will therefore be well advised to seek advice in relation to these procedures, to avoid falling foul of anti-discrimination legislation and leaving themselves open to claims of unfair dismissal and/or age discrimination.

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