Social Media Policies: how to mitigate the risk of employees' online activity

Sinead Morgan*

Publishing content online and maintaining an online presence/image is now commonplace for many employees. Recent cases suggest that while some employees hold the misconceived belief that posts made on their personal social media networks outside the workplace cannot give rise to consequences within the workplace, this is clearly not the case.

Given the substantial reputational risks for businesses attached to online content, employers will investigate complaints of inappropriate content and if necessary take steps to address this conduct with their employees, often through the use of disciplinary sanction.

Although there is limited caselaw on the issue, a series of recent cases address various online behaviour that can give rise to disciplinary action within the workplace.

More cases stemming from employee online comments are anticipated

The case of *Irene Glynn v Carlow Dental Centre* (ADJ-00043734) involved an employee of a dental clinic who had published extreme views in relation to refugees on her personal Facebook account which included the following comment "Ireland is on its knees, Irish working people can't afford heating or food yet refugees think it's a free for all, stay fight for your country our grandparents fought against the English do the same".

The employer deemed the comments, which were posted on the Irish supporters of Ukraine Facebook page as hate speech under Section 2 (1) of the Prohibition of Incitement to Hatred Act 1989.

Incitement to hatred is defined under that Act as "written material, words, behaviour, visual images or sounds, as the case may be, are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred".

HATE SPEECH

Although the employee did not identify her employer in the post, her views were traced back to the company and reported to the employer by a member of the public. The employer requested the employee to remove the posts which they deemed offensive. The employee failed to do so and was dismissed for gross misconduct a number of days later.

The employer had been aware of previous social media postings by the employee regarding immigrants, but no Social Media Policy had been put in place to address such behaviour.

The employee's defence was that she was entitled to freedom of speech and that her opinions fell outside the remit of her employment.

Unfortunately, no detailed discussion of the balance between the employer's right to discipline an employee and the employee's right to freedom of speech was addressed in the decision.

The employer argued that they had a zero-tolerance policy towards any form of hate speech and that the comments could cause reputational damage to the business. The WRC adjudicator helpfully found that, "an employer has the right to dismiss where this is necessary to protect its business interests and reputation; that postings made by an employee on social media platforms outside of working hours may warrant disciplinary action up to and including

dismissal; and that while every person has the right to freedom of expression, this right is not absolute."

However, she also determined that based on the facts of this case, that the sanction of dismissal was disproportionate. In making this decision, she pointed to the fact that the employer had no Social Media Policy which clearly prevented its employees from making inappropriate comments online which might damage business interests.

In those circumstances the employer was unable to defend the case and an award of €10,564.62 was made to the employee.

DAMAGING COMMENTS

In the well-publicised case of *Courtney Carey v Wix Online Platforms Limited* ADJ-00048434/2023) a customer support employee was dismissed by an Israeli-owned technology business for gross misconduct for posts and comments made on LinkedIn describing Israel as a "terrorist state" and which criticised the "indiscriminate" bombing of Gaza by Israel.

The company decided to terminate the employment after being notified of the posts by numerous Israeli employees who complained about Ms Carey's posts.

Given that no process had been followed by the company, they chose not to defend the dismissal which they acknowledged was procedurally unfair so the WRC did not need to consider the justification for the dismissal. Therefore, the only issues addressed by the WRC were quantum and mitigation of loss.

Having considered the evidence of the complainant, an award of €35,000 was made in circumstances where the complainant had secured a new role with a pay differential.

As there was an admission of liability it was not necessary for the WRC to consider whether the employer had adequately balanced the employee's right to privacy versus the company's right to protect its business interests which is unhelpful.

Given the significant damage that can be done by employee postings, with that impact being felt immediately (as in this case where numerous complaints were raised by employees of the business) we would anticipate similar cases will arise in the not too distant future.

RANGE OF RISKS

It is widely accepted that certain online behaviour such as bullying and harassment or unlawful behaviour is unacceptable.

Caselaw clearly indicates that when behaviour by an employee outside of work is sufficiently connected to work it will be deemed to be a disciplinary issue.

In circumstances where social media and social networking has a reach well outside the workplace it is important to clearly address these risks within your Social Media Policy. This applies equally to inappropriate commentary directed to employees or other parties.

A range of risks arise for employers to include grievances and bullying complaints lodged by staff members to significant reputational damage to the brand.

KEY POINTS

Caselaw around misuse of social media continues to evolve highlighting the risks to employers in respect of online content to include claims of hate speech, bullying and comments which negatively impact the employer.

Given the prevalence of social media use by employees it is essential that employers issue a carefully drafted Social Media Policy that covers all issues and complaints that might arise.

The key takeaways from caselaw, in particular these recent cases, is as follows:

- The employer must have a clear Social Media Policy in place which clearly sets out prohibited behaviour (for example, illegal, derogatory, discriminatory comments). There should be a focus on company values and respecting others.
- Clear sanctions should be outlined for breaches and the policy should be applied uniformly.
- The Social Media Policy should focus on protecting the brand and avoiding comments that could damage reputation or goodwill.
- The Social Media Policy should be clearly notified to employees with updated training being provided highlighting employees' obligations.
- The Social Media Policy should also address comments which could be deemed to be bullying or hate speech or could cause reputational damage to the business. Cyber bullying should be specifically addressed and defined in the policy.
- Personal Use and Professional Use should be defined in the Social Media Policy with the limits of both being set out.
- Decisions to discipline an employee based on the reputational ground are generally the most difficult to justify. There should be a clear link between the commentary and the damage to the business referenced in any disciplinary process.
- The policy should have a broad scope and should address comments about employees, third parties and customers.
- The policy should address comments made both in the workplace using company devices or personal devices and comments posted outside working hours.
- If an employer becomes aware of particular online commentary by employees which concerns them they should ensure it is adequately addressed by their Social Media Policy.
- The policy should make it clear that the employee should only make comments in their personal capacity not on behalf of the company.
- Permitting employees to post imagery which is recorded on business premises or while in uniform puts the company at risk.
- In order to defend any dismissal or disciplinary action on foot of a breach of the Social Media Policy the employer must have conducted a thorough investigation and disciplinary process before applying a sanction.
- If a dismissal by reason of gross misconduct is being considered the employer should be able to point to a policy/policies where the action is defined as gross misconduct.

Typically this would be contained in the Social Media Policy, Dignity at Work Policy, Code of Conduct and/or the Disciplinary Policy.

- Before applying a sanction the employer should consider whether this sanction would be a reasonable response in the particular circumstances and would withstand the scrutiny of the Workplace Relations Commission.

* *Sinead Morgan is Legal Director at DAC Beachcroft*