Social media and employment law – legal issues

May 2016 – Rachael Heenan, Partner, Capsticks
“HR and social media in the NHS: an essential guide for HR directors and managers”

http://www.nhsemployers.org/Aboutus/Publications/Pages/HR-social-media-NHS.aspx

“We trust our staff with patients’ lives, so why don’t we trust them with social media?”

(David Foord, Clinical Governance Lead at NHS Direct)
Covers key questions around

- What potential impact will social media have on HR work?
- How are HR and other NHS professionals currently using social media?
- What advice and guidance is available for HR and other NHS professionals?

Reflects the evolving use of social media in NHS
NHSE Guidance

- Policy preventing all social media use now unworkable
- Access to social media can increase staff engagement
- But confidentiality issues
- Blurring of personal and professional identities
- Well drafted policy essential
  - Confidentiality
  - Avoid bringing organisation into disrepute
“The necessity of common sense”
Other relevant guidance

- GMC – Doctors’ use of social media
- NMC – Guidance on using social media responsibly
- Information Commissioner’s office – The employment practices code
- ACAS – social media, discipline and grievances
SOCIAL MEDIA EXPLAINED

TWITTER  I'M EATING A #DONUT
FACEBOOK I LIKE DONUTS
FOURSQUARE THIS IS WHERE I EAT DONUTS
INSTAGRAM HERE'S A VINTAGE PHOTO OF MY DONUT
YOUTUBE HERE I AM EATING A DONUT
LINKED IN MY SKILLS INCLUDE DONUT EATING
PINTEREST HERE'S A DONUT RECIPE
LAST FM NOW LISTENING TO "DONUTS"
G+ I'M A GOOGLE EMPLOYEE WHO EATS DONUTS.
Today’s Session

- Freedom of expression
- Social Media HR “Hotspots”
  - Recruitment and social media
  - What the Tribunals think
  - Managing employees’ activities
  - Social media policies
Freedom of expression

- Art 10 of the ECHR – public authorities must act in a way which is compatible with the ECHR under the HRA

- But what about the rights of others in the workplace when they find the view offensive?

- How far can the employer discipline someone for expressing views in the workplace or out of it via social media?
Points to consider

- Who has complained?

- Are they being overly sensitive?
  - section 26(4) Equality Act 2010 – whether it is reasonable for the conduct to have that effect

- If this is a disciplinary matter – what is the work related context? What is the impact on the employer?

- If social media has been used, do you have a policy which deals with its use?
Social Media & Recruitment
Advertising posts on Social Media Sites

- **Benefits**
  - reach a wider audience
  - seen to be embracing new technology

- **Potential risks**
  - pool of candidates will be narrower if this is the only method of advertisement
  - discrimination claim could arise – potentially age

- Best to use it as one means of advertisement – not exclusively
“Using social media in your recruitment process: The essential guide for HR directors and managers”


Patients should feel confident that the NHS is recruiting the very best staff. NHS Jobs gets 250,000 visitors every month.

The increasing use of social media raises the question of whether platforms like LinkedIn and Facebook can help attract a higher percentage of quality applicants than a ‘passive’ online advert
Key Points:

- Social media can and should be used to help advertise jobs.
- Social media platforms aren’t just used by young people, older applicants can also be reached through them.
- There are different levels of social media use. All take time and resources.
- You can use information from an applicant’s online profile(s) during shortlisting and interview as long as you do not discriminate on the grounds of age, sex, disability, race, marriage, religion and belief or sexual orientation.
Using social media, you can help prospective, quality employees find job opportunities that suit them, by:

- increasing awareness of the NHS Jobs website and the jobs available at your organisation by broadcasting them on social media platforms.
- targeting individuals and groups of people with relevant information based on your organisation’s workforce plan.
- making sure your organisation is social media friendly – it’s no use attracting candidates via social media then preventing them from using it when they join your organisation.
Broadcasting job opportunities

- The more people who see a job opportunity, the more likely it is you will receive a greater number of applications.

- For example, broadcasting (by using LinkedIn updates, Facebook updates or tweeting) your mid-level cardiology nurse opportunities gives them a greater audience than just visitors to the NHS Jobs website or recipients of an NHS Jobs email alert.
Targeting relevant audiences with job opportunities

- Just as the NHS doesn’t operate independently from other organisations in the ‘offline world’, the same is true online. All NHS organisations are part of an inter-connected network of employers, trainers and advertisers.

- NHS organisations and their recruitment processes interact with and rely on various public, third and private sector organisations.

- Many of these will have online profiles and will be talking to individuals who are potential quality applicants.

- Just think how much more effective you could be if these organisations were supporting your recruitment.
Vetting candidates via social media

- Is consent required to google..?
- Personal data – used for a different purpose?
- Be careful of general trawling for information
- Discrimination risks – age, religion, sexuality may be revealed on social media sites
Information Commissioner (1)

- The Data Protection Act 1998 applies to any information that constitutes personal data

- Information on social media sites = personal data

- If information will be obtained from sources other than the applicant’s application form, individuals should be informed of this and should be told the nature of the additional information sought and the sources which will be used (Section 1.2.4 Employment Practices Code)
Section 1.6.6 - employers should not place reliance on information collected from possibly unreliable sources and the applicant should be allowed to make representations about information that will affect the decision to finally appoint

Do you give a chance to respond?
Information Commissioner (3)

- What to consider: recruitment
  - Fair processing – transparency
  - Collect adequate, relevant but not excessive information
  - Accuracy - checking; verification; vetting; social media
  - Holding information – security
  - Retention
  - Secure disposal / deletion
Vetting candidates: considerations

- What is your policy?
- Consistency is key – if you are going to check one candidate, check them all
- If not, there is a risk of a discrimination claim
- If you decide that you do not want to hire as a result, be clear about your reasons
- Are there other reasons – interview performance?
Employee Activities: What Are The Tribunals Making of It All?
Smith v Trafford Housing [2012]

- Demotion for comments on gay marriage
- Connection with employer on FB
- Colleagues as friends
- No reasonable reader would conclude on behalf of employer
- A diverse workforce involves employing people with different views
- Disciplinary policy n/a as not sufficient work related content
Deputy store manager. He went off with stress during a period of organisational change.

- He attended meetings about the change where he was told that information given to him was confidential.
- When he thought the consultation was over he posted on Facebook that Halfords staff were against the change.
- He later read Halfords’ policy that statements made online that were not in its best interest would be subject to disciplinary action.
He removed the post
Halfords took disciplinary action
Mr Stephens apologised and said it would not happen again
Dismissed for breach of trust in posting confidential business information
ET found Mr Stephens had been unfairly dismissed
No reasonable employer would have summarily dismissed him
Given Mr Stephens’ actions in removing the post and apologising, there was nothing to indicate that an ongoing employment relationship was untenable
Pub landlord posted comments while she was working about two customers who had made inappropriate comments about her.

Wetherspoons had a policy which reserved the right to take disciplinary action for blogging.

Dismissed for gross misconduct.

The appropriate action had been taken and the dismissal was within the range of reasonable responses.

ET said it would have been more inclined to award a final written warning but that would have been substituting its own view for that of Wetherspoons.
Blogging about your Colleagues: Teggart v Teletech UK Limited [2011]

- Northern Ireland Tribunal decision
- Mr Teggart posted vulgar comments on Facebook about a colleague, A
- A could not see them but was told about them by another colleague
- An anonymous complaint was made and the issue was investigated
- Mr Teggart was dismissed for harassment and bringing the company into disrepute
Teggart v Teletech UK Limited [2011]

- Mr Teggart argued that his right to freedom of expression and right to private life had been breached.
- The Tribunal found that by posting the comments on Facebook he had given up the right to privacy.
- It also found that the right to freedom of expression was not unlimited and did not provide a defence when the comments amounted to harassment.
Circulating offensive emails: Gosden v Lifeline Project Ltd [2011]

- Gosden worked for Lifeline and was placed with the prison service to work with drug users
- Gosden forwarded an offensive chain email outside work hours and from his home computer to a colleague who worked for HMPS
- The colleague circulated it within HMPS
- Gosden dismissed for gross misconduct
- Fair dismissal
- Brought the company into disrepute
Whistleblowing

- Comments made on a social media site that a Trust is failing to comply with its legal obligations or to protect the health and safety of service users

- Is this a qualifying disclosure?

- Comment may be whistleblowing
Some Practical Considerations –
Managing Employees and Social Media Policies
Protecting employers against liability for employees' actions on social media sites

- An employer can be vicariously liable for discriminatory acts carried out by their employees.

- The Equality Act 2010 which provides that an act done by a person "in the course of their employment" is treated as also having been done by their employer unless the employer can show that they took reasonable steps to prevent the action.

- Case law makes clear that the phrase "in the course of employment" is construed broadly and can include acts which took place outside the workplace (for example, at after work drinks) or on social media sites.

- The greatest risk lies if the posts occurred during work time, but vicarious liability can also arise from postings outside working hours if the only reason that the two people have a connection is because they work together.
In the case of **Otomewo v Carphone Warehouse Ltd**, two members of staff posted a status update on the claimant’s facebook page, without his permission or knowledge.

The status update read: “*finally came out of the closet. I am gay and proud.*”

It was posted in the course of employment, the employees’ actions took place during working hours and it involved dealings between staff and a manager – the employer was found vicariously liable for the conduct which amounted to harassment on the grounds of sexual orientation.
Social Media Policies – Tweet your way to a P45

- Do you really need a Policy?
  - New York Times Policy
- Why have a policy?
  - Helps protect employers against liability
  - Guidelines for employees on what they can and cannot say about the company
  - Helps line managers manage performance effectively.
  - Help employees draw a line between their private and professional lives
  - Complies with the law on discrimination, data protection and protecting the health
Social Media Policies

Where do you start?

- Adopt a “common sense” approach
- May be possible to simply extend existing IT Security policies
- Focus on the positive…
- …But remind individuals that there are consequences
- Confidentiality and reputation

Sources of information/guidance

- ACAS Guide
- NHS Employers Briefing Paper
- Professional associations (GMC/BMA/NMC etc)
Social Media Policies

- **What to include?**
  - Everyone – employees and locums/agency
  - All activity in and out of work is potentially covered
  - Internet & Email Use
  - Use of Smartphones
  - Remind employees of privacy settings for social networking sites
  - Blogging or Tweeting on behalf of the employer
  - Remember NHS specifics
  - Possible Sanctions
Patient confidentiality

- Policies should expressly prohibit the posting of patient information on social media sites.
- Staff need to think about inadvertent breaches (eg, a patient who is in the background of a photo) and be clear that this could lead to disciplinary action.
Employee Activities

- Do you allow access at work?
  - Many Trusts have social media profiles but employees are not permitted to access these sites from work computers

- Wasting time at work
  - Have a clear policy in place
  - Set out expectations on business use
  - use of smart phones
Employee Activities

- Blogging and tweeting
  - if they are representing the Trust there should be clear rules about what they may disclose, the range of opinions they can express

- Remind employees of the following
  - their posts can be shared and be made public
  - they can improve their privacy settings
  - the risk of defamation and harassment claims against them personally
Does an employer have a right to snoop?

- Barbulescu v Romania
  - Yahoo messenger for customers
  - Employer’s Policy bans use of computers or equipment for personal purposes
  - Personal messages
  - Article 8 – right to respect for private and family life not engaged
Cyber - bullying
Cyber-bullying

- Forms
  - offensive emails
  - email threats
  - blog comments
  - gossip
  - text messages
  - sharing personal data online

- Anti-bullying policy – ensure it’s up to date and includes reference to comments made in and outside of the workplace
Discussion