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# Social media and employment law – do's and don'ts



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@heenanrachael  
@capstickslp



A screenshot of a web browser displaying the Twitter profile page for Rachael Heenan (@heenanrachael). The browser's address bar shows the URL "https://twitter.com/heenanrachael". The profile header includes a large banner image of cyclists on a street and a smaller profile picture of Rachael Heenan. Below the banner, statistics are listed: TWEETS (2,279), PHOTOS/VIDEOS (272), FOLLOWING (1,996), FOLLOWERS (758), and FAVOURITES (252). A "Follow" button is visible. The bio identifies her as a Partner at @Capstickslp. The main content area shows a list of tweets, including one from Rachael Heenan about a uapp.ly link and two retweeted tweets by Heather Jackson and Rob Webster. On the right side, there is a sign-up form for Twitter and a "Worldwide Trends" section with various hashtags. The Windows taskbar is visible at the bottom of the browser window.

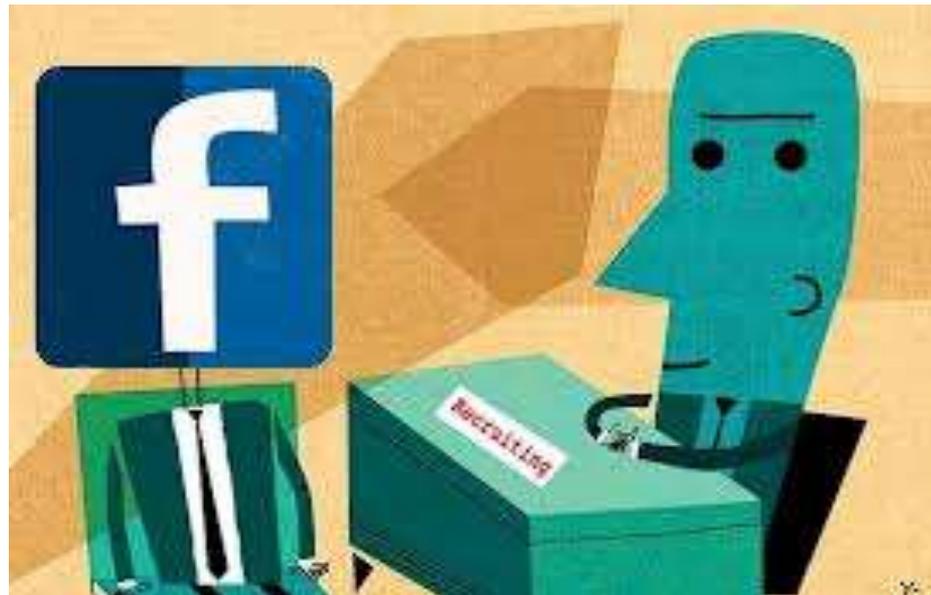


# Today's Session



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- Social Media HR “Hotspots”
    - Recruitment and social media
    - What the Tribunals think
    - Managing employees' activities
    - Social media policies

# Social Media & Recruitment



# Advertising posts on Social Media Sites



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- 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

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- “Using social media in your recruitment process: The essential guide for HR directors and managers”
    - <http://www.nhsemployers.org/~media/Employers/Publications/Using-social-media-recruitment-guide.pdf>
  - 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

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- 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.

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- 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.

# NHS Employers Guidance (3)



- 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.



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- 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)



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- 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)

# Information Commissioner (2)



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- 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?

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- 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



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- 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]



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- 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

# Blogging about your Employer: Stephens v Halfords plc [2011] (1)



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- 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

# Stephens v Halfords plc [2011] (2)



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- 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

# Blogging about your Clients: Preece v JD Wetherspoons plc [2011]



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- 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]



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- 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]



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- 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



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- 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

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# Protecting employers against liability for employees' actions on social media sites



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- 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.

# Vicarious liability and social media – Otomewo v Carphone Warehouse [2011]



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- 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



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- 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

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- 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)

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- 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

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- 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



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- 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

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- 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

# 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

